A TREATISE ON THE LAW

OF

CONTRIBUTORY NEGLIGENCE

OR

NEGLIGENCE AS A DEFENSE

BY

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PREFACE TO THIRD EDITION.

About two years ago Messrs. Baker, Voorhis & Co. asked me to prepare a new edition of Beach on Contributory Negligence, of which they owned the copyrights. I have been able to do the work only at irregular intervals, and hence it has been greatly delayed; but that has been in great measure compensated for by the opportunity it has afforded for examining the latest cases. Some of these cases have introduced modifications of old principles, and others have applied old principles to new conditions. These changes and additions have been indicated in the text and notes. I think it will be found that all important decisions upon the subject of contributory negligence which have been reported since the last edition have been cited. Scarcely any modern text-book is more frequently referred to by the courts than Beach on Contributory Negligence; and Mr. Beach's statements of the law have been generally regarded as correct, and his discussion of disputed points acute and discriminating. I have, therefore, been careful to make only such changes as the growth of the law has rendered necessary.

JOHN J. CRAWFORD.

No. 30 Broad Street,
New York, February 1, 1899.

PREFACE TO SECOND EDITION.

In the preparation of a second edition of this work I have availed myself of the opportunity to rewrite the text in many places, to reconstruct and increase the number of the chapters and sections, and to include as nearly as possible a citation of all the valuable cases reported since the publication of the first edition. The volume of the work, as compared with the earlier edition, has been increased nearly fifty per cent., and the number of cases cited is nearly doubled. I have done the work of revision almost entirely with my own hand, and it is literally true that every sentence of the present volume has passed directly under my eye, and that I have spared no reasonable effort to make it accurate and complete.

The first edition of this work was my first venture in legal authorship; the volume in hand is my first attempt at second or revised editions of my own work. The original edition was generally and generously commended by the profession, and, inasmuch as I believe that the work in its present shape is now much more available as a lawyer's tool than it has heretofore been, I am not without confidence that this new edition may prove useful and acceptable to my brethren in the law.

CHARLES F. BEACH, JR.

The Mills Building, 35 Wall Street,
New York, May 2, 1892.

PREFACE TO FIRST EDITION.

I have made this book upon the Law of Contributory Negligence in the belief that such a work, even if only fairly well done, would be timely, and might possibly be, in some degree, useful to the bench and bar. The libraries have furnished, hitherto, no separate treatise upon this subject; the latest editions of the standard works upon the Law of Negligence, which consider Contributory Negligence only incidentally, were published several years ago, and the subject is one of constant, and constantly increasing interest and importance to the profession. It is by far the most important and material branch of the Law of Negligence, and although we already have at hand, aside from the several English treatises, the three excellent American works of Messrs. Shearman & Redfield, Dr. Wharton, and Judge Thompson, respectively — each in its way the best of the three — I have thought, because the subject is an interesting one and impinges so much upon so many other leading titles in the law, that this work of mine might supplement rather than supplant what has already been better done upon the more general subject of Negligence, and that it might, in consequence, turn out not a wholly superfluous undertaking. I have collected and cited more than three thousand cases — not omitting, as I believe, a reference to any valuable adjudication in point, by the State and Federal courts of our own country, and have endeavored to give a due prominence to recent English authorities, and to include, particularly, citations from the latest volumes of the reports and from current periodical legal literature.

I may frankly acknowledge that in the progress of my work I have drawn without stint from many sources. I owe much to the three American treatises on Negligence, to divers other works, and to many essayists, pamphleteers, and reports, as the notes declare.

CHARLES FISK BEACH, Jr.

The Courier-Journal Building,
Louisville, Ky., Oct. 10, 1885.

TABLE OF CONTENTS.

CHAPTER I.

Introductory — Of Negligence and of Contributory Negligence Generally.

		PAGE.
§ 1.	The derivation of the law of negligence	1
2.	Coggs v. Bernard — Sir William Jones and the later commentators	2
3.	The scholastic theory	3
4.	Attempts at definitions of negligence	4
5.	The definitions of Baron Alderson, John Austin and the American commentators	5
6.	Negligence defined	6
7.	Contributory negligence defined	7
8.	Butterfield v. Forrester	8
9.	The text of Lord Ellenborough's decision	9
10.	Davies v. Mann	10
11.	Davies v. Mann criticised	11
12.	The reasons for the rule that contributory negligence is a defense	12
13.	The reasons for the rule further considered	13

CHAPTER II.

The General Rule.

§ 14.	General statement of the rule	15
15.	Express or implied waiver of a right of action	19
16.	The same subject continued	20
17.	Ordinary care	20
18.	Ordinary negligence	21
19.	Ordinary care as affecting the rule in question	22
20.	Ordinary care and the plaintiff's conduct	24
21.	What is ordinary care	26
21a.	Persons under disabilities	28
21b.	Rule as to children	28
22.	Ordinary care usually a question of fact	29
23.	Illustration of this rule	30
24.	Proximate cause	31
25.	The doctrine of proximate cause stated	33
26.	Not the sole proximate cause	35
27.	Illustration of this rule — The influence of Davies v. Mann,	36
28.	The rule in Davies v. Mann	37

PAGE.

§ 29. The influence of Davies v. Mann on the New York courts, 37
30. The influence of Davies v. Mann in other States..... 39
31. What is a proximate cause 39
32. The same subject continued 40
33. Distinction between casual connection and a plaintiff's negligence 42
34. Connection of the plaintiff's negligence with his injury... 46
35. Summary statement of the doctrine of contributory negligence as a defense..... 50

CHAPTER III.

The Plaintiff's Conduct or Condition as Affecting the Right to Recover.

§ 36. The plaintiff's previous knowledge 52
37. Voluntary exposure to danger 54
38. Plaintiff's failure to anticipate the fault of defendant.... 57
39. This rule further stated 60
40. Plaintiff acting erroneously under the impulse of fear produced by the defendant 61
41. The same subject continued 66
42. Plaintiff acting erroneously in trying to save human life.. 67
43. Same subject — Where defendant not negligent..... 69
44. Exposure in effort to save property..... 70
44a. Where one is in discharge of legal duty..... 70
45. Plaintiff doing an illegal act 72
46. Wilful negligence of the defendant 73
47. Where plaintiff acts in violation of law..... 73
48. A misapplication of this rule 74
49. When plaintiff and defendant are *in pari delicto*..... 75
50. Plaintiff a trespasser 77
51. Invitation upon or license to go upon dangerous premises, 82
51a. Children as trespassers — Liability of landowner — Dangerous attractions 85
52. A trespass as *per se* contributory negligence..... 87
53. The same subject continued 88
54. Plaintiff's prior negligence in connection with defendant's subsequent negligence 89
55. Judge Thompson's position criticised 90
56. When the plaintiff's negligence precedes the defendant's in point of time 90
57. Plaintiff's negligence after the catastrophe 92
58. The same subject continued 93
59. This statement of the rule examined 94
60. Negligence of the decedent under Lord Campbell's act.. 95

CHAPTER IV.

The Conduct of the Defendant as Affecting the Matter of Contributory Negligence.

PAGE.

§ 61. Gross negligence of the defendant 99
62. Distinction between gross negligence and wilful negligence, 100
63. Defendant's gross negligence 101
64. Wilful negligence of the defendant 102
65. Actions for assault and battery 104
66. Application of this rule in Pennsylvania and Kentucky.... 104
67. When the defendant, by his acts or omissions, throws the plaintiff off his guard 105
68. This rule illustrated 107
69. Mitigation and apportionment of damages..... 108
70. Application of this doctrine 110
71. The rule criticised 111

CHAPTER V.

Comparative Negligence.

§ 72. Comparative negligence 112
73. The theory of the rule of comparative negligence 113
74. The degrees of negligence the measure of the comparison, 114
75. The extent to which this rule prevails 115
76. This modification of the general rule repudiated 115
77. The same subject continued 116
78. The former rule in Illinois 118
79. Galena & Chicago Union Railroad Company v. Jacobs..... 118
80. Other Illinois cases 120
81. This rule attributed to Chief Justice Breese 122
82. Further criticism of this rule 123
83. The same subject continued 124
84. This rule not a rule of contributory negligence..... 125
85. A comparison of relative degrees of negligence 126
85a. Rule of comparative negligence now obsolete in Illinois.. 127
86. The rule in Kansas 127
87. A confusion of the degrees of negligence with proximateness and remoteness 128
88. The rule in Georgia 129
89. Macon, etc., Railroad Company v. Davis 130
90. The later Georgia cases 131
91. The confusion in these cases pointed out 132
92. Summary statement of the Georgia rule 133
93. The rule in Tennessee 134
94. Whirley v. Whitman 135
95. The defense of this rule 136
96. The rule in Kentucky 136
97. The Kentucky statute 137
98. Louisville, &c., Railroad Company v. Collins 138
99. The position of the Kentucky courts stated 139

CHAPTER VI.

The Imputed Contributory Negligence of Third Persons.

PAGE.

§ 100. The rule stated 142
101. The reason of the rule 143
102. No contribution among tort feasors 144
103. The contributory negligence of the plaintiff's agent must be imputed to the plaintiff 145
104. The rule illustrated 146
105. The rule in Thorogood v. Bryan 147
106. A similar rule in the Admiralty 148
107. Baron Pollock's criticism — Thorogood v. Bryan overruled, 150
108. Thorogood v. Bryan in Pennsylvania 152
109. Thorogood v. Bryan in Arkansas, Iowa, Wisconsin, and Michigan 153
110. The general American rule 155
111. Rule in the federal courts and in New Jersey..... 156
112. The New Jersey rule further stated 158
113. Privity in negligence between a public carrier and a shipper of goods 159
114. The prevalence of this rule 160
115. Plaintiff's negligence concurring with that of the driver of a private conveyance 162
115a. When negligence of driver imputed to other occupant of vehicle 163
115b. Imputing neglect of the husband to the wife 165
116. In the case of persons *non sui juris*..... 167
117. Who are to be held *non sui juris* 167
118. The status of infants 169
119. The New York rule — Hartfield v. Roper 169
120. The language of the court 170
121. The later cases following Hartfield v. Roper 171
122. The rule modified in various jurisdictions 173
123. The modification in New York 174
124. The same subject continued 175
124a. Where negligence of parent not a proximate cause 176
125. Negligence of the defendant must be shown 177
126. The English doctrine further considered 179
127. A criticism of Hartfield v. Roper 180
128. The same subject continued 182
129. The criticism continued 182
130. The rule in Hartfield v. Roper denied 183
131. When the action is for the parent's benefit 186
131a. Where action is brought by the parent as administrator, &c. 187
132. Contributory negligence of child when action brought by parent 189
133. The rule modified by reason of the plaintiff's poverty or destitution 190

PAGE.
§ 134. A further statement of the rule in Pennsylvania 191
135. This doctrine commended 193
136. Ordinary care in a child 194
137. Children as trespassers 196
138. Other English cases 197
139. The doctrine condemned 198
140. The general American rule 198
141. The Massachusetts rule 200
142. Duty of parents to guard children — What omissions amount to contributory negligence 201

CHAPTER VII.

Railway Passengers.

§ 143. Contributory negligence as a defense to actions brought against railway companies 204
144. Duty of a public carrier to passengers 205
145. The reciprocal duty of the passenger 207
146. Boarding moving trains 209
147. Alighting from moving trains 210
148. Where the passenger acts upon the advice or direction of the trainmen 213
149. Standing or riding on platform 215
149a. Leaving seat while train is in motion 217
150. Riding in baggage cars, on locomotives, or in other unauthorized positions or places 217
151. The passenger must comply with the reasonable rules of the company 218
152. Employee's waiver of the rules not a defense 219
153. The rule herein summarized 220
154. Riding in exposed or unlawful places 221
155. Injuries at car windows and doors 224
156. The same subject continued 226
157. The rule in Wisconsin 227
158. Notice of the danger 228
159. The English rule 229
160. Injuries at and about railway stations 230
161. The same subject continued 235
162. The English rule 236
163. The rule further stated 237
164. Where plaintiff is hit by something thrown or dropped from a moving train 238
165. Injuries to free passengers 239
166. The same subject continued 241
167. Newsboys, peddlers, etc. 242
168. Carrier's liability limited by contract 243
169. The English rule 243
170. The rule of the Supreme Court of the United States 244

PAGE.
§ 171. The New York rule 245
172. The general American rule 246
173. Passenger's negligence as to baggage 250
174. Conditions stamped or printed on checks 252
175. Traveling on Sunday 253
176. Bosworth v. Inhabitants of Swansey..... 254
177. Rule in Vermont, Maine and elsewhere 255

CHAPTER VIII.

The Railway Company in Its Relation to Strangers.

§ 178. Duty of a public carrier to persons lawfully upon its premises, but who are neither passengers nor employees 257
179. The rule further stated 258
180. Duty of the public at railway crossings 259
181. The duty to look and listen 262
182. Rule of "stop, look and listen"..... 265
183. Where the view is obstructed 270
184. Duty of one riding with another..... 272
184a. Irregular trains 273
184b. Application of rule to passengers 273
184c. Rule as to bicyclists 273
185. Failure of the railway company to give signals — Duty of person crossing track 274
186. Right of traveler to assume that signals will be given.... 276
187. Right of a trespasser 278
188. Plaintiff's ignorance no justification for his carelessness.. 279
189. The rule illustrated 281
190. Flagmen, gatemen, &c. 281
191. Care required of railroad when the view is obstructed.... 284
192. Crossings at grade 286
193. Duty of care 287
194. Duty of the railway 288
195. Vigilance of one crossing a track must be proportionate to the danger 289
196. The rule summarized 289
197. Plaintiff deaf or intoxicated 291
198. Trespassers on a railway track — The Pennsylvania rule.. 293
199. Judge Gibson's statement of the rule..... 293
200. The Pennsylvania rule further stated 294
201. The modified rule as to trespassers 296
202. Duty of trespasser 298
203. The rule summarized 299
204. Children as trespassers on railroad property 303
205. The general rule 305
206. The rule illustrated 305
207. The turn-table cases 306

PAGE.
§ 208. The Minnesota case 307
209. Other cases which follow this rule 308
210. The contrary rule 309
210a. Same subject — Cars left across street 311
211. Walking along a railway track 312
212. Where the track is a *quasi* public way 315
213. The English rule 317
214. Further statement of the rule in the United States 317
215. The duty of the railway to the trespasser after the injury, 318
216. Various other acts of trespass upon railway property 319
217. Flying switches 320

CHAPTER IX.

Fences and Fires.

(A.) Fences.

§ 218. Injuries to domestic animals trespassing on railway tracks 322
219. How far the English rule prevails in the United States, 323
220. A modification of the English rule 327
221. The American rule 328
222. The American the reverse of the English rule 329
223. The effect of a statute 331
224. A summary statement of the prevailing doctrine 333
225. Duty of a railway company to maintain fences 336
226. Statutes requiring the maintenance of a fence 338
227. These statutes considered 342
228. Contributing to a breach in a fence, or failure to repair.. 345
229. Where the land owner contracts to fence for the railway, 348
230. Where the stock escape and are injured 349
231. The New York decisions 351
232. The same subject continued 352
233. Summary statement of the rule 353
234. The rule in New England and in Wisconsin 353

(B.) Fires.

235. Negligent communication of fire 355
236. The effect of a statute 355
237. A further statement of the rule in the United States..... 356
238. Vaughan v. Taff Vale Ry. Co.— The doctrine of this case criticised 358
239. The rules as to combustibles, shavings, dried grass, &c.... 359
240. The obligation of the plaintiff herein 361
241. The analogy of the "Squib case" 363
242. The rule in Pennsylvania 365

CHAPTER X.

Highways Other Than Railways — The Law of the Road.

		PAGE.
§ 243.	Liability of municipal corporations for injuries from defective highways	367
244.	Duty of corporate officials	368
245.	Liability for injuries to runaway horses occasioned by defects in the streets	369
246.	Traveler's own negligence contributing to the injury	371
246a.	Presumption that highway is safe	372
247.	Not negligent to use a defective highway	373
248.	Qualification of this rule	375
249.	The obligation of the traveler on a defective highway	376
250.	Injuries from excavations in the highway	377
251.	Right of pedestrian in the roadway	379
252.	Deviation from the highway	380
253.	Duty of the municipal authorities herein	380
254.	The rule further stated	382
255.	Further illustrations	384
256.	Trespass upon the highway	385
257.	Illustrations of this rule	386
258.	Leaving horses untied or unattended on the highway	387
259.	The same subject continued	388
260.	Unskillful or reckless driving	390
261.	Sunday traveling	391
262.	The New England rule	392
263.	The Massachusetts rule illustrated	393
264.	The same subject continued	394
265.	The rule in Maine and Vermont	395
266.	The Rhode Island rule	396
267.	These New England Sunday law decisions criticised	397
268.	Pedestrians crossing the highway	398
269.	The same subject continued	400
270.	Icy sidewalks	401
271.	The same subject continued	402
272.	Mere slipperiness not a defect in the highway	403
273.	The duty of the traveler on an icy highway	404
274.	The liability of the owner of property in respect to icy pavements	406
275.	The foregoing rules summarized	407
276.	Injuries to persons in the highway from something falling from the adjoining property	408
277.	The same subject continued	409
278.	Children injured upon the highway	410
279.	This rule further illustrated	411
280.	The rule in New Hampshire	412
281.	The author's criticism	412
282.	Collisions upon the highway	413
283.	The same subject continued	415
284.	Injuries upon ferry boats	417

CHAPTER XI.

Street Railways.

		PAGE.
§ 285.	Duties of street railway companies as common carriers..	419
286.	Intoxicated passengers	421
287.	Duty as to pedestrians	423
288.	Walking upon a street railway track	425
288a.	Crossing street at other places than regular crossing....	426
289.	The track not a highway	426
290.	The degree of care not the same as that required in case of steam railroads	427
290a.	Where cars operated by electricity or the cable	429
291.	Alighting from or boarding moving street cars	431
292.	Where motive power is electricity or the cable	432
293.	Riding upon the platforms of street cars	433
294.	How far it is the duty of the passenger to ride inside the car when there is room	434
295.	Risks assumed by passenger riding in exposed position....	436
296.	Passenger's hand or arm outside of the car window	437
297.	Free passengers and trespassers upon street cars	438
298.	The New England Sunday rule applied to street railways,	439

CHAPTER XII.

Master and Servant — The Servant's Rights and Obligations.

§ 299.	Servant's own contributory negligence a bar	441
300.	Where servant's negligence not proximate cause of injuries — Illegal acts	442
301.	Where injury caused by recklessness	443
302.	Master's individual neglect a ground of liability	444
303.	This doctrine stated	444
304.	When the master's negligence combines with that of a coservant in producing the injury	445
305.	Herein of proximate cause	446
306.	*Respondeat superior*	447
307.	The early cases	448
308.	The exception to the rule of *respondeat superior*	449
309.	Later English cases following Priestley v. Fowler	450
310.	The same subject continued	450
311.	The rule in the United States — Murray v. South Carolina R. Co.	451
312.	The reasoning of the South Carolina case	452
313.	Farwell v. Boston & Worcester R. Co.	452
314.	The rule stated	453
315.	The reasoning of the Massachusetts case	454
316.	The reason of the rule criticised	455
317.	The same subject continued	456
318.	The modification of this rule in Kentucky	457
319.	The leading case in Kentucky	458

PAGE.

§ 320. The opinion in the Collins case 459
321. The rule in Illinois 460
322. The rule in Tennessee 460
323. Who are fellow-servants 461
324. The rule stated 462
325. Rule of vice-principal 465
326. Chicago, Milwaukee & St. Paul R. Co. v. Ross 466
327. Who is a vice-principal 467
328. Applications of this doctrine 470
329. Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other defendants? 472
330. What is a common employment 473
331. The same subject continued 474
332. Illustrations — Railroad employees 474
333. When conductor is a fellow-servant 480
334. Rule as to train dispatcher 481
335. Statutory modifications of the rule in the case of railway employees 482
336. Further illustrations — Miscellaneous employees 483
337. Servants not in common employment — Illustrations 484
338. Servants of different masters 485
339. The rule stated 486
340. This rule approved 488
341. As between different railway corporations having running connections 489
342. As to volunteers 490
343. The same subject continued 491
344. Partnerships and receivers as employees 492

CHAPTER XIII.

Master and Servant — The Master's Obligations and Liabilities

§ 345. The obligation of the master 494
346. Defective, dangerous or unfit machinery, appliances, tools, or premises 494
347. Applications of this rule — Dangerous premises 496
348. The same subject continued — Defective machinery 499
349. The master's duty as to machinery a continuing duty .. 501
350. This rule criticised 503
351. Master must provide safe and good, but not the safest and best, appliances 503
352. Master not a guarantor of the safety or sufficiency of his appliances 505
353. Incompetent and unfit employees 506
354. The duty as to servants also a continuing duty 509
355. The master not held to warrant the faithfulness or competency of his servants 509

PAGE.

§ 356. The master may act through an agent and become responsible for his acts 510
357. The rule as to minor servants 512
358. Where the master orders the servant into danger or into a service which he did not contract to perform..... 514
359. The patent and latent dangers of the employment..... 516
360. The servant's assumption of risk — Illustrations..... 518
361. Risks not assumed — Illustrations 523
362. The master's duty toward minor servants 525
363. Overhead railway bridges and depot roofs 528
364. Injuries to trainmen in coupling cars 530
365. The same subject continued 531
366. Knowledge on the part of the employer 533
367. The same subject continued 533
368. The obligation of the servant 535
369. He must possess a fair measure of skill for the service he undertakes, and must inform himself at the outset of the duties and dangers peculiar to his work 535
370. His knowledge when a bar 536
371. Continued service, after knowledge, a waiver of the defect or danger..... 539
372. Where master promises to remove the danger..... 542
373. Servant must obey rules established to promote his safety, 544
374. Liability of a servant to a fellow-servant 546
375. His liability to the master and to third persons 547
376. Statutory modifications of the rule which exempts a master from liability to one servant for the negligent wrongdoing a co-servant 548
377. The Employer's Liability Act in England 548
378. The effect of the act 549
379. Legislation on the subject in the United States..... 550
380. Should the employee be allowed to make a contract releasing his employer from the liability imposed by these statutes 554
381. The same subject continued — Griffith v. The Earl of Dudley 555
382. The English doctrine not approved in America 556
383. Contracts releasing the employer from his common-law liability 556
384. The Georgia cases 558
385. The laws of other countries as to the liability of an employer for injuries to an employee caused by the carelessness of a fellow-employee — Scotland 558
386. The Scotch rule further stated 559
387. The rule in Ireland 560
388. The rule on the Continent of Europe 560

CHAPTER XIV.

Special and Particular Cases.

		PAGE.
§ 389.	Intoxication as contributory negligence	562
390.	Intoxication as want of ordinary care	563
391.	The intoxication of trespassers	565
392.	This rule illustrated	566
393.	The presumption of sobriety	567
394.	This rule further stated	568
395.	One intoxicated not beyond the pale of the law	569
396.	Deafness, blindness, or other physical infirmity as a defense	571
397.	The rule as to physical disabilities further considered,	572
398.	Negligence as a defense in actions upon policies of insurance	573
399.	The same subject continued	574
400.	In actions for failure to transmit or deliver telegraphic dispatches	575
401.	The same subject continued	576
402.	The rule in the Admiralty	577
403.	Lord Stowell's rules considered	578
404.	Lord Stowell's second rule defined	579
405.	Contributory negligence in actions between attorney and client	581
406.	In actions between physician and patient	583
407.	The same subject continued	584
408.	In actions between innkeeper and guest	585
409.	Cayle's case	586
410.	The key of the guest's room	587
411.	Duty of the guest to exercise care	588
412.	The rule illustrated	589
413.	Accidents in discharge of fireworks	590
414.	Injury to one walking on the sea shore	591
415.	Where the plaintiff's property is a nuisance	592
416.	Miscellaneous	593

CHAPTER XV.

The Burden of Proof.

§ 417.	The question stated	595
418.	The rule in Butterfield v. Forrester	596
419.	Whether the presumption should be against the plaintiff,	597
420.	The plaintiff in this class of cases generally at fault	597
421.	The presumption sometimes in favor of the plaintiff	598
422.	The burden upon the plaintiff	599
423.	This rule defended	600
424.	Mr. Freeman's criticism of the rule	603
425.	His position untenable	603
426.	The burden upon the defendant	604

PAGE.

§ 427. Where plaintiff's own case raises presumption of contributory negligence 607
428. The rule in Connecticut 608
429. Judge Redfield's statement of the rule 609
430. The rule in Kansas 610
431. This rule criticised 610
432. The rule distinguished 611
433. The rule in New York 612
434. The rule in New York further stated 613
435. The development of the rule in New York 615
436. This development further considered 616
437. The position of the New York court stated 617
438. The New York cases further considered 618
439. The New York rule summarized 618
440. The disagreement of the courts upon this question 621
441. No possible middle ground 622
442. Tendency toward the better rule 622
443. Pleading contributory negligence 623

CHAPTER XVI.

Law and Fact.

§ 444. General statement 625
445. A mixed question of law and fact 626
446. A preliminary question of law for the court 627
447. Contributory negligence as matter of law 628
448. When a question of fact 629
449. A question of law only in a plain case 631
450. Contributory negligence as a question of fact 632
451. Judge Cooley's statement of the rule 634
452. What the inquiry involves 635
453. The tendency of the law in its development 636
454. Summary statement of the rule 637

TABLE OF CASES.

[The references are to pages.]

A.

Abbett v. Chicago &c. R. Co. (29 Minn. 482), 289.
Abbett v. Johnson County (114 Ind. 61; 16 N. E. Rep. 127), 367.
Abbott v. Johnstown &c. R. Co. (80 N. Y. 27; 36 Am. Rep. 572), 490.
Abbott v. Macfie (2 Hurl. & Colt, 744; 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315), 306.
Abel v. Delaware &c. Canal Co. (103 N. Y. 581; 57 Am. Rep. 773), 504.
Abend v. Terre Haute &c. R. Co. (111 Ill. 202; 20 Cent. L. J. 77; 19 Cent. Law Jour. 350; 53 Am. Rep. 616), 17, 443, 481, 545, 628.
Abernethy v. Van Buren (52 Mich. 383), 372.
Abraham v. Reynolds (5 Hurl. & N. 142; 6 Jur. (N. S.) 53; 8 Week. Rep. 181), 485, 486.
Absor v. French (2 Show. 28), 383.
Accola v. Chicago &c. R. Co. (70 Iowa, 185), 346.
Achtenhagen v. Watertown (18 Wis. 331), 168, 607.
Acker v. County of Anderson (20 S. C. 495), 390.
Ackert v. Lansing (48 How. Pr. 374; 59 N. Y. 646), 83.
Acton v. Blundell (12 M. & W. 324, 353), 3.
Adams v. Carlisle (21 Pick. 147), 371, 599.
Adams v. Iron Cliffs Co. (78 Mich. 271; 44 N. W. Rep. 170), 291.
Adams v. Lancashire &c. Ry. Co. (L. R. 4 C. P. 739), 230.
Adams v. McKinney (Add. 258), 336.
Adams v. Missouri Pac. Ry. Co. (100 Mo. 555; 12 S. W. Rep. 637), 238.
Adams v. Natick (13 Allen, 429), 382.
Adams v. Town of Chicopee (147 Mass. 440; 18 N. E. Rep. 231), 404.
Adams v. Van Alstyne (25 N. Y. 232), 336.
Adams v. Washington & Georgetown R. Co. (9 App. D. C. 26), 284, 433.
Adams v. Wicasset Bank (1 Greenl. 361), 367.
Adams v. Young (44 Ohio St. 80), 363.
Adasken v. Gilbert (165 Mass. 443; 43 N. E. Rep. 197), 553.
Adolph v. Central &c. R. Co. (65 N. Y. 554), 427.
Ahern v. Steele (1 N. Y. Supl. 259), 203.
Ainley v. Manhattan Ry. Co. (47 Hun, 206), 231.
Alabama &c. R. Co. v. Anderson (109 Ala. 299; 19 So. Rep. 516), 283.
Alabama &c. R. Co. v. Arnold (80 Ala. 600), 633.
Alabama &c. R. Co. v. Arnold (84 Ala. 159; 4 So. Rep. 359), 232.
Alabama &c. R. Co. v. Chapman (80 Ala. 615; 2 So. Rep. 738), 43, 313.
Alabama &c. R. Co. v. Davis (69 Miss. 444; 13 So. Rep. 693), 163.
Alabama &c. R. Co. v. Hawk (72 Ala. 112), 216.
Alabama &c. Ry. Co. v. Jones (73 Miss. 110; 19 So. Rep. 105), 321.
Alabama &c. R. Co. v. McAlpine (71 Ala. 545), 330.
Alabama &c. R. Co. v. McAlpine (75 Ala. 113), 334.
Alabama &c. R. Co. v. Richie (111 Ala. 297; 20 So. Rep. 49), 531, 545.
Alabama &c. R. Co. v. Roach (110 Ala. 266; 20 So. Rep. 132), 508.
Alabama &c. R. Co. v. Thomas (83 Ala. 343; 3 So. Rep. 802), 248.
Alabama &c. R. Co. v. Waller (48 Ala. 459), 453.
Alaska Mining Co. v. Whelan (168 U. S. 86), 484.
Albert v. Bleecker St. R. Co. (2 Daly, 389), 72, 388, 423, 424.

[The references are to pages.]

Albert v. State (66 Md. 325), 80, 97.
Albertson v. Keokuk &c. R. Co. (48 Iowa, 492), 187.
Albion, Town of, v. Hetrick (90 Ind. 545; 46 Am. Rep. 230), 54, 56, 58, 145, 156, 371, 373, 375.
Albright v. Penn. (14 Tex. 290), 417.
Albro v. Agawam Canal Co. (6 Cush. 75), 461, 489, 547.
Albro v. Jaquith (4 Gray, 99; 64 Am. Dec. 56), 546, 547.
Aldrich v. Gorham (77 Me. 287), 42, 370.
Aldridge v. Blast Co. (78 Mo. 559), 539.
Aldridge v. Great Western Ry. Co. (3 Man., G. & S. 515), 355.
Alexander v. Louisville &c. R. Co. (83 Ky. 589), 521, 544.
Alexander v. Toronto &c. Ry. Co. (33 Upper Canada, 474), 249.
Alexander v. Town of New Castle (115 Ind. 51; 17 Atl. Rep. 200), 371.
Alger v. Lowell (3 Allen, 402), 35, 391, 563.
Alger v. Mississippi &c. R. Co. (10 Iowa, 268), 329, 333.
Alleghany County v. Broadwaters (69 Md. 533; 16 Atl. Rep. 223), 374.
Allegheny Heating Co. v. Rohan (118 Penn. St. 223; 11 Atl. Rep. 789), 454.
Allen v. Deming (14 N. H. 133), 255.
Allen v. Duffie (43 Mich. 1; 38 Am. Rep. 159), 392.
Allen v. Hancock (16 Vt. 230), 92, 389.
Allen v. Johnson (76 Mich. 31; 42 N. W. Rep. 1075), 54.
Allen v. Maine Cent. R. Co. (82 Me. 111; 19 Atl. Rep. 105), 272.
Allen v. New Gas Co. (1 Exch. Div. 251; 45 L. J. 668; 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335), 464, 473.
Allen v. Pennsylvania R. Co. (12 Atl. Rep. 493), 280.
Allen v. Willard (57 Penn. St. 374), 606.
Allerton v. Boston &c. R. Co. (146 Mass. 241; 15 N. E. Rep. 621), 283.
Allerton Packing Co. v. Egan (86 Ill. 253), 541.
Allison v. Western &c. R. Co. (64 N. C. 382), 448.
Allyn v. Boston &c. R. Co. (105 Mass. 77), 264, 270, 280, 599.
Alpern v. Churchill (53 Mich. 607), 58.
Alsop v. Ohio &c. Ry. Co. (19 Ill. App. 292), 344.
Alston v. Herring (11 Exch. 822), 33.
Altee v. South Carolina Ry. Co. (21 S. C. 550; 53 Am. Rep. 699 (n.)), 529.
Altoona v. Lotz (114 Penn. St. 238), 57.
American Ins. Co. v. Insley (7 Penn. St. 223; 47 Am. Dec. 509), 573.
Ames v. Broadway &c. R. Co. (56 N. Y. Super. Ct. 3), 203.
Anderson v. Bath (42 Me. 346), 390.
Anderson v. Bennett (16 Or. 515), 456, 465.
Anderson v. Minneapolis St. Ry. Co. (42 Minn. 490; 44 N. W. Rep. 518), 424.
Anderson v. Morrison (22 Minn. 274), 514.
Anderson v. New Jersey Co. (7 Robt. 611), 444.
Anderson v. New York &c. R. Co. (6 N. Supl. 182), 289.
Anderson v. Northern Mill Co. (42 Minn. 424; 44 N. W. Rep. 315), 498.
Anderson v. Scholey (114 Ind. 553; 17 N. E. Rep. 125), 59.
Anderson v. Wasatch &c. R. Co. (2 Utah, 518), 363.
Anderson v. Winston (31 Fed. Rep. 528), 462, 537.
Anderson, City of, v. Hervey (67 Ind. 420), 601.
Andreoli v. N. Y. C. & H. R. R. Co. (14 App. Div. (N. Y.) 345), 633.
Andrews v. Boedecker (17 Ill. App. 213), 486.
Andrews v. Capitol &c. R. Co. (2 Mackey, 137; 47 Am. Rep. 266), 434.
Andrews v. Mason City &c. R. Co. (77 Iowa, 669; 42 N. W. Rep. 513), 42.
Andrews v. Runyon (65 Cal. 629), 626.
Anglo-American &c. Co. v. Baier (20 Ill. App. 376), 27.
Annapolis &c. R. Co. v. Baldwin (60 Md. 88; 45 Am. Rep. 711), 324, 326, 337.
Annas v. Milwaukee &c. R. Co. (67 Wis. 46; 57 Am. Rep. 388), 249.
Anthony v. Leeret (105 N. Y. 591; 12 N. E. Rep. 561), 498, 450.
Apitz v. Missouri Pac. Ry. Co. (17 Mo. App. 419), 353.

[The references are to pages.]

Appel v. Buffalo &c. R. Co. (111 N. Y. 550; 19 N. E. Rep. 93), 522.
Arctic Fire Ins. Co. v. Austin (69 N. Y. 470; 25 Am. Rep. 221), 148, 161, 581.
Ardesco Oil Co. v. Gilson (63 Penn. St. 146), 496.
Arkerson v. Dennison (117 Mass. 407), 496.
Armistead v. Wilde (17 Q. B. 261), 586, 589.
Armour v. Hahn (111 U. S. 313), 475.
Armstrong v. Medbury (67 Mich. 250; 34 N. W. Rep. 566), 84.
Armstrong v. Southeastern Ry. Co. (11 Jur. 758). 98.
Armstrong v. The Lancashire & Yorkshire Ry. Co. (23 W. R. 295; L. R. 10 Exch. 47), 149, 150.
Arnold v. Illinois &c. R. Co. (83 Ill. 273; 25 Am. Rep. 383), 223.
Artman v. Kansas &c. R. Co. (22 Kan. 296), 286.
Artusy v. Missouri Pac. Ry. Co. (73 Tex. 191; 11 S. W. Rep. 177), 301.
Artz v. Chicago &c. R. Co. (34 Iowa, 153, 160; 38 Iowa, 293; 44 Iowa, 284), 35, 116, 276, 277, 285, 289.
Ashbrook v. Frederick Ave. Ry. Co. (18 Mo. App. 290), 435.
Ashby v. White (1 Smith's L. C. 6th Eng. ed.) 266; 8th Am. ed. of 1885, 505), 149, 159.
Asher v. St. Louis &c. Ry. Co. (89 Mo. 116), 339.
Ashmore v. Pennsylvania Steam &c. Co. (28 N. J. Law, 180), 245.
Ashton v. Detroit City Ry. Co. (78 Mich. 587; 44 N. W. Rep. 141), 431.
Ashworth v. Stanwix (3 El. & El. 701; 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 134; 4 L. T. (N. S.) 85), 444, 445, 492.
Assop v. Yates (2 Hurl. & N. 767), 541.
Aston v. Heaven (2 Espin. 533), 78.
Atchison &c. R. Co. v. Bales (16 Kan. 252), 363.
Atchison &c. R. Co. v. Cash (27 Kan. 587), 342.
Atchison &c. R. Co. v. Flinn (24 Kan. 627), 148, 218.
Atchison &c. R. Co. v. Hegwir (21 Kan. 622), 325, 328.
Atchison &c. R. Co. v. Henry (57 Kan. 154; 45 Pac. Rep. 576), 128.
Atchison &c. R. Co. v. Holt (29 Kan. 149), 496, 502.
Atchison &c. R. Co. v. Hughes (55 Kan. 491; 40 Pac. Rep. 919), 210, 213, 214.
Atchison &c. R. Co. v. Ledbetter (34 Kan. 326), 501.
Atchison &c. R. Co. v. McKee (37 Kan. 592; 15 Pac. Rep. 484), 500, 505, 511, 542.
Atchison &c. R. Co. v. Moore (29 Kan. 632), 496.
Atchison &c. R. Co. v. Morgan (43 Kan. 1; 22 Pac. Rep. 995), 288.
Atchison &c. R. Co. v. Plunkett (25 Kan. 188; 2 Am. & Eng. Ry. Cas. 128), 536.
Atchison &c. R. Co. v. Shaft (33 Kan. 521). 344.
Atchison &c. R. Co. v. Slattery (57 Kan. 499; 46 Pac. Rep. 941), 546.
Atchison &c. R. Co. v. Smith (28 Kan. 561), 173, 304, 626, 633.
Atchison &c. R. Co. v. Stanford (12 Kan. 354; 15 Am. Rep. 362), 361.
Atchison &c. R. Co. v. Thul (32 Kan. 255), 497.
Atchison &c. R. Co. v. Tindall (57 Kan. 719; 48 Pac. Rep. 12), 443.
Atchison &c. R. Co. v. Townsend (39 Kan. 115; 17 Pac. Rep. 804), 275, 289.
Atchison &c. R. Co. v. Wagner (33 Kan. 660), 533.
Atchison &c. R. Co. v. Walz (40 Kan. 433; 19 Pac. Rep. 787), 76.
Atkins v. Merrick Thread Co. (142 Mass. 431), 517.
Atkinson v. Abraham (45 Hun, 238), 83.
Atkinson v. Goodrich Transportation Co. (60 Wis. 141; 50 Am. Rep. 352), 32, 41, 143.
Atkinson v. Sellers (5 C. B. (N. S.) 442), 396.
Atkyn v. Wabash Ry. Co. (41 Fed. Rep. 193), 490.
Atlanta, City of, v. Wilson (59 Ga. 644; 27 Am. Rep. 396; 60 Ga. 473), 370.
Atlanta Cotton Factory v. Speer (69 Ga. 137; 47 Am. Rep. 750), 466, 514.
Atlanta Cotton Seed Oil Mills v. Coffey (80 Ga. 145; 4 S. E. Rep. 759), 83.

[The references are to pages.]

Atlanta &c. R. Co. v. Ayers (53 Ga. 12), 98, 111, 133.
Atlanta &c. Ry. Co. v. Gravitt (93 Ga. 369; 20 S. E. Rep. 550; 44 Am. St. Rep. 145), 185, 188.
Atlanta &c. Ry. Co. v. Leach (91 Ga. 419), 68.
Atlanta &c. R. Co. v. Wyly (65 Ga. 120), 133, 626.
Atlantic &c. R. Co. v. Burt (49 Ga. 606), 337.
Atlantic &c. R. Co. v. Ironmonger (Va.) (29 S. E. Rep. 319), 164.
Atwater v. Town of Veteran (6 N. Y. Supl. 907), 26, 329.
Atwood v. Bangor &c. Ry. Co. (91 Me. 399; 40 Atl. Rep. 67), 302.
Au v. New York &c. R. Co. (29 Fed. Rep. 72), 481.
Augusta &c. R. Co. v. Killian (79 Ga. 234; 4 S. E. Rep. 165), 97, 489.
Augusta &c. R. Co. v. McElmurry (24 Ga. 75), 101, 111, 132, 133.
Augusta &c. R. Co. v. Renz (55 Ga. 126), 434.
Aurora v. Dale (90 Ill. 46), 372, 375, 384.
Aurora v. Hillman (90 Ill. 61), 292, 372, 373, 379, 380, 405, 565.
Aurora &c. R. Co. v. Grimes (13 Ill. 585), 26, 39, 118, 172, 316, 601.
Austin v. Boston & Maine R. Co. (164 Mass. 282; 41 N. E. Rep. 288), 521.
Austin v. Chicago &c. R. Co. (91 Ill. 35), 298.
Austin v. Great Western &c. Ry. Co. (L. R. 2 Q. B. 442), 207, 221, 240.
Austin v. Manchester &c. Ry. Co. (16 Jur. 766), 22.
Austin v. Manchester &c. Ry. Co. (16 Q. B. 600; 10 C. B. 454), 99, 244.
Austin v. New Jersey Steamboat Co. (43 N. Y. 75, 82), 25, 33, 38.
Austin. City of, v. Ritz (72 Tex. 391; 9 S. W. Rep. 884), 25.
Austin &c. R. Co. v. Beatty (73 Tex. 592; 11 S. W. Rep. 358), 26, 61.
Avegno v. Hart (25 La. Ann. 235; 13 Am. Rep. 133), 414.
Avery v. Maxwell (4 N. H. 36), 323.
Axford v. Prior (C. P. 14 W. R. 611), 81, 590.
Ayer v. City of Norwich (99 Conn. 376; 12 Am. Rep. 396), 389.
Aylesworth v. Chicago &c. R. Co. (30 Iowa, 457), 339.

B.

Babson v. Rockport (101 Mass. 93), 386, 391.
Bailey v. Jourdan (18 App. Div. (N. Y.) 387), 164.
Bailey v. Mayor of New York (3 Hill, 531; 38 Am. Dec. 669), 369.
Bailey v. New Haven &c. R. Co. (107 Mass. 496), 288.
Bailey v. Tacoma Traction Co. (16 Wash. 48), 433.
Baird v. Addie (16 Ct. of Ses. Cas. 490), 560.
Baird v. Chicago &c. R. Co. (61 Iowa, 359), 530, 539.
Bajus v. Syracuse &c. R. Co. (34 Hun (N. Y.), 153), 43.
Bajus v. Syracuse &c. R. Co. (103 N. Y. 312; 57 Am. Rep. 723), 500.
Baker v. Allegheny R. Co. (95 Penn. St. 211; 40 Am. Rep. 634), 445, 496, 517.
Baker v. Chicago &c. R. Co. (73 Iowa, 389; 35 N. W. Rep. 460), 335.
Baker v. Fehr (97 Penn. St. 70), 606, 626, 629.
Baker v. Flint &c. R. Co. (68 Mich. 90; 35 N. W. Rep. 836), 196.
Baker v. Pendergast (32 Ohio St. 494; 30 Am. Rep. 620), 399.
Baker v. Portland (58 Me. 199; 4 Am. Rep. 274), 46, 72, 369, 371, 387, 391, 563, 565.
Baker v. Robbins (9 Kan. 303), 325.
Baker v. Wilmington &c. R. Co. (118 N. C. 1015; 24 S. E. Rep. 415), 302.
Balbridge &c. Bridge Co. v. Cartrett (75 Tex. 628; 13 S. W. Rep. 8), 370.
Balch v. Smith (7 Hurl. & N. 736; 8 Jur. (N. S.) 197; 31 L. J. (Exch.) 201; 10 Week. Rep. 387; 6 L. T. (N. S.) 158), 79, 84.
Balcom v. Dubuque &c. R. Co. (21 Iowa, 102), 325, 328.
Baldwin v. Barney (12 R. I. 392; 34 Am. Rep. 670), 17, 254, 255, 396, 397.
Baldwin v. Chicago &c. R. Co. (50 Iowa, 680), 502.
Baldwin v. Ensign (49 Conn. 113; 44 Am. Rep. 205), 388.
Baldwin v. Greenwoods Turnpike Co. (49 Conn. 238; 16 Am. Rep. 33), 381.
Baldwin v. Railroad Co. (50 Iowa, 680), 496.

[The references are to pages.]

Baldwin v. St. Louis &c. Ry. Co. (63 Iowa, 210), 57.
Baldwin v. Turnpike Co. (40 Conn. 238), 370, 381.
Ball v. Town of Woodbine (61 Iowa, 83; 47 Am. Rep. 805), 591.
Ball v. Wabash &c. Ry. Co. (83 Mo. 574), 247.
Ballou v. Chicago &c. R. Co. (54 Wis. 259; 41 Am. Rep. 31), 477, 497, 502, 533.
Balor v. Baltimore &c. R. Co. (9 W. Va. 270), 334.
Baltimore, The (8 Wall. 377), 579.
Baltimore v. Morriott (9 Md. 160), 605.
Baltimore City Passenger R. Co. v. Kemp (61 Md. 619; 48 Am. Rep. 134), 419.
Baltimore City Passenger R. Co. v. Wilkinson (30 Md. 224), 436.
Baltimore Elevator Co. v. Neal (65 Md. 438), 509.
Baltimore &c. R. Co. v. Boteler (38 Md. 568), 292, 563.
Baltimore &c. R. Co. v. Brady (32 Md. 328), 246.
Baltimore &c. R. Co. v. Breinig (25 Md. 378), 264, 285.
Baltimore &c. R. Co. v. Colvin (118 Penn. St. 230; 12 Atl. Rep. 337), 283.
Baltimore &c. R. Co. v. Conoyer (Ind.) (48 N. E. Rep. 352), 277, 278.
Baltimore &c. R. Co. v. Depew (40 Ohio St. 121), 54.
Baltimore &c. R. Co. v. Fitzpatrick (35 Md. 32), 24, 46.
Baltimore &c. R. Co. v. Johnson (59 Ind. 188), 348.
Baltimore &c. R. Co. v. Kane (69 Md. 11; 13 Atl. Rep. 387), 209.
Baltimore &c. R. Co. v. Kean (65 Md. 394), 91.
Baltimore &c. R. Co. v. Lamborn (12 Md. 257), 324.
Baltimore &c. R. Co. v. Leapley (65 Md. 571), 107.
Baltimore &c. R. Co. v. McDonnell (43 Md. 534), 91, 172, 173, 423.
Baltimore &c. R. Co. v. McKenzie (81 Va. 71), 463, 498.
Baltimore &c. R. Co. v. Mah (66 Md. 53), 281.
Baltimore &c. R. Co. v. Mulligan (45 Md. 487), 91, 324, 333, 334.
Baltimore &c. R. Co. v. Myers (18 U. S. App. 569; 62 Fed. Rep. 367), 108, 213.
Baltimore &c. R. Co. v. Reaney (42 Md. 117), 32, 145.
Baltimore &c. R. Co. v. Rose (65 Md. 485), 83.
Baltimore &c. R. Co. v. Rowan (104 Ind. 88), 529.
Baltimore &c. R. Co. v. Schultz (43 Ohio St. 270), 347.
Baltimore &c. R. Co. v. Schwindling (101 Penn. St. 258; 47 Am. Rep. 706), 296, 304, 308.
Baltimore &c. R. Co. v. Shipley (39 Md. 251), 363.
Baltimore &c. R. Co. v. Skeels (3 W. Va. 556), 249.
Baltimore &c. R. Co. v. State (18 Atl. Rep. 1107), 219.
Baltimore &c. R. Co. v. State (29 Md. 252), 270.
Baltimore &c. R. Co. v. State (33 Md. 542), 78, 297.
Baltimore &c. R. Co. v. State (62 Md. 479; 50 Am. Rep. 233), 296, 297, 315.
Baltimore &c. R. Co. v. State (63 Md. 135), 235.
Baltimore &c. R. Co. v. State (69 Md. 551; 16 Atl. Rep. 212), 76.
Baltimore &c. R. Co. v. State (11 Rep. 160), 26.
Baltimore &c. R. Co. v. State (79 Md. 335; 29 Atl. Rep. 518), 163.
Baltimore &c. R. Co. v. Strickler (51 Md. 47; 34 Am. Rep. 291), 529.
Baltimore &c. R. Co. v. Trainor (33 Md. 542), 91, 277.
Baltimore &c. R. Co. v. Whitacre (35 Ohio St. 627), 56, 263, 606, 607.
Baltimore &c. R. Co. v. Whittaker (24 Ohio St. 642), 270.
Baltimore &c. R. Co. v. Wightman (29 Gratt. 431; 26 Am. Rep. 384), 206.
Baltimore &c. R. Co. v. Woodruff (4 Md. 242; 59 Am. Dec. 72), 6, 8, 357.
Baltimore &c. Turnpike Co. v. Bateman (68 Md. 389; 13 Atl. Rep. 54), 370.
Baltimore &c. Turnpike Co. v. Cassell (66 Md. 419), 381.
Baltimore &c. Turnpike Road v. Cason (20 Atl. Rep. 113), 436.
Baltimore Traction Co. v. Helms (84 Md. 515; 36 Atl. Rep. 119), 426, 428, 429.
Bamberger v. Citizens Street Ry. Co. (95 Tenn. 18; 31 S. W. Rep. 163), 28, 181, 186, 188, 633.

[The references are to pages.]

Bancroft v. Boston &c. R. Co. (97 Mass. 275), 98, 316, 317.
Banister v. Pennsylvania Co. (98 Ind. 220), 344.
Banks v. Highland St. R. Co. (136 Mass. 485), 73, 103.
Banning v. Chicago &c. Ry. Co. (89 Iowa, 74; 56 N. W. Rep 272), 18, 36, 264.
Bannon v. Baltimore &c. R. Co. (24 Md. 108), 175.
Barbee v. Reese (60 Miss. 906), 32.
Barber v. Essex (27 Vt. 62), 607, 620.
Barber v. Roxbury (11 Allen, 320), 369.
Barbo v. Bassett (35 Minn. 485), 501.
Bardwell v. Mobile &c. R. Co. (63 Miss. 574), 108.
Bare v. Pennsylvania R. Co. (19 Atl. Rep. 935), 291.
Barkdoll v. Pennsylvania R. Co. (18 Atl. Rep. 82), 531.
Barker v. Hannibal &c. R. Co. (98 Mo. 50; 11 S. W. Rep. 254), 297.
Barker v. Savage (45 N. Y. 191; 6 Am. Rep. 66), 89, 284, 292, 379, 399, 400.
Barker v. Town of Perry (67 Iowa. 146), 368.
Barksdull v. New Orleans &c. R. Co. (23 La. Ann. 180), 173. 203.
Barley v. Chicago &c. R. Co. (4 Biss. 430), 303.
Barnes v. Chapin (4 Allen, 444), 388.
Barnes v. Chicopee (138 Mass. 67; 52 Am. Rep. 259), 382.
Barnes v. Shreveport City Ry. Co. (47 La. Ann. 1218), 28.
Barnes v. Sowden (119 Penn. St. 53; 12 Atl. Rep. 804), 55.
Barnes v. Ward (9 C. B. 392; 19 L. J. (C. P.) 195), 382.
Barnum v. Terpenning (75 Mich. 557; 42 N. W. Rep. 967), 22.
Barrett v. Market St. Ry. Co. (81 Cal. 296), 422.
Barrett v. Southern Pac. Ry. Co. (91 Cal. 296; 27 Pac. Rep. 666), 202, 308.
Barrett v. Third Ave. R. Co. (45 N. Y. 628), 145, 156.
Barry v. New York &c. R. Co. (92 N. Y. 289; 44 Am. Rep. 377), 81, 196, 315.
Barry v. Oyster Bay &c. Steamboat Co. (67 N. Y. 301; 23 Am. Rep. 115), 242.
Barstow v. Old Colony R. Co. (143 Mass. 535; 10 N. E. Rep. 255), 314, 490.
Bartlett v. Crozier (17 Johns. 449; 8 Am. Dec. 428), 367.
Bartlett v. Hooksett (48 N. H. 18), 389.
Bartlett v. New York &c. Transp. Co. (8 N. Y. Supl. 309; 57 N. Y. Super. Ct. 348), 207, 418.
Barton v. St. Louis &c. R. Co. (52 Mo. 253; 14 Am. Rep. 418), 226, 227. 626, 633.
Bartonshill Coal Co. v. McGuire (3 Macq. H. L. Cas. 266; 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 785), 451, 560.
Bartonshill Coal Co. v. Reid (3 Macq. 266; 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 796), 451, 463, 560.
Bass v. Chicago &c. R. Co. (28 Ill. 9), 119, 329, 358.
Bassett v. City of St. Joseph (53 Mo. 290; 14 Am. Rep. 446), 382.
Bassett v. Fish (75 N. Y. 303), 56, 58.
Batchelor v. Fortescue (11 L. R. Q. B. Div. 474), 98.
Bateman v. New York &c. R. Co. (47 Hun, 429), 231.
Batterson v. Chicago &c. R. Co. (49 Mich. 184), 505.
Batterson v. Chicago &c. Ry. Co. (53 Mich. 125), 537.
Batterson v. Vogel (10 Mo. App. 235), 585, 586.
Battishill v. Humphreys (38 N. W. Rep. 581), 103.
Bauer v. St. Louis &c. Ry. Co. (46 Ark. 388), 442.
Baughman v. Shenango &c. R. Co. (92 Penn. St. 335; 37 Am. Rep. 690), 264, 267.
Baulec v. New York &c. R. Co. (59 N. Y. 356; 5 Lans. 436; 62 Barb. 623; 17 Am. Rep. 325), 464, 509.
Baun v. Chicago &c. R. Co. (53 Iowa, 595), 466.
Baxter v. Boston &c. R. Co. (102 Mass. 383), 340.
Baxter v. Roberts (44 Cal. 187), 496, 534.
Baxter v. Troy &c. R. Co. (41 N. Y. 502), 264, 276, 287.
Bay City &c. R. Co. v Austin (21 Mich. 390), 341.
Bayley v. Manchester &c. Ry. Co. (L. R. 7 C. P. 415), 420.
Baylor v. Baltimore &c. R. Co. (9 W. Va. 270), 330.

[The references are to pages.]

Baylor v. Delaware &c. R. Co. (40 N. J. Law, 23; 29 Am. Rep. 208), 529.
Bay Shore R. Co. v. Harris (67 Ala. 6), 168.
Beach v. Parmenter (23 Penn. St. 196), 399, 416.
Beall v. Township of Athens (45 N. W. Rep. 1014), 49.
Bean v. Oceanic Steam Nav. Co. (24 Fed. Rep. 124), 499.
Bean v. St. Louis &c. Ry. Co. (20 Mo. App. 641), 344.
Beardsley v. Swann (4 McLean, 333), 605.
Beatrice, City of, v. Reid (41 Neb. 214; 59 N. W. Rep. 770), 376.
Beatty v. Gilmore (16 Penn. St. 463; 55 Am. Dec. 514), 23, 92, 606.
Beauchamp v. Saginaw Mining Co. (50 Mich. 163; 45 Am. Rep. 30), 44, 145.
Beanlieu v. Portland Co. (48 Me. 291), 510, 631.
Becht v. Corbin (92 N. Y. 658), 615, 619.
Beck v. Carter (68 N. Y. 283; 23 Am. Rep. 175), 382, 383.
Beck v. East River Ferry Co. (6 Robt. 82), 157.
Beckdolt v. Grand Rapids &c. R. Co. (113 Ind. 343; 15 N. E. Rep. 686), 342.
Becke v. Missouri Pac. Ry. Co. (102 Mo. 544; 13 S. W. Rep. 1053), 155.
Beckham v. Hillier (47 N. J. Law, 12), 545.
Beckwith v. New York &c. R. Co. 7 N. Y. Supl. 719; 54 Hun, 446), 290.
Bedel v. Lull (Cro. Jac. 224), 147.
Bedell v. Berkey (76 Mich. 435; 43 N. W. Rep. 308), 83.
Bedford &c. R. Co. v. Rainbolt (99 Ind. 551), 206.
Beems v. Chicago &c. R. Co. (58 Iowa, 150; 12 N. W. Rep. 150), 530, 539.
Beers v. Housatonic &c. R. Co. (19 Conn. 566), 26, 620, 635.
Behler v. German &c. Ins. Co. (68 Ind. 353), 574.
Behrens v. Kansas &c. R. Co. (5 Colo. 400), 626.
Beisiegel v. New York &c. R. Co. (14 Abb. Pr. (N. S.) 29; 40 N. Y. 9), 260, 615.
Beittenmiller v. Bergner &c. Brewing Co. (12 Atl. Rep. 599), 540.
Belford v. Canada Shipping Co. (35 Hun, 347), 499.
Belk v. People (125 Ill. 584; 17 N. E. Rep. 744), 144.
Bell v. Central R. Co. (73 Ga. 520), 97.
Bell v. Hannibal & St. J. R. Co. (86 Mo. 599), 299.
Bell v. New York &c. R. Co. (17 Week. Dig. (N. Y.) 79), 66.
Bell v. Smith (39 Conn. 211), 620.
Bellefontaine &c. R. Co. v. Bailey (11 Ohio St. 333), 333.
Bellefontaine &c. R. Co. v. Hunter (33 Ind. 335, 356), 264, 270, 276.
Bellefontaine &c. R. Co. v. Reed (33 Ind. 476), 327, 351.
Bellefontaine &c. R. Co. v. Snyder (18 Ohio St. 399; 24 Ohio St. 670), 44, 178, 185, 186, 203.
Bellman v. New York &c. R. Co. (42 Hun (N. Y.) 130), 107.
Belton v. Baxter (54 N. Y. 245; 13 Am. Rep. 578; 58 N. Y. 411), 264, 379, 399, 400.
Bemis v. Connecticut &c. R. Co. (42 Vt. 375; 1 Am. Rep. 339), 327.
Bemis v. New Orleans &c. R. Co. (47 La. Ann. 1671; 18 So. Rep. 711), 217.
Bender v. St. Louis &c. Ry. Co. (137 Mo. 240; 37 S. W. Rep. 132), 520.
Benjamin v. Holyoke Street Ry. Co. (160 Mass. 3; 35 N. E. Rep. 95), 399.
Benn v. Null (65 Iowa, 407), 511.
Bennett v. Brooklyn Heights R. Co. (1 App. Div. (N. Y.) 205), 427.
Bennett v. Brooks (9 Allen, 118), 254.
Bennett v. Chicago &c. R. Co. (19 Wis. 145), 325, 354.
Bennett v. Fitfield (13 R. I. 139; 43 Am. Rep. 17), 369.
Bennett v. Louisville &c. R. Co. (102 U. S. 577), 231, 258, 315, 590.
Bennett v. Lovell (12 R. I. 166; 34 Am. Rep. 628), 378, 388.
Bennett v. New Jersey &c. Trans. Co. (36 N. J. Law, 225; 13 Am. Rep. 435), 149, 156, 157, 159, 425.
Bennett v. New York &c. R. Co. (57 Conn. 422; 18 Atl. Rep. 668), 233.
Bennett v. Railroad (102 U. S. 577), 81.

[The references are to pages.]

Bennett v. Syndicate Ins. Co. (39 Minn. 254; 39 N. W. Rep. 488), 634.
Benson v. Goodwin (147 Mass. 237; 17 N. E. Rep. 517), 483.
Benson v. Titcomb (72 Me. 31), 599.
Bentley v. Georgia Pac. Ry. Co. (86 Ala. 484; 6 So. Rep. 37), 299, 300.
Benton v. Central R. Co. (42 Iowa, 192), 270.
Benton v. Chicago &c. R. Co. (55 Iowa, 496), 213, 420.
Benzing v. Steinway (101 N. Y. 547), 511, 534.
Bequette v. Peoples' Transportation Co. (2 Or. 200), 125.
Berea Stone Co. v. Kraft (31 Ohio St. 287; 27 Am. Rep. 510), 465, 470.
Bergheim v. Great Eastern Ry. Co. (3, C. P. D. 221), 251.
Bergman v. St. Louis &c. R. Co. (88 Mo. 678; 1 S. W. Rep. 384), 76, 321.
Bernhardt v. Rensselaer &c. R. Co. (1 Abh. App. Dec. 131; 32 Barb. 165; 18 How. Pr. 427; 19 How. Pr. 199), 64, 260.
Bernina, The (L. R. 12 P. & D. 58; L. R. 13 App. Cas. 1), 8, 145.
Berns v. Coal Co. (27 W. Va. 285; 55 Am. Rep. 304), 447, 503.
Berrigan v. N. Y. &c. R. Co. (131 N. Y. 582), 518.
Berry v. Northeastern R. Co. (72 Ga. 137), 96.
Bertelson v. Chicago &c. Ry. Co. (5 Dak. 313; 40 N. W. Rep. 531), 296.
Besel v. New York &c. R. Co. (70 N. Y. 171), 478.
Bethea v. Raleigh &c. R. Co. (106 N. C. 279; 10 S. E. Rep. 1045), 334.
Bevier v. Delaware &c. Canal Co. (13 Hun, 254), 357.
Biddle v. Hestonville &c. Ry. Co. (112 Penn. St. 551), 438.
Bigelow v. Reed (51 Me. 325), 72, 409.
Bigelow v. Rutland (4 Cush. 247), 391, 599.
Billings v. Worcester (102 Mass. 329; 3 Am. Rep. 460), 403, 404.
Billman v. Railroad Co. (76 Ind. 166), 47.
Binicker v. Hannibal &c. R. Co. (83 Mo. 660), 347.
Binney v. Proprietors (5 Pick. 505), 336.
Birge v. Gardner (19 Conn. 507), 17, 79, 85, 185, 198, 199, 298, 306.
Birkett v. Knickerbocker Ice Co. (110 N. Y. 504; 18 N. E. Rep. 108), 98, 203, 399.
Birmingham v. Dorer (3 Brewst. 690), 187.
Birmingham Electric Ry. Co. v. Clay (108 Ala. 233; 19 So. Rep. 309), 209.
Birmingham Mineral R. Co. v. Harris (98 Ala. 326; 13 So. Rep. 377), 337.
Bisaillon v. Blood (64 N. H. 565; 15 Atl. Rep. 147), 184.
Bischoff v. Peoples' Ry. Co. (121 Mo. 216), 65.
Bishop v. Township of Schuylkill (8 Atl. Rep. 449), 368.
Bishop v. Union R. Co. (14 R. I. 314; 51 Am. Rep. 386), 439.
Bissell v. New York &c. R. Co. (29 Barb. 602; 25 N. Y. 442). 245, 246.
Bitner v. Utah Cent. Ry. Co. (4 Utah, 502; 11 Pac. Rep. 620), 76.
Black v. City of Lewiston (13 Pac. Rep. 80), 397.
Black v. Goodrich Trans. Co. (55 Wis. 319; 42 Am. Rep. 713), 248.
Blaine v. Chesapeake &c. R. Co. (9 W. Va. 252), 330, 334.
Blair v. Erie Ry. Co. (66 N. Y. 313; 23 Am. Rep. 55), 207, 240.
Blair v. Grand Rapids &c. R. Co. (60 Mich. 124; 26 N. W. Rep. 855), 67.
Blair v. Milwaukee &c. R. Co. (20 Wis. 254), 340.
Blake v. Ferris (5 N. Y. 48; 55 Am. Dec. 304), 448.
Blake v. Maine &c. R. Co. (70 Me. 60; 35 Am. Rep. 297), 453, 463, 510.
Blakeley v. Le Duc (19 Minn. 187), 417.
Blanchard v. Lake Shore &c. Ry. Co. (126 Ill. 416; 18 N. E. Rep. 799), 275, 296, 316.
Blessing v. Missouri &c. R. Co. (77 Mo. 410), 478.
Bliss v. London &c. Ry. Co. (2 Fost. & Fin. 341), 355.
Bliss v. South Hadley (145 Mass. 91; 13 N. E. Rep. 352), 202.
Blockman v. Toronto Street Ry. Co. (38 Up. Can. Q. B. 173), 316.
Blodgett v. Boston (8 Allen, 237), 386, 411, 412.

[The references are to pages.]

Blood v. Tyngsboro (103 Mass. 509), 391.
Bloomfield v. Burlington &c. R. Co. (74 Iowa, 607; 38 N. W. Rep. 431), 269.
Bloomington v. Rogers (83 Ind. 261), 602.
Bloomington, City of, v. Perdue (99 Ill. 329), 372. 375, 391.
Bloomsburg S. & E. L. Co. v. Gardner (126 Penn. St. 80; 24 W. N. C. 21; 17 Atl. Rep. 521), 53.
Bloor v. Town of Delafield (69 Wis. 273; 34 N. W. Rep. 115), 24.
Blyth v. Birmington Water Works Co. (11 Exch. 784; 2 Jur. (N. S.) 333; 25 L. J. (Exch.) 212), 5, 29, 355.
Blyth v. Topham (Cro. Jac. 158), 79.
Board of Commissioners of Boone County v. Mutchler (137 Ind. 140; 36 N. E. Rep. 534), 55, 163, 164.
Board of Internal Improvements v. Scearce (2 Duv. 576), 105, 458.
Board of Trustees &c. v. Mayer (10 Ind. 401), 602.
Boardman v. Brown (44 Hun, 336), 500.
Boatwright v. Northeastern R. Co. (25 S. C. 128), 454.
Bogard v. Louisville &c. Ry. Co. (100 Ind. 491), 484.
Bogenschutz v. Smith (84 Ky. 330; 1 S. W. Rep. 578), 540.
Boggs v. Missouri Pac. Ry. Co. (18 Mo. App. 274), 344.
Boggs v. Parr (3 Hughes, 504), 579.
Bogie v. Town of Waupun (75 Wis. 1; 43 N. W. Rep. 667), 384.
Bogle v. Winslow (5 Phila. 136), 583.
Bohan v. Milwaukee &c. R. Co. (58 Wis. 30), 264.
Bohler v. Owens (60 Ga. 185), 586.
Boland v. Louisville &c. R. Co. (106 Ala. 641; 18 So. Rep. 99), 532.
Boland v. Missouri &c. R. Co. (36 Mo. 484), 178, 185, 189, 200, 424.
Bolch v. Smith (7 Hurl. & N. 736), 409, 590.
Boldt v. New York &c. R. Co. (18 N. Y. 432), 476, 478.
Bolton v. Colder (1 Watts, 360), 415.
Bomar v. Maxwell (9 Humph. (Tenn.) 620; 51 Am. Dec. 682), 250.
Bomboy v. New York Cent. &c. R. Co. (47 Hun, 425), 262.
Bon v. Railway Pass. Ass. Co. (56 Iowa, 664; 41 Am. Rep. 127), 574.
Bonce v. Dubuque &c. R. Co. (53 Iowa, 278), 601.
Bond v. Smith (113 N. Y. 378; 21 N. E. Rep. 128; 44 Hun (N. Y.) 219), 57. 83.
Bonnell v. Delaware &c. R. Co. (39 N. J. Law, 189), 286.
Booth v. Boston &c. R. Co. (67 N. Y. 593; 73 N. Y. 38; 29 Am. Rep. 97), 446, 466, 495, 508.
Booth v. Mister (7 Car. & P. 66), 448.
Borgman v. Omaha &c. Ry. Co. (41 Fed. Rep. 667), 465.
Bormann v. City of Milwaukee (93 Wis. 522; 67 N. W. Rep. 924), 520.
Born v. Albany Plank Road (101 Penn. St. 334), 378, 633.
Borough of Mauch Chunk v. Kline (100 Penn. St. 119; 45 Am. Rep. 364), 404.
Boss v. Litton (5 Car. & P. 407), 379, 399, 400.
Boss v. Providence &c. R. Co. (15 R. I. 149; 4 East. Rep. 490; 32 Alb. Law Jour. 266; 1 Atl. Rep. 9), 236, 238.
Bossout v. Rome &c. R. Co. (10 N. Y. Supl. 602), 509.
Bossworth v. Swansey (10 Metc. 363; 43 Am. Dec. 441), 73, 254, 393, 599.
Botsford v. Michigan &c. R. Co. (33 Mich. 256), 496, 504.
Bott v. Pratt (33 Minn. 323; 53 Am. Rep. 47), 387.
Bottoms v. Seaboard &c. R. Co. (114 N. C. 699; 19 S. E. Rep. 730), 28, 186.
Bouga v. Township of Weare (109 Mich. 520; 67 N. W. Rep. 557), 373.
Bouwmeester v. Grand Rapids &c. R. Co. (67 Mich. 87; 34 N. W. Rep. 414), 300, 301.
Bovee v. Town of Danville (53 Vt. 190), 376, 620.
Bowen v. Chicago &c. Ry. Co. (95 Mo. 268; 8 S. W. Rep. 230), 498.
Bower v. Chicago &c. Ry. Co. (61 Wis. 457), 280.
Bower v. Wellington (126 Mass. 391), 399.
Bowman v. Chicago &c. R. Co. (85 Mo. 533), 350.
Bowman v. Troy &c. R. Co. (37 Barb. 516), 324, 332, 352.

[The references are to pages.]

Bowyer v. Burlew (3 N. Y. Super. Ct. 362), 324.
Boyce v. Manhattan Ry. Co. (54 N. Y. Super. Ct. 286), 231.
Boyle v. Missouri Pac. Ry. Co. (21 Mo. App. 416), 353.
Boyle v. Mowry (122 Mass. 251), 534.
Boyle v. New York &c. R. Co. (39 Hun, 171), 335.
Brabbitts v. Chicago &c. R. Co. (38 Wis. 289), 454, 466.
Brace v. New York &c. R. Co. (27 N. Y. 269), 343.
Bradbury v. Furlung (13 R. I. 15; 43 Am. Rep. 1), 96.
Bradbury v. Goodwin (108 Ind. 286), 500.
Bradford, City of, v. Downs (126 Penn. St. 622; 24 W. N. C. 153; 17 Atl. Rep. 884), 48.
Bradley v. Andrews (51 Vt. 530), 17, 591.
Bradley v. Boston &c. R. Co. (2 Cush. 539), 288.
Bradley v. Nashville &c. Ry. Co. (14 Lea (Tenn.) 374), 477. 490.
Bradley v. New York &c. R. Co. (62 N. Y. 99), 491.
Bradley v. Rea (103 Mass. 188; 4 Am. Rep. 524), 393.
Bradshaw's Adm'r v. L. & N. R. Co. (Ky.) (21 S. W. Rep. 346), 514.
Bradwell v. Pittsburgh &c. Ry. Co. (153 Penn. St. 105; 25 Atl. Rep. 623), 565.
Brady v. Ball (14 Ind. 317), 325.
Brady v. Rensselaer &c. R. Co. (3 Thomp. & C. 537; 1 Hun, 378), 352, 354.
Brady v. Toledo &c. R. Co. (81 Mich. 616; 45 N. W. Rep. 1110), 291.
Branan v. May (17 Ga. 136), 605.
Brann v. Chicago &c. R. Co. (53 Iowa, 595), 496, 502.
Brannon v. Adams (76 Ill. 331), 570.
Brannon v. May (17 Ga. 136), 130, 131, 132.
Branson v. Labrot (81 Ky. 638; 50 Am. Rep. 193), 175, 200.
Brazil Block Coal Co. v. Gaffney (119 Ind. 455; 21 N. E. Rep. 1102), 526.
Brazil & Chicago Coal Co. v. Cain (98 Ind. 282), 483.
Breasted v. Farmers' Loan & Trust Co. (8 N. Y. 299; 59 Am. Dec. 482), 574, 575.
Breckenfelder v. Lake Shore &c. Ry. Co. (79 Mich. 560; 44 N. W. Rep. 957), 287.
Breen v. New York &c. R. Co. (99 N. Y. 297), 224.
Brehm v. Great Western Ry. Co. (34 Barb. 256), 145.
Bremmer v. Green Bay &c. R. Co. (61 Wis. 114), 340.
Brendell v. Buffalo &c. R. Co. (27 Barb. 534), 276.
Brennan v. Fair Haven &c. R. Co. (45 Conn. 284), 29 Am. Rep. 679), 175, 207, 242, 438.
Brennan v. Friendship (67 Wis. 223), 27.
Brennan v. Gordon (118 N. Y. 489; 23 N. E. Rep. 810; 13 Daly, 208), 485, 507, 512, 517.
Brentner v. Chicago &c. R. Co. (68 Iowa, 530; 19 Am. Law Rev. 668), 601.
Brewer v. Tennessee Coal &c. Co. (97 Tenn. 615; 35 S. W. Rep. 549), 54.
Brezee v. Powers (80 Mich. 172; 45 N. W. Rep. 130), 57.
Brice v. Louisville &c. R. Co. (9 S. W. Rep. 288), 533.
Brick v. Rochester &c. R. Co. (98 N. Y. 211; 32 Alb. Law Jour. 52), 454, 465, 470, 479, 498, 502.
Brickell v. New York &c. R. Co. (120 N. Y. 290; 24 N. E. Rep. 449), 162, 272, 273.
Bricker v. Caldwell (132 Penn. St. 1; 18 Atl. Rep. 983), 240.
Bricker v. Phila. &c. R. Co. (132 Penn. St. 1; 18 Atl. Rep. 983), 240.
Brickman v. South Carolina &c. R. Co. (8 S. C. 173), 497.
Brickner v. New York &c. R. Co. (2 Lans. 506), 511.
Brickner v. New York &c. R. Co. (49 N. Y. 672), 472.
Bridge v. Grand June. &c. Ry. Co. (3 M. & W. 244), 16, 24, 46, 149, 279, 607.
Bridger v. Asheville &c. R. Co. (25 S. C. 24), 27. 167. 195.
Bridger v. Asheville &c. R. Co. (27 S. C. 456; 3 S. E. Rep. 860), 168, 308.
Bridges v. North London Ry. Co. (L. R. 6. Q. B. 377; 24 L. T. Rep. (N. S.) 835), 235.
Bridge's Adm'r v. Tennessee Coal &c. Co. (109 Ala. 287; 19 So. Rep. 495), 542.
Briggs v. Guilford (8 Vt. 264), 380.

[The references are to pages.]

Briggs v. Missouri Pac. Ry. Co. (82 Mo. 37), 338.
Briggs v. Taylor (28 Vt. 183), 181, 635.
Briggs v. Union St. Ry. Co. (148 Mass. 72; 19 N. E. Rep. 19), 431.
Brill v. Eddy (115 Mo. 596; 22 S. W. Rep. 488), 185.
British &c. Ins. Co. v. Gulf &c. Ry. Co. (63 Tex. 475; 51 Am. Rep. 661), 248.
Britton v. Cummington (107 Mass. 347), 91, 381, 386.
Britton v. Great Western Cotton Co. (L. R. 7 Exch. 130), 514 541.
Broadwell v. Swigert (7 B. Mon. 39; 45 Am. Dec. 47), 49, 160, 161, 581.
Broderick v. Detroit Union R. Co. (56 Mich. 261; 56 Am. Rep. 382), 463.
Brodeur v. Valley Falls Co. (16 R. I. 448; 17 Atl. Rep. 54), 464, 521.
Bronson v. N. Y. C. & H. R. R. Co. (24 App. Div. (N. Y.) 262), 273.
Bronson v. Southbury (37 Conn. 199), 185.
Bronson's Adm'r v. Labrot (81 Ky. 638), 86.
Brooks v. Boston (19 Pick. 174), 43.
Brooks v. Boston &c. R. Co. (135 Mass. 21), 211.
Brooks v. Buffalo &c. R. Co. (25 Barb. 600; 1 Abb. App. Dec. 211), 280, 320.
Brooks v. Hannibal &c. R. Co. (35 Mo. App. 571), 335.
Brooks v. Hart (14 N. H. 307), 414, 416.
Brooks v. Lincoln St. Ry. Co. (22 Neb. 816; 36 N. W. Rep. 529), 423, 425.
Brooks v. New York &c. R. Co. (13 Barb. 594), 336, 342, 345.
Brooks v. Petersham (16 Gray, 181), 63.
Brooks v. Schwerin (54 N. Y. 343), 379, 399.
Brooksville v. Pumphrey (59 Ind. 78; 26 Am. Rep. 76), 389.
Brooksville &c. Turnpike Co. v. Pumphrey (59 Ind. 74; 26 Am. Rep. 76), 370.
Broschart v. Tuttle (59 Conn. 20), 12.
Brossman v. Lehigh Valley R. Co. (113 Penn. St. 490; 57 Am. Rep. 479), 529.
Brothers v. Carter (57 Mo. 373; 14 Am. Rep. 424), 465.
Brown v. Byroads (47 Ind. 435), 490.
Brown v. Central Pac. R. Co. (12 Pac. Rep. 512), 32.
Brown v. Chicago &c. Ry. Co. (64 Iowa, 652), 498.
Brown v. Chicago &c. Ry. Co. (69 Iowa, 161), 523.
Brown v. Chicago &c. R. Co. (54 Wis. 342; 41 Am. Rep. 41), 33, 44, 64, 237.
Brown v. Christopher &c. R. Co. (34 Hun, 471), 423.
Brown v. Eastern R. Co. (11 Cush. 97), 252.
Brown v. European &c. R. Co. (58 Me. 384), 172, 178.
Brown v. Gilchrist (80 Mich. 56; 45 N. W. Rep. 82), 510.
Brown v. Hannibal &c. R. Co. (37 Mo. App. 394), 181, 200.
Brown v. Hannibal &c. R. Co. (50 Mo. 461; 11 Am. Rep. 420), 279, 297, 315.
Brown v. Hannibal &c. R. Co. (99 Mo. 310; 12 S. W. Rep. 655), 285.
Brown v. Hard (56 Ill. 317), 120.
Brown v. Kings Co. &c. Ins. Co. (31 How. Pr. 512), 573.
Brown v. Louisville &c. R. Co. (111 Ala. 275; 19 So. Rep. 1001), 545.
Brown v. Lynn (31 Penn. St. 510), 59, 78, 89, 295.
Brown v. McLeish (71 Iowa, 381; 32 N. W. Rep. 385), 537.
Brown v. Maxwell (6 Hill (N. Y.), 592; 41 Am. Dec. 771), 443, 461, 513, 615.
Brown v. Milwaukee &c. R. Co. (22 Minn. 165), 18, 25, 26, 264.
Brown v. Milwaukee &c. R. Co. (21 Wis. 39), 340.
Brown v. Minneapolis &c. R. Co. (23 Am. Law Reg. 335), 476.
Brown v. New York &c. R. Co. (32 N. Y. 597; 31 Barb. 385), 157, 321.
Brown v. Sennett (68 Cal. 225), 485.
Brown v. Skowhegan (82 Me. 273; 19 Atl. Rep. 399), 381.
Brown v. Sullivan (71 Tex. 470; 10 S. W. Rep. 288), 36.
Brown v. Texas &c. Ry. Co. (42 La. Ann. 350; 7 So. Rep. 682), 269.
Brown v. Wabash &c. Ry. Co. (18 Mo. App. 568), 249.
Brown v. Wabash &c. Ry. Co. (20 Mo. App. 222), 42, 47.

[The references are to pages.]

Brown v. Winona &c. R. Co. (27 Minn. 162; 38 Am. Rep. 285), 454, 476, 479.
Brown v. Wood (16 Atl. Rep. 42), 442.
Browne v. Providence &c. R. Co. (12 Gray, 55), 345.
Brownell v. Flagler (5 Hill, 282), 103, 616.
Browning v. City of Springfield (17 Ill. 143; 63 Am. Dec. 345), 369.
Brownlie v. Tennant (16 Ct. of Ses. Cas. 998), 560.
Bruker v. Town of Covington (69 Ind. 33; 35 Am. Rep. 202), 56, 371, 375, 376, 385.
Brunswick &c. R. Co. v. Hoover (74 Ga. 426), 277.
Brusso v. City of Buffalo (90 N. Y. 679), 378.
Bryan v. Missouri Pac. R. Co. (32 Mo. App. 228), 249.
Bryant v. Biddeford (39 Me. 193), 255.
Bryant v. Burlington &c. R. Co. (66 Iowa, 305; 19 Am. Law Rev. 669; 55 Am. Rep. 275), 523, 538.
Bryant v. Central &c. R. Co. (56 Vt. 710), 358, 360.
Bryant v. Rich (106 Mass. 180; 8 Am. Rep. 311), 420, 421, 448.
Brydon v. Stewart (2 Macq. 30; 1 Pat. Sc. App. 447), 451.
Buchanan v. Chicago &c. R. Co. (75 Iowa, 393; 39 N. W. Rep. 663), 489.
Bucher v. Cheshire R. Co. (25 U. S. 555), 255.
Bucher v. Fitchburg R. Co. (131 Mass. 156; 41 Am. Rep. 216), 254, 394.
Bucher v. New York &c. R. Co. (98 N. Y. 128), 214, 627, 633.
Buck v. City of Biddeford (82 Me. 433; 19 Atl. Rep. 912), 396.
Buckingham v. Fisher (70 Ill. 121), 387.
Buckley v. Gutta-Percha &c. Mfg. Co. (113 N. Y. 540; 21 N. E. Rep. 717), 527.
Buckley v. Port Henry Iron Ore Co. (2 N. Y. Supl. 133), 501.
Buckner v. Richmond &c. R. Co. (72 Miss. 873; 18 So. Rep. 449), 542.
Buddenburgh v. Benner (1 Hilt. 84), 587.
Buel v. New York &c. R. Co. (31 N. Y. 314), 63, 66, 215, 216.
Buesching v. St. Louis Gas Light Co. (73 Mo. 219; 39 Am. Rep. 503), 81, 606, 622.
Buffington v. Swansey (2 Am. Law Rev. 235), 396.
Buhrens v. Dry Dock &c. Ry. Co. (53 Hun, 571; 6 N. Y. Supl. 224), 425.
Bulger v. Albany Ry. Co. (42 N. Y. 459), 178, 424.
Bulkley v. New York &c. R. Co. (27 Conn. 479), 324, 328, 340.
Bullard v. Harrison (4 Mau. & Sel. 387; 2 Blackstone's Commentaries, 36), 383.
Bullock v. Mayor &c. of New York (99 N. Y. 654; 1 East. Rep. 170), 55, 367, 374, 375.
Bullock v. Wilmington &c. R. Co. (105 N. C. 180; 10 S. E. Rep. 988), 285.
Bulman v. Monmouth Ins. Co. (35 Me. 227), 573.
Bunnell v. Rio Grande Western Ry. Co. (13 Utah, 314; 44 Pac. Rep. 927), 624.
Bunt v. Sierra Buttes Gold Mining Co. (24 Fed. Rep. 847), 537.
Bunting v. Central R. Co. (14 Nev. 351), 290.
Bunting v. Central &c. R. Co. (16 Nev. 277), 34, 103, 279.
Burbridge v. Kansas City R. Co. (36 Mo. App. 669), 428.
Burdick v. Worrall (4 Barb. 596), 414.
Burgess v. Clements (4 Mau. & Sel. 306), 588.
Burgess v. Davis Sulphur Ore Co. (165 Mass. 71; 42 N. E. Rep. 501), 515, 519.
Burgess v. Great Western Ry. Co. (6 C. B. (N. S.) 923; 95 Eng. Com. L. 923), 207.
Burgin v. Richmond & Danville R. Co. (115 N. C. 673; 20 S. E. Rep. 473), 212.
Burke v. Anderson (34 U. S. App. 132; 69 Fed. Rep. 814), 519.
Burke v. Broadway &c. R. Co. (34 How. Pr. 239; 49 Barb. 529), 172, 189, 615.
Burke v. Louisville &c. R. Co. (7 Heisk. 451; 19 Am. Rep. 618), 357.
Burke v. Norwich &c. R. Co. (34 Conn. 474), 453, 486.
Burke v. Witherbee (98 N. Y. 562), 500, 504.
Burling v. Illinois &c. R. Co. (85 Ill. 18), 313.

[The references are to pages.]

Burlington &c. R. Co. v. Crockett (17 Neb. 570), 97.
Burlington &c. R. Co. v. Crockett (19 Neb. 138), 497.
Burlington &c. R. Co. v. Franzer (15 Neb. 365), 331.
Burlington &c. R. Co. v. Shoemaker (18 Neb. 369), 344.
Burlington &c. R. Co. v. Webb (18 Neb. 215; 53 Am. Rep. 809), 333, 341, 353.
Burlington &c. R. Co. v. Westover (4 Neb. 268), 357, 361, 363.
Burnett v. Burlington &c. R. Co. (16 Neb. 332), 297.
Burnham v. Grand Trunk R. Co. (63 Me. 298; 18 Am. Rep. 220), 252.
Burns v. Bellefontaine &c. R. Co., (50 Mo. 139), 433, 434, 435.
Burns v. Chicago &c. Ry. Co. (69 Iowa, 450), 442, 504.
Burns v. Elba (32 Wis. 605), 563.
Burns v. North Chicago R. M. Co. (65 Wis. 312), 282.
Burns v. Ocean S. S. Co. (84 Ga. 709; 11 S. E. Rep. 493), 500.
Burns v. Poulson (L. R. 8 C. P. 563; 29 L. T. (N. S.) 329), 448.
Burrell v. Uncapher (117 Penn. St. 373; 11 Atl. Rep. 619), 42, 368.
Burroughs v. Housatonic R. Co. (15 Conn. 124; 38 Am. Dec. 64), 357.
Burrows v. Erie Ry. Co. (63 N. Y. 556), 212.
Burrows v. Marsh Gas & Coke Co. (L. R. 5 Exch. 67; L. R. 7 Exch. 96), 41, 92, 144.
Burton v. Missouri Pac. Ry. Co. (32 Mo. App. 455), 524.
Burton v. North Mo. &c. R. Co. (30 Mo. 372), 338.
Bush v. Brainard (1 Cowen, 78; 13 Am. Dec. 513), 88, 614, 615.
Bush v. Johnson (23 Penn. St. 209), 606.
Bushby v. New York &c. R. Co. (37 Hun, 104), 503.
Bushby v. St. Louis &c. Ry. Co. (81 Mo. 43), 346.
Buster v. Hannibal &c. R. Co. (18 Mo. App. 578), 335.
Butcher v. W. Va. & P. R. Co. (37 W. Va. 180; 16 S. E. Rep. 457), 260, 278, 608.
Butler v. Gettysburg &c. R. Co. (126 Penn. St. 160; 19 Atl. Rep. 39), 269.
Butler v. Milwaukee &c. R. Co. (28 Wis. 487), 279, 321.
Butler v. St. Paul & Duluth R. Co. (59 Minn. 135; 60 N. W. Rep. 1090), 211.
Butterfield v. Forrester (11 East, 60), 8, 10, 11, 16, 22, 25, 34, 130, 371, 596, 616.
Butterfield v. Western &c. R. Co. (10 Allen, 532), 270, 271, 571.
Button v. Frink (51 Conn. 342; 50 Am. Rep. 24), 370, 601, 635.
Button v. Hudson River R. Co. (18 N. Y. 248), 33, 38, 50, 91, 92, 101, 189, 614, 616.
Butts v. St. Louis &c. Ry. Co. (98 Mo. 272; 11 S. W. Rep. 754), 287.
Buzby v. Philadelphia Traction Co. (126 Penn. St. 559; 17 Atl. Rep. 895; 24 W. N. C. 155), 428.
Buzzell v. Laconia Manfg. Co. (48 Me. 113), 496, 540, 599.
Byram v. McGuire (3 Head, 530), 33, 91.
Byrne v. Boadle (2 Hurl. & C. 722; 33 L. J. (Exch.) 13; 9 L. T. (N. S.) 450; 12 Week. Rep. 279), 408, 409.
Byrne v. Knickerbocker Ice Co. (56 N. Y. Super. Ct. 337; 4 N. Y. Supl. 531), 416.
Byrne v. New York &c. R. Co. (104 N. Y. 362; 58 Am. Rep. 512), 275, 316.
Byrne v. N. Y. &c. R. Co. (83 N. Y. 620), 196. 303.
Byrne v. Wilson (15 Ir. Rep. C. L. 332), 145.
Byrnes v. New York &c. R. Co. (113 N. Y. 251; 21 N. E. Rep. 50), 477.

C.

Cable v. Southern Ry. Co. (N. C.) (29 S. E. Rep. 377), 634.
Cahill v. Layton (57 Wis. 600; 46 Am. Rep. 46), 378.
Cairncross v. Village of Pewankee (86 Wis. 181; 56 N. W. Rep. 648), 374.
Cairo &c. R. Co. v. Murry (82 Ill. 77), 327, 331.
Cairo &c. R. Co. v. Woolsey (85 Ill. 370), 327, 328, 331, 353.
Calder v. Smalley (66 Iowa, 219; 19 Am. Law Rev. 664; 55 Am. Rep. 270), 384, 385.
Caldwell v. Pittsburgh &c. R. Co. (74 Penn. St. 421), 438.
Callaghan v. Del. &c. R. Co. (5 N. Y. Supl. 285; 52 Hun, 276), 282.

[The references are to pages.]

Callahan v. Bean (9 Allen, 401), 168, 172, 599.
Callahan v. Warne (40 Mo. 131), 20, 33.
Calumet Iron and Steel Co. v. Martin (115 Ill. 358; 3 N. E. Rep. 456), 119, 127.
Calvo v. Charlotte &c. R. Co. (23 S. C. 526; 55 Am. Rep. 28), 476.
Camden &c. R. Co. v. Baldauf (16 Penn. St. 67; 55 Am. Dec. 481), 250.
Camden &c. R. Co. v. Bausch (7 Atl. Rep. 731), 249, 250.
Camden &c. R. Co. v. Hoosey (99 Penn. St. 492; 44 Am. Rep. 120), 216.
Camp v. Church Wardens (7 La. Ann. 321), 453.
Camp v. Wood (76 N. Y. 92; 32 Am. Rep. 282), 83, 590.
Campbell v. Atlanta &c. R. Co. (53 Ga. 488; 56 Ga. 586), 134, 605.
Campbell v. Boyd (88 N. C. 129; 39 Am. Rep. 503; 43 Am. Rep. 740), 80, 81, 315.
Campbell v. Bridwell (5 Or. 311), 330, 338.
Campbell v. Lunsford (83 Ala. 512; 3 So. Rep. 522), 442.
Campbell v. New York &c. R. Co. (35 Hun, 506), 499.
Campbell v. Portland Sugar Co. (62 Me. 552; 16 Am. Rep. 503), 81, 258.
Campbell v. Race (7 Cush. 408; 54 Am. Rep. 728), 383.
Campbell v. Stillwater (32 Minn. 308; 50 Am. Rep. 567), 42, 47.
Candiff v. Louisville &c. Ry. Co. (7 So. Rep. 691), 223.
Canfield v. Baltimore &c. R. Co. (93 N. Y. 532; 45 Am. Rep. 268), 247.
Caniff v. Blanchard Nav. Co. (66 Mich. 638; 33 N. W. Rep. 744), 80.
Cannon v. Railway (6 Ir. L. R. 199), 143, 216.
Cannon v. Rowland (34 Ga. 422; 35 Ga. 105), 75.
Capper v. Louisville &c. Ry. Co. (103 Ind. 305), 477.
Car Co. v. Cooper (60 Ark. 545; 31 S. W. Rep. 154), 85.
Carbine's Adm'r v. Bennington &c. R. Co. (61 Vt. 348; 17 Atl. Rep. 491), 529.
Card v. Ellsworth (65 Me. 547; 20 Am. Rep. 722), 63.
Carey v. Arlington Mills (148 Mass. 338; 19 N. E. Rep. 525), 526.
Carey v. Berkshire R. Co. (1 Cush. 475; 48 Am. Dec. 616), 98.
Carey v. Chicago &c. R. Co. (61 Wis. 71), 94, 340.
Carey v. Chicago &c. Ry. Co. (67 Wis. 608), 500.
Carey v. Rae (58 Cal. 163), 383.
Carle v. Bangor &c. R. Co. (43 Me. 269), 453.
Carlin v. Chicago &c. R. Co. (37 Iowa, 316), 299, 601.
Carlisle v. Brisbane (113 Penn. St. 544; 57 Am. Rep. 483), 153.
Carlisle v. Sheldon (38 Vt. 440, 447), 165.
Carlson v. Northwestern Telephone Exchange Co. (63 Minn. 428; 65 N. W. Rep. 914), 468.
Carlton v. Franconia Iron Co. (99 Mass. 216), 82.
Carlton v. Wilmington &c. R. Co. (104 N. C. 365), 335.
Carolina, The (30 Fed. Rep. 119; 31 Fed. Rep. 112), 500.
Caron v. Boston & Albany R. Co. (164 Mass. 423; 42 N. E. Rep. 112), 482, 519.
Carpenter v. Boston &c. R. Co. (97 N. Y. 494; 49 Am. Rep. 540), 207, 238.
Carpenter v. Mexican Nat. R. Co. (39 Fed. Rep. 315), 537.
Carr v. Eel River & Eureka R. Co. (98 Cal. 366; 33 Pac. Rep. 213), 211.
Carr v. Lancashire &c. Ry. Co. (7 Exch. 707), 244.
Carraher v. San Francisco Bridge Co. (81 Cal. 98; 22 Pac. Rep. 480), 282.
Carrico v. Railway Co. (39 W. Va. 87), 300.
Carrington v. Louisville &c. R. Co. (88 Ala. 472; 6 So. Rep. 410), 16, 300.
Carroll v. East Tenn. &c. R. Co. (82 Ga. 452), 545.
Carroll v. Minnesota &c. R. Co. (13 Minn. 30), 25, 103, 296, 299, 489.
Carroll v. New Haven &c. R. Co. (1 Duer. 571), 36.
Carroll v. New York &c. R. Co. (1 Duer, 571), 219.
Carroll v. Staten Island R. Co. (58 N. Y. 126; 17 Am. Rep. 221), 77, 205, 255, 397.
Carroll v. Union Pac. Ry. Co. (88 Mo. 239), 208.

[The references are to pages.]

Carsley v. White (21 Pick. 255), 371.
Carter v. Chambers (79 Ala. 223), 379, 387.
Carter v. Columbia &c. R. Co. (19 S. C. 20; 45 Am. Rep. 754), 88, 313, 606.
Carter v. Kansas City Cable Ry. Co. (42 Fed. Rep. 37), 206.
Carter v. Louisville &c. R. Co. (98 Ind. 552; 49 Am. Rep. 780), 220, 298, 420.
Carter v. Towne (98 Mass. 567; 109 Mass. 507), 42, 180.
Carterville, Village of, v. Cook (129 Ill. 152; 22 N. E. Rep. 14), 42.
Cartwright v. Chicago &c. Ry. Co. (52 Mich. 606; 50 Am. Rep. 274), 234.
Carver v. Detroit &c. Plank Road Co. (69 Mich. 616; 25 N. W. Rep. 183), 381.
Carver v. Detroit Plank Road Co. (61 Mich. 584; 28 N. W. Rep. 721), 633.
Cary v. Cleveland &c. R. Co. (29 Barb. 47), 253.
Cary v. St. Louis &c. R, Co. (60 Mo. 213), 338.
Casey v. Berkshire R. Co. (48 Am. Dec. 616), 138.
Casey's Adm'r v. Louisville &c. R. Co. (84 Ky. 79), 460.
Cashill v. Wright (6 El. & Bl. 891), 586, 589.
Caslin v. Lake Shore &c. R. Co. (93 Mich. 553; 53 N. W. Rep. 724), 214.
Cassady v. Magher (85 Ind. 228), 570.
Cassedy v. Stockbridge (21 Vt. 391), 390, 565, 570.
Cassida v. Oregon Ry. & Nav. Co. (14 Or. 551; 13 Pac. Rep. 438), 62, 316.
Cassidy v. Angell (12 R. I. 447; 34 Am. Rep. 690), 270, 606, 607.
Cassidy v. Maine &c. R. Co. (76 Me. 488), 481.
Caswell v. Boston &c. R. Co. (98 Mass. 194), 207, 258.
Caswell v. Chicago &c. R. Co. (42 Wis. 193), 358.
Caswell v. Worth (5 El. & Bl. 849), 56.
Catawissa R. Co. v. Armstrong (49 Penn. St. 186), 49.
Caterham Ry. Co. v. London R. (87 Eng. Com. Law, 410), 231.
Catherine, The (17 How. (U. S.) 170), 579.
Catherine of Dover, The (Dawson, 2 Hagg. Ad. 145), 578.
Cauley v. Pittsburgh &c. R. Co. (95 Penn. St. 398; 40 Am. Rep. 664), 304, 308, 313.
Caulkins v. Matthews (5 Kan. 191), 128.
Cayle's Case (8 Coke's Rep. 32; 1 Smith's L. C. (8th ed.) 249), 586, 587.
Cayzer v. Taylor (10 Gray, 274), 144, 446, 499, 508.
Central Branch &c. R. Co. v. Henigh (23 Kan. 347; 33 Am. Rep. 167), 128, 304, 308, 319, 626.
Central &c. R. Co. v. Davis (19 Ga. 437), 326, 334.
Central &c. R. Co. v. Feller (84 Penn. St. 226), 291, 571.
Central &c. R. Co. v. Gleason (69 Ga. 200), 114, 133.
Central &c. R. Co. v. Lawrence (13 Ohio St. 67), 327, 329, 334.
Central &c. R. Co. v. Lea (20 Kan. 353), 325, 331.
Central &c. R. Co. v. Mason (51 Miss. 234), 599.
Central &c. R. Co. v. Moore (24 N. J. Law, 824), 260, 320.
Central &c. R. Co. v. Phillippi (20 Kan. 9), 325, 327.
Central &c. R. Co. v. Smith (69 Ga. 268), 214.
Central &c. R. Co. v. Smith (78 Ga. 694; 3 S. E. Rep. 397), 133, 298.
Central &c. R. Co. v. Van Horn (38 N. J. Law, 133), 236.
Central Passenger Ry. Co. v. Kuhn (86 Ky. 578; 6 S. W. Rep. 441), 155.
Central R. Co. v. Crosby (74 Ga. 737), 69.
Central R. Co. v. DeBray (71 Ga. 406), 480.
Central R. Co. v. Dixon (42 Ga. 327), 319.
Central R. Co. v. Freeman (75 Ga. 331), 206.
Central R. Co. v. Golden (93 Ga. 510), 28.
Central R. Co. v. Harrison (73 Ga. 744), 59.
Central R. Co. v. Haslett (74 Ga. 59), 538.
Central R. Co. v. Letcher (69 Ala. 106; 44 Am. Rep. 505), 16, 212.
Central R. Co. v. Phillips (91 Ga. 526), 28.
Central R. Co. v. Raiford (82 Ga. 400; 9 S. E. Rep. 169), 314.

[The references are to pages.]

Central R. Co. v. Ryals (11 S. E. Rep. 449), 545.
Central R. Co. v. Sanders (73 Ga. 513), 206.
Central R. Co. of Ga. v. Sears (53 Ga. 630), 490.
Central R. & B. Co. v. Kitchens (83 Ga. 83; 9 S. E. Rep. 827), 499.
Central R. & B. Co. v. Miles (88 Ala. 256; 6 So. Rep. 696), 211.
Central R. & B. Co. v. Newman (94 Ga. 560), 102.
Central Trust Co. v. East Tennessee &c. Ry. Co. (69 Fed. Rep. 353), 482, 545.
Central Trust Co. v. Texas &c. Ry. Co. (32 Fed. Rep. 448), 491, 500.
Central Trust Co. v. Wabash &c. Ry. Co. (26 Fed. Rep. 896), 58, 542.
Central Trust Co. v. Wabash &c. Ry. Co. (27 Fed. Rep. 159), 283.
Central Trust Co. v. Wabash &c. Ry. Co. (31 Fed. Rep. 246), 168.
Centralia, City of, v. Krouse (64 Ill. 19), 374, 401, 405, 571.
Chaffee v. Boston &c. R. Co. (104 Mass. 108), 282.
Chamberlain v. Enfield (43 N. H. 358), 389.
Chamberlain v. Milwaukee &c. R. Co. (7 Wis. 431), 607.
Chamberlain v. Morgan (68 Penn. St. 168), 583, 584, 585.
Chamberlain v. Town of Wheatland (7 N. Y. Supl. 190), 390.
Chambers v. Matthews (18 N. J. Law, 368), 324.
Chambers v. Western North Carolina R. Co. (91 N. C. 471), 441.
Champlin v. Railway Pass. Ins. Co. (6 Lans. 71), 574.
Chandler v. New York &c. R. Co. (159 Mass. 589; 35 N. E. Rep. 89), 600.
Chapin v. Sullivan &c. R. Co. (39 N. H. 564), 349, 354.
Chaplin v. Hawes (3 Car. & P. 555), 414, 416.
Chapman v. Cook (10 R. I. 304; 14 Am. Rep. 686), 382.
Chapman v. Erie Ry. Co. (55 N. Y. 579), 469, 509.
Chapman v. New Haven &c. R. Co. (19 N. Y. 341), 101, 156, 161.
Chapman v. Rothwell (El., Bl. & El. 168), 81, 83.
Chartiers Tp. v. Phillips (122 Penn. St. 601; 16 Atl. Rep. 26), 42.
Chase v. Chase (15 Nev. 259), 330, 337.
Chase v. Maine Cent. R. Co. (77 Me. 62; 52 Am. Rep. 744; 78 Me. 346; 1 East. Rep. 96), 27, 290, 599.
Chase v. Maine Cent. R. Co., 167 Mass. 383, 387; 45 N. E. Rep. 911), 260, 262, 269.
Chase v. New York &c. R. Co. (24 Barb. 273), 109.
Chesapeake &c. R. Co. v. Foster (88 Tenn. 671; 13 S. W. Rep. 694), 97.
Chesapeake &c. Ry. Co. v. Lee (84 Va. 642; 5 S. E. Rep. 579), 442.
Chesapeake &c. R. Co. v. McMannon (8 S. W. Rep. 18), 507.
Chesapeake &c. R. Co. v. Clowes (93 Va. 189; 24 S. E. Rep. 833), 217.
Chesapeake &c. Ry. Co. v. Reeves' Adm'r (11 S. W. Rep. 464), 234.
Chesson v. Roper Lumber Co. (118 N. C. 59; 23 S. E. Rep. 925), 484.
Chesterfield v. Janssen (1 Atk. 352), 5.
Chevalier v. Straham (2 Tex. 115; 47 Am. Dec. 639), 417.
Chicago v. Starr's Adm'r (42 Ill. 174), 168, 172, 189, 198.
Chicago & Alton R. Co. v. Murphy (17 Ill. App. 444), 54.
Chicago, Burlington & Quincy R. Co. v. Dewey (26 Ill. 255), 122, 175.
Chicago, Burlington & Quincy R. Co. v. Hazzard (26 Ill. 373), 122.
Chicago, Burlington & Quincy R. Co. v. McGinnis (49 Neb. 649; 68 N. W. Rep. 1057), 518.
Chicago, Burlington & Quincy R. Co. v. Triplett's Adm'r (38 Ill. 482), 122.
Chicago, City of, v. Bixby (84 Ill. 82; 25 Am. Rep. 429), 404.
Chicago, City of, v. Hesing (83 Ill. 204; 25 Am. Rep. 378), 173, 188, 381.
Chicago, City of, v. McGiven (78 Ill. 352), 404.
Chicago, City of, v. Stearns (105 Ill. 554), 121.
Chicago City Ry. Co. v. Robinson (127 Ill. 1; 18 N. E. Rep. 772), 175, 423, 424, 428.
Chicago City Ry. Co. v. Wilcox (24 N. E. Rep. 419), 168, 173, 185.
Chicago &c. R. Co. v. Adler (56 Ill. 344), 277.

[The references are to pages.]

Chicago &c. R. Co. v. Ashury (84 Ill. 429), 541.
Chicago &c. R. Co. v. Avery (109 Ill. 314), 503.
Chicago &c. R. Co. v. Bayfield (37 Mich. 205), 454, 465, 481.
Chicago &c. R. Co. v. Becker (76 Ill. 26; 84 Ill. 483), 26, 63, 172.
Chicago &c. R. Co. v. Bell (70 Ill. 102), 292, 565, 566.
Chicago &c. R. Co. v. Bills (118 Ind. 221; 20 N. E. Rep. 775), 103, 212.
Chicago &c. R. Co. v. Bingenheimer (116 Ill. 226), 499.
Chicago &c. R. Co. v. Boggs (101 Ind. 522), 76.
Chicago &c. R. Co. v. Brady (Neb.) (71 N. W. Rep. 721), 278.
Chicago &c. R. Co. v. Bragonier (119 Ill. 51), 537.
Chicago &c. Ry. Co. v. Brown (24 Pac. Rep. 497), 128.
Chicago &c. Ry. Co. v. Carpenter (12 U. S. App. 302; 56 Fed. Rep. 451), 222.
Chicago &c. R. Co. v. Cauffman (38 Ill. 424), 329.
Chicago &c. Ry. Co. v. Chapman (30 Ill. App. 504; 24 N. E. Rep. 417), 21, 247.
Chicago &c. R. Co. v. Chambers' Exrs. (32 U. S. App. 253; 68 Fed. Rep. 148), 164, 523.
Chicago &c. R. Co. v. Clark (70 Ill. 276), 120.
Chicago &c. R. Co. v. Clark (108 Ill. 113), 113, 121, 536, 538.
Chicago &c. v. Crisman (19 Colo. 30; 34 Pac. Rep. 286), 262.
Chicago &c. R. Co. v. Coss (73 Ill. 394), 120, 319.
Chicago &c. R. Co. v. Damerell (81 Ill. 450), 270.
Chicago &c. R. Co. v. Dewey (26 Ill. 255), 119, 319.
Chicago &c. R. Co. v. Dignan (56 Ill. 486), 321.
Chicago &c. R. Co. v. Dillon (17 Ill. App. 355), 119.
Chicago &c. R. Co. v. Dimick (96 Ill. 42), 114, 121, 126, 263.
Chicago &c. R. Co. v. Donahue (75 Ill. 106), 91, 120, 126.
Chicago &c. R. Co. v. Doyle (18 Kan. 58), 19, 534.
Chicago &c. Ry. Co. v. Dunleavy (129 Ill. 132; 22 N. E. Rep. 15), 59, 263, 266.
Chicago &c. R. Co. v. Dunn (61 Ill. 385; 52 Ill. 451), 114, 120, 125.
Chicago &c. Ry. Co. v. Eininger (114 Ill. 79), 314.
Chicago &c. R. Co. v. Engle (84 Ill. 397), 331, 332.
Chicago &c. R. Co. v. Fears (53 Ill. 115), 276.
Chicago &c. Ry. Co. v. Felton (125 Ill. 458; 17 N. E. Rep. 765), 62.
Chicago &c. R. Co. v. Fietsam (123 Ill. 518; 15 N. E. Rep. 169), 119, 126.
Chicago &c. R. Co. v. Flexman (103 Ill. 546), 420.
Chicago &c. R. Co. v. Flint (22 Ill. App. 502), 319.
Chicago &c. R. Co. v. Garvey (58 Ill. 85), 289, 321.
Chicago &c. R. Co. v. Geary (110 Ill. 383), 480.
Chicago &c. Ry. Co. v. Goebel (119 Ill. 515; 10 N. E. Rep. 369), 59, 258.
Chicago &c. R. Co. v. Goss (17 Wis. 428), 325.
Chicago &c. R. Co. v. Goyette (133 Ill. 21; 24 N. E. Rep. 549), 359.
Chicago &c. R. Co. v. Gregory (58 Ill. 226), 172, 190.
Chicago &c. Ry. Co. v. Gregory (58 Ill. 272), 120, 460, 601.
Chicago &c. R. Co. v. Gretzner (46 Ill. 74), 101, 120, 264, 279.
Chicago &c. R. Co. v. Hague (48 Neb. 97), 103.
Chicago &c. R. Co. v. Hanley (26 Ill. App. 351), 76.
Chicago &c. Ry. Co. v. Hansen (166 Ill. 623; 46 N. E. Rep. 1071), 266.
Chicago &c. R. Co. v. Harney (28 Ind. 28), 189.
Chicago &c. R. Co. v. Hatch (79 Ill. 137), 120, 126, 264.
Chicago &c. R. Co. v. Hazzard (26 Ill. 373), 119, 206, 223, 224, 601.
Chicago &c. R. Co. v. Hedges (105 Ind. 398), 263.
Chicago &c. Ry. Co. v. Hines (132 Ill. 161; 23 N. E. Rep. 1021), 501.
Chicago &c. R. Co. v. Hogan (27 Neb. 801; 43 N. W. Rep. 1148), 342.
Chicago &c. R. Co. v. Hogarth (38 Ill. 370), 119.
Chicago &c. R. Co. v. Honey (27 U. S. App. 196; 63 Fed. Rep. 39), 165, 167.

[The references are to pages.]

Chicago &c. R. Co. v. Hunt (24 Ill. App. 744), 359.
Chicago &c. R. Co. v. Hyatt (48 Neb. 161; 67 N. W. Rep. 8), 103, 212.
Chicago &c. R. Co. v. Jackson (55 Ill. 492; 8 Am. Rep. 661), 497, 536, 538, 541.
Chicago &c. R. Co. v. Jacobs (63 Ill. 178), 260, 281.
Chicago &c. R. Co. v. Johnson (103 Ill. 512), 19, 114, 121.
Chicago &c. R. Co. v. Keefe (47 Ill. 108), 477, 481.
Chicago &c. R. Co. v. Kellam (92 Ill. 245; 34 Am. Rep. 128), 78, 329, 350.
Chicago &c. R. Co. v. Kennedy (22 Ill. App. 308), 347.
Chicago &c. R. Co. v. Knsel (63 Ill. 180, n.), 260, 264, 281.
Chicago &c, R. Co. v. Kuster (22 Ill. App. 188), 119.
Chicago &c. R. Co. v. Lane (130 Ill. 116; 22 N. E. Rep. 513), 290.
Chicago &c. R. Co. v. Langley (2 Bradw. 505), 121.
Chicago &c. R. Co. v. Lee (60 Ill. 501; 68 Ill. 566; 87 Ill. 454), 120, 126, 290.
Chicago &c. R. Co. v. Lewis (5 Ill. 242), 121.
Chicago &c. R. Co. v. McCarty (49 Neb. 475; 68 N. W. Rep. 633), 515.
Chicago &c. R. Co. v. McDonald (21 Ill. App. 409), 476.
Chicago &c. R. Co. v. McGaha (19 Ill. App. 342), 106.
Chicago &c. R. Co. v. McGinnis (49 Neb. 649; 68 N. W. Rep. 1057), 539.
Chicago &c. R. Co. v. McKean (40 Ill. 218), 76, 78, 119, 264.
Chicago &c. R. Co. v. Major (18 Ill. 349), 172, 188, 189, 601.
Chicago &c. Ry. Co. v. Mason (27 Ill. App. 450), 119.
Chicago &c. R. Co. v. Michie (83 Ill. 427), 74.
Chicago &c. R. Co. v. Mock (72 Ill. 141), 120, 126.
Chicago &c. R. Co. v. Montgomery (15 Ill. App. 205), 533.
Chicago &c. R. Co. v. Moranda (93 Ill. 302; 34 Am. Rep. 168), 478.
Chicago &c. R. Co. v. Moss (60 Miss. 1003) 45 Am. Rep. 428), 248.
Chicago &c. R. Co. v. Murphy (53 Ill. 336), 476.
Chicago &c. R. Co. v. Murray (62 Ill. 326; 71 Ill. 601), 120.
Chicago &c. R. Co. v. Nash, 24 Rep. 884), 335.
Chicago &c. R. Co. v. Notzki (66 Ill. 455), 276.
Chicago &c. R. Co. v. O'Byran (15 Ill. App. 134), 462.
Chicago &c. R. Co. v. O'Connor (119 Ill. 586), 629.
Chicago &c. R. Co. v. Payne (59 Ill. 534; 49 Ill. 499), 120, 285.
Chicago &c. R. Co. v. Pennell (94 Ill. 448; 110 Ill. 435), 362, 364, 626.
Chicago &c. R. Co. v. Perkins (125 Ill. 127; 17 N. E. Rep. 1), 282.
Chicago &c. R. Co. v. Perkins (26 Ill. App. 67), 282.
Chicago &c. R. Co. v. Pondrom (51 Ill. 333; 2 Am. Rep. 306), 226, 227.
Chicago &c. R. Co. v. Pounds (49 U. S. App. 476; 82 Fed. Rep. 217), 272.
Chicago &c. R. Co. v. Randolph (53 Ill. 510; 5 Am. Rep. 60), 213.
Chicago &c. R. Co. v. Rice (71 Ill. 567), 343.
Chicago &c. R. Co. v. Rogers (17 Ill. App. 638), 126.
Chicago &c. R. Co. v. Ross (8 Fed. Rep. 544; 112 U. S. 377), 138, 453, 465, 466, 480.
Chicago &c. R. Co. v. Rusch (84 Ill. 570), 453.
Chicago &c. R. Co. v. Russell (91 Ill. 298; 33 Am. Rep. 54), 497, 529, 534.
Chicago &c. R. Co. v. Ryan (131 Ill. 474; 23 N. E. Rep. 385), 235.
Chicago &c. R. Co. v. Saunders (85 Ill. 288), 342.
Chicago &c. R. Co. v. Scates (90 Ill. 586), 210.
Chicago &c. R. Co. v. Seirer (60 Ill. 295), 346, 349.
Chicago &c. R. Co. v. Simonson (54 Ill. 504; 5 Am. Rep. 155), 120, 356, 358.
Chicago &c. R. Co. v. Sims (17 Neb. 691), 94.
Chicago &c. R. Co. v. Smith (18 Ill. App. 119), 504.
Chicago &c. R. Co. v. Smith (46 Mich. 504), 103, 304.
Chicago &c. Ry. Co. v. Snyder (117 Ill. 376), 442, 480.
Chicago &c. R. Co. v. Spilker (134 Ind. 380; 33 N. E. Rep. 280; 34 N. E. Rep. 218), 166, 265.

[The references are to pages.]

Chicago &c. R. Co. v. Starmer (26 Neb. 630; 42 N. W. Rep. 706), 286, 290.
Chicago &c. R. Co. v. Still (19 Ill. 499), 264, 271, 571.
Chicago &c. R. Co. v. Stites (20 Ill. 648), 499.
Chicago &c. R. Co. v. Stumps (69 Ill. 409), 178.
Chicago &c. R. Co. v. Sullivan (63 Ill. 293), 120, 460.
Chicago &c. R. Co. v. Swanson (16 Neb. 254), 481.
Chicago &c. R. Co. v. Sweeney (52 Ill. 330), 118, 120, 264.
Chicago &c. R. Co. v. Swett (45 Ill. 197), 497, 505.
Chicago &c. R. Co. v. Sykes (96 Ill. 162), 319.
Chicago &c. R. Co. v. Taylor (69 Ill. 461; 10 Am. Rep. 626), 508.
Chicago &c. R. Co. v. Tilton (26 Ill. App. 362), 289.
Chicago &c. R. Co. v. Triplett (38 Ill. 482), 98, 106, 119, 292.
Chicago &c. R. Co. v. Umphenor (69 Ill. 198), 342.
Chicago &c. R. Co. v. Unney (19 Colo. 36; 34 Pac. Rep. 288), 271.
Chicago &c. R. Co. v. Van Patten (64 Ill. 510; 74 Ill. 91), 120, 125.
Chicago &c. R. Co. v. Ward (61 Ill. 130), 531.
Chicago &c. R. Co. v. Warner (123 Ill. 38; 14 N. E. Rep. 206), 119.
Chicago &c. R. Co. v. Warner (108 Ill. 538), 536, 538.
Chicago &c. Ry. Co. v. Wilson (133 Ill. 55; 24 N. E. Rep. 555), 263.
Chidsey v. Canton (17 Conn. 475), 367.
Child v. Hearn (22 W. R. 864; L. R. 9 Exch. 176), 149.
Childs v. New Orleans St. Ry. Co. (33 La Ann. 154), 425.
Chiles v. Drake (2 Metc. (Ky.) 146), 104, 458.
Chippendale v. Lancashire &c. Ry. Co. (21 L. J. (N. S.) Q. B. 22), 244.
Chisholm v. Knickerbocker Ice Co. (1 N. Y. Supl. 743), 380.
Chrisholm v. State of New York (141 N. Y. 246; 36 N. E. Rep. 184), 373, 619.
Christian v. Erwin (125 Ill. 619; 17 N. E. Rep. 707), 119.
Chrystal v. Troy &c. R. Co. (4 N. Y. Supl. 703; 105 N. Y. 164; 11 N. E. Rep. 380), 203.
Church v. Charleston &c. Ry. Co. (21 S. C. 495), 623.
Churchill v. Holt (127 Mass. 165; 34 Am. Rep. 355; 131 Mass. 67; 41 Am. Rep. 191), 145, 385.
Cicero & Proviso Street Ry. Co. v. Meixner (160 Ill. 320; 43 N. E. Rep. 823), 127, 432, 433.
Cincinnati &c. R. Co. v. Barker (94 Ky. 71; 21 S. W. Rep. 347), 358.
Cincinnati &c. R. Co. v. Butler (103 Ind. 31), 275.
Cincinnati &c. Ry. Co. v. Duncan (143 Ind. 524; 42 N. E. Rep. 37), 262, 271.
Cincinnati &c. R. Co. v. Carper (112 Ind. 26; 13 N. E. Rep. 122), 107, 108.
Cincinnati &c. R. Co. v. Eaton (53 Ind. 310), 296.
Cincinnati &c. Ry. Co. v. Farra (31 U. S. App. 306; 66 Fed. Rep. 496), 260, 261, 268, 269.
Cincinnati &c. R. Co. v. Hildreth (77 Ind. 504), 341, 348.
Cincinnati &c. R. Co. v. Hiltzhauer (99 Ind. 486), 325.
Cincinnati &c. R. Co. v. Howard (124 Ind. 280; 24 N. E. Rep. 892), 280, 289.
Cincinnati &c. R. Co. v. Jones (111 Ind. 259; 12 N. E. Rep. 113), 343.
Cincinnati &c. R. Co. v. McMullen (117 Ind. 439; 20 N. E. Rep. 287), 503, 601.
Cincinnati &c. Ry. Co. v. Parker (109 Ind. 235; 9 N. E. Rep. 787), 341, 344.
Cincinnati &c. R. Co. v. Peters (80 Ind. 168), 213, 626.
Cincinnati &c. R. Co. v. Smith (22 Ohio St. 227; 10 Am. Rep. 722), 329, 341.
Cincinnati &c. R. Co. v. Street (50 Ind. 225), 325.
Cincinnati &c. R. Co. v. Waterson (4 Ohio St. 424), 103, 329, 348.
Cincinnati Street Ry. Co. v. Whitcomb (31 U. S. App. 374; 66 Fed. Rep. 915), 428.
Cincinnati Street Ry. Co. v. Wright (54 Ohio St. 181; 48 N. E. Rep. 688), 165.
Ciriack v. Merchants' Woolen Co. (151 Mass. 152; 23 N. E. Rep. 829), 528.
Citizens' &c. Ins. Co. v. Marsh (55 Penn. St. 387), 574.

[The references are to pages.]

Citizens' Pass. Ry. Co. v. Thomas (132 Penn. St. 504; 19 Atl. Rep. 286), 425.
Citizens' St. Ry. Co. v. Carey (56 Ind. 396), 424.
Citizens' St. Ry. Co. v. Steen (42 Ark. 321), 425.
Citizens' St. Ry. Co. v. Sutton (148 Ind. 169; 46 N. E. Rep. 462), 602.
Citizens' St. Ry. Co. v. Twiname (111 Ind. 587; 13 N. E. Rep. 55), 420.
City v. Neuding (19 Am. Law Rev. 492), 369.
City Council v. Benjamin (2 Strobh. 508; 49 Am. Dec. 608), 392.
City Council of Montgomery v. Wright (72 Ala. 411; 47 Am. Rep. 422), 373, 375, 629.
City of Anderson v. Hervey (67 Ind. 420), 601.
City of Atlanta v. Wilson (59 Ga. 644; 27 Am. Rep. 396; 60 Ga. 473), 370.
City of Aurora v. Hillman (90 Ill. 61), 405.
City of Austin v. Ritz (72 Tex. 391; 9 S. W. Rep. 884), 26.
City of Beatrice v. Reid (41 Neb. 214; 59 N. W. Rep. 770), 376.
City of Bloomington v. Perdue (99 Ill. 329), 372, 375, 391.
City of Bradford v. Downes (126 Penn. St. 622; 24 W. N. C. 153; 17 Atl. Rep. 884), 48.
City of Carlisle, The (39 Fed. Rep. 807), 581.
City of Centralia v. Krouse (64 Ill. 19), 374, 401, 405, 571.
City of Chicago v. Bixby (84 Ill. 82; 25 Am. Rep. 429), 404.
City of Chicago v. Hesing (83 Ill. 204; 25 Am. Rep. 378), 121, 188, 381.
City of Chicago v. McGiven (78 Ill. 352), 404.
City of Chicago v. Stearns (105 Ill. 554), 121.
City of Covington v. Bryant (7 Bush, 248), 137.
City of Erie v. Magill (101 Penn. St. 616; 47 Am. Rep. 739), 56, 372, 374, 405.
City of Goshen v. England (119 Ind. 368; 21 N. E. Rep. 977), 48.
City of Hartford v. Talcott (48 Conn. 525; 40 Am. Rep. 189), 407.
City of Highlands v. Paine (23 Colo. 295; 47 Pac. Rep. 283), 374.
City of Huntington v. Breen (77 Ind. 29), 372, 373, 602.
City of Keokuk v. Independent District of Keokuk (53 Iowa, 352; 36 Am. Rep. 226), 406.
City of Leavenworth v. Hatch (57 Kan. 57; 57 Am. St. Rep. 355), 163.
City of Lenark v. Dougherty (153 Ill. 163; 38 N. E. Rep. 892), 127.
City of Lexington v. McQuillan (9 Dana, 513; 35 Am. Dec. 159), 367.
City of Lincoln v. Walker (18 Neb. 224; 19 Am. Law Rev. 162), 378, 606.
City of Madison v. Ross (3 Ind. 236; 54 Am. Dec. 481), 26.
City of Montgomery v. Wright (72 Ala. 411; 47 Am. Rep. 422), 371, 626.
City of Navasota v. Pearce (46 Tex. 525; 26 Am. Rep. 279), 368.
City of New York v. Starin (12 N. E. Rep. 631), 417.
City of Pekin v. McMahon (154 Ill. 141; 39 N. E. Rep. 484), 29, 85, 188.
City of Quincy v. Barker (81 Ill. 300; 25 Am. Rep. 278), 405.
City of Rock Island v. Vanlandschoot (78 Ill. 485), 565, 571.
City of St. Paul v. Kuby (8 Minn. 166), 172.
City of Salina v. Trosper (27 Kan. 545), 372, 373, 563, 565.
City of Scranton v. Hill (102 Penn. St. 378; 48 Am. Rep. 211), 380.
City of Toledo v. Cone (19 Am. Law Rev. 330), 470.
City of Vicksburg v. Hennessy (54 Miss. 391; 28 Am. Rep. 354), 371, 599.
City of Vicksburg v. McLain (67 Miss. 4; 6 So. Rep. 774), 169.
City Ry. Co. v. Lee (50 N. J. Law, 435; 14 Atl. Rep. 883), 434, 436.
Clais v. Minneapolis &c. R. Co. (34 Minn. 57), 341.
Clapp v. City of Providence (17 How. (U. S.) 161), 381.
Clapp v. Town of Ellington (3 N. Y. Supl. 516; 22 Abb. New Cas. 387), 372.
Clara, The (102 U. S. 200), 581.
Clardy v. St. Louis &c. R. Co. (73 Mo. 576), 330.

[The references are to pages.]

Clark v. Barnes (37 Hun, 389), 537.
Clark v. Boston & Maine R. Co. (164 Mass. 434; 41 N. E. Rep. 666; 167 Mass. 383), 260, 264, 269, 271.
Clark v. Boston &c. R. Co. (128 Mass. 1), 284, 314.
Clark v. Boston &c. R. Co. (64 N. H. 323; 10 Atl. Rep. 676), 350.
Clark v. Burns (118 Mass. 275), 251.
Clark v. Chambers (L. R. 3 Q. B. Div. 327), 198, 306, 378.
Clark v. Chicago &c. R. Co. (62 Mich. 358; 28 N. W. Rep. 914), 341.
Clark v. City of Manchester (62 N. H. 577), 199.
Clark v. Eighth Ave. R. Co. (36 N. Y. 135; 32 Barb. 657), 434, 436.
Clark v. Famous Shoe and Clothing Co. (16 Mo. App. 463), 67.
Clark v. Holmes (6 Hurl. & N. 349; 7 Hurl. & N. 937), 497.
Clark v. Missouri Pac. Ry. Co. (35 Kan. 350; 11 Pac. Rep. 134), 262, 263, 278.
Clark v. St. Paul &c. R. Co. (28 Minn. 128), 541, 542.
Clark v. Soule (137 Mass. 380), 446.
Clark v. Syracuse &c. R. Co. (11 Barb. 112), 324, 332, 352.
Clark v. Union Ferry Co. (35 N. Y. 485), 417.
Clark v. Waltham (128 Mass. 567), 401.
Clark v. Rhode Island Electric Lighting Co. (17 Atl. Rep. 59), 83.
Clark's Adm'r v. Richmond &c. R. Co. (78 Va. 709; 49 Am. Rep. 394), 529.
Clarke v. Penn. Co. (132 Ind. 199, 64.
Classen v. Leopold (2 Sweeney, 705), 586, 587.
Claxton v. Lexington &c. R. Co. (13 Bush, 636), 105, 458, 627, 633.
Clay v. Chicago &c. R. Co. (17 Mo. App. 629), 626.
Clay v. Wood (5 Espin. 44), 414.
Clayards v. Dethick (12 Q. B. 439), 60.
Claypool v. McAllister (20 Ill. 504), 417.
Clayton v. Brooks (150 Ill. 97), 64, 374, 377.
Cleary v. Philadelphia &c. R. Co. (8 Penn. Co. Ct. Rep. 96), 96.
Cleaves v. Pigeon Hill Granite Co. (145 Mass. 541; 14 N. E. Rep. 646), 289.
Cleghorn v. New York &c. R. Co. (56 N. Y. 44), 565.
Cleland v. Thornton (43 Cal. 439), 41.
Clemens v. Hannibal &c. R. Co. (53 Mo. 366; 14 Am. Rep. 460), 357.
Cleveland v. Grand Trunk Ry. Co. (42 Vt. 449), 363.
Cleveland v. Spier (16 C. B. (N. S.) 398), 492.
Cleveland v. Steamboat Co. (68 N. Y. 306), 417.
Cleveland &c. R. Co. v. Baddeley (150 Ill. 328; 36 N. E. Rep. 965), 127.
Cleveland &c. R. Co. v. Crawford (24 Ohio St. 631; 15 Am. Rep. 633), 23, 188, 260, 269, 606.
Cleveland &c. R. Co. v. Crossley (36 Ind. 370), 341.
Cleveland &c. R. Co. v. Curran (19 Ohio St. 1; 2 Am. Rep. 362), 248, 249.
Cleveland &c. R. Co. v. Elliott (4 Ohio St. 474), 327, 329.
Cleveland &c. R. Co. v. Elliott (28 Ohio St. 340), 91, 270.
Cleveland &c. R. Co. v. Keary (3 Ohio St. 201), 465.
Cleveland &c. Ry. Co. v. Keely (138 Ind. 600; 37 N. E. Rep. 406), 203.
Cleveland &c. Ry. Co. v. Kernochan (55 Ohio St. 306; 45 N. E. Rep). 531), 519.
Cleveland &c. R. Co. v. Manson (30 Ohio St. 451), 185.
Cleveland &c. R. Co. v. Schneider (45 Ohio St. 678; 17 N. E. Rep. 321), 283.
Cleveland &c. R. Co. v. Terry (8 Ohio St. 570), 50, 59, 276, 291, 571, 572, 626.
Cleveland &c. R. Co. v. Wynant (100 Ind. 160), 24.
Cleveland Rolling Mill Co. v. Corrigan (46 Ohio St. 283; 20 N. E. Rep. 466), 196, 526.
Cliff v. Midland Ry. Co. (L. R. 5 Q. B. 258), 263, 277.
Clifford v. Dam (81 N. Y. 56), 377.
Clifford v. Denver &c. R. Co. (9 Colo. 333; 12 Pac. Rep. 219), 499.
Clifford v. Old Colony R. Co. (141 Mass. 564), 476, 483.

[The references are to pages.]

Clopp v. Mear (19 Atl. Rep. 504; 25 W. N. C. 571), 83.
Clotworthy v. Hannibal &c. R. Co. (80 Mo. 220), 234.
Cloughessy v. City of Waterbury (51 Conn. 405; 19 Am. Law Rev. 492), 403.
Clowers v. Wabash &c. Ry. Co. (21 Mo. App. 213), 483, 502.
Clute v. Wiggins (14 Johns. (N. Y.) 175; 7 Am. Dec. 449), 586.
Clyde v. Richmond & D. R. Co. (69 Fed. Rep. 673), 482.
Coal Run Coal Co. v. Jones (127 Ill. 379; 20 N. E. Rep. 89), 76.
Coan v. Marlborough (164 Mass. 206; 41 N. E. Rep. 238), 515.
Coates v. Missouri &c. R. Co. (61 Mo. 38), 357, 360.
Cobb v. Standish (14 Me. 198), 391.
Cockle v. London &c. Ry. Co. (L. R. 7 C. P. 321; 27 L. T. Rep. (N. S.) 320), 236, 237.
Coddington v. Brooklyn Crosstown R. Co. (102 N. Y. 66), 262.
Cody v. New York &c. R. Co. (151 Mass. 462; 24 N. E. Rep. 402), 62.
Coffey v. Chapel (2 N. Y. Supl. 648), 501.
Coggin v. Central &c. R. Co. (62 Ga. 685; 35 Am. Rep. 132), 486.
Coggs v. Bernard (2 Ld. Raym. 909; 1 Smith's L. C. (8th ed.) 369), 2, 3, 21.
Cogswell v. Oregon &c. R. Co. (6 Or. 417), 292, 301.
Cohen v. Dry Dock &c. R. Co. (69 N. Y. 170), 423.
Cohen v. Eureka &c. R. Co. (14 Nev. 376), 280.
Cohen v. Hune (1 McCord, 444), 417.
Colbert v. Rankin (72 Cal. 197; 13 Pac. Rep. 491), 536.
Colchester, Mayor of, v. Brooke (7 Q. B. 339, 377), 180, 183, 592.
Cole v. City of Newburyport (129 Mass. 594), 389.
Cole v. Goodwin (19 Wend. 251; 32 Am. Dec. 470), 245, 250.
Colegrove v. New Haven &c. R. Co. (20 N. Y. 492), 36, 156.
Coleman v. Flint &c. R. Co. (64 Mich. 160; 31 N. W. Rep. 47), 343.
Coleman v. Henderson (Littell's Select Cases (Ky.) 171; 12 Am. Dec. 290), 391, 393.
Coleman v. Wilmington &c. R. Co. (25 S. C. 446), 481.
Collier v. Steinhart (51 Cal. 116), 463.
Collins v. Atlantic &c. R. Co. (65 Mo. 230), 338.
Collins v. City of Council Bluffs (32 Iowa, 324; 7 Am. Rep. 200), 401.
Collins v. Dodge (37 Minn. 503; 35 N. W. Rep. 368), 379.
Collins v. Long Island R. Co. (10 N. Y. Supl. 701), 281.
Collins v. Middle Levee Commissioners (L. R. 4 C. P. 279; 38 L. J. (C. P.) 236; 20 L. T. (N. S.) 442), 41.
Collins v. New York &c. R. Co. (5 Hun, 499), 357, 361.
Collins v. South Boston R. Co. (142 Mass. 301; 57 Am. Rep. 675), 202, 424.
Collis v. Dorchester (6 Cush. 396), 381.
Colorado &c. R. Co. v. Caldwell (11 Colo. 545; 19 Pac. Rep. 542), 335.
Colorado &c. R. Co. v. Holmes (5 Colo. 197), 16, 50, 626, 629.
Colorado &c. R. Co. v. Martin (7 Colo. 592; 19 Am. Law Rev. 163), 465, 481, 632.
Colorado &c. R. Co. v. Ogden (3 Colo. 499), 453, 534.
Colton v. Richards (123 Mass. 484), 479.
Columbia &c. R. Co. v. Hawthorn (3 Wash. T. 353; 19 Pac. Rep. 25), 500.
Columbia Ins. Co. v. Lawrence (10 Peters, 517), 573.
Columbus &c. R. Co. v. Arnold (31 Ind. 174), 464, 478, 496.
Columbus &c. R. Co. v. Bradford (86 Ala. 574; 6 So. Rep. 90), 629.
Columbus &c. R. Co. v. Farrell (31 Ind. 408), 231, 235.
Columbus &c. R. Co. v. Terry (8 Ohio St. 570), 279.
Columbus &c. R. Co. v. Troesch (68 Ill. 545; 18 Am. Rep. 578), 497, 509, 510, 534.
Columbus &c. R. Co. v. Webb (8 Ohio Law Jour. 201; 12 Ohio St. 475), 477, 496.
Columbus &c. R. Co. v. Wood (86 Ala. 164; 5 So. Rep. 463), 320.
Colwell v. Manhattan Ry. Co. (10 N. Y. Supl. 636), 107.
Comerford v. Dupuy (17 Cal. 308), 330.

[The references are to pages.]

Comings v. Hannibal &c. R. Co. (48 Mo. 512), 330.
Commonwealth v. Boston &c. R. Co. (126 Mass. 61), 612.
Commonwealth v. Boston &c. R. Co. (129 Mass. 500; 37 Am. Rep. 382), 64, 213, 232, 238.
Commonwealth v. Brockton &c. Ry. Co. (143 Mass. 501; 10 N. E. Rep. 506), 420.
Commonwealth v. Louisville &c. R. Co. (80 Ky. 291; 44 Am. Rep. 475), 255, 397.
Commonwealth v. Metropolitan R. Co. (107 Mass. 236), 423.
Commonwealth v. Sampson (97 Mass. 407), 254, 395.
Commonwealth v. Vermont &c. R. Co. (108 Mass. 7; 11 Am. Rep. 301), 207, 242.
Comyns v. Boyer (Cro. Eliz. 405), 392.
Con v. Burbridge (13 C. B. (N. S.) 430), 388.
Conaty v. N. Y., N. H. & H. R. Co. (164 Mass. 572; 42 N. E. Rep. 103), 283.
Condon v. Missouri &c. R. Co. (78 Mo. 567), 478, 502.
Cone v. Delaware &c. R. Co. (81 N. Y. 206; 37 Am. Rep. 491), 446, 495.
Cones v. Cincinnati &c. Ry. Co. (114 Ind. 328; 16 N. E. Rep. 638), 270.
Congdon v. Central &c. R. Co. (56 Vt. 399; 48 Am. Rep. 793), 323, 340, 348, 354.
Conley v. American Express Co. (87 Me. 352; 32 Atl. Rep. 965), 539.
Conley v. Cincinnati &c. Ry. Co. (12 S. W. Rep. 764), 279.
Conley v. Forty-second St. &c. Ry. Co. (2 N. Y. Supl. 229), 432.
Conley v. Pittsburgh &c. R. Co. (95 Penn. St. 398; 98 Penn. St. 498), 203.
Conley v. Portland (78 Me. 217), 484.
Conly v. Penn. R. Co. (12 Atl. Rep. 496), 232.
Connell's Ex'rs v. Ry. Co. (93 Va. 44; 24 S. E. Rep. 467), 47.
Connelly v. Minneapolis &c. Ry. Co. (35 N. W. Rep. 582), 476.
Conners v. Burlington &c. Ry. Co. (71 Iowa, 490; 32 N. W. Rep. 465), 442.
Connerton v. Delaware &c. Canal Co. (169 Penn. St. 339; 32 Atl. Rep. 416), 606.
Connolly v. City of Boston (117 Mass. 64; 19 Am. Rep. 396), 256, 393.
Connolly v. Davidson (15 Minn. 519; 2 Am. Rep. 154), 483, 492.
Connolly v. Knickerbocker Ice Co. (114 N. Y. 104; 21 N. E. Rep. 101), 168, 399, 434.
Connor v. Pioneer Fireproof Const. Co. (29 Fed. Rep. 629), 498.
Connors v. Hennessy (112 Mass. 96), 489.
Connyers v. Sioux City &c. R. Co. (78 Iowa, 410; 43 N. W. Rep. 267), 335.
Conolly v. Crescent R. Co. (41 La. Ann. 57), 422.
Conradt v. Clauve (93 Ind. 476), 594.
Conroy v. Iron Works Co. (62 Mo. 35), 497.
Conroy v. Oregon Construction Co. (23 Fed. Rep. 71), 601, 605, 623.
Conroy v. Vulcan Iron Works (62 Mo. 38), 543.
Consolidated Coal Co. v. Wombacher (24 N. E. Rep. 627), 623.
Consolidated Traction Co. v. Scott (58 N. J. Law, 682; 34 Atl. Rep. 1094), 28, 29, 428.
Consolidated Traction Co. v. Behr (37 Atl. Rep. 142), 163.
Constitution, The (Gilp. 579), 579.
Continental, The (14 Wall. 345), 579.
Continental Improvement Co. v. Stead (95 U. S. 161), 260.
Conway v. Belfast Ry. Co. (Ir. R. 9 C. L. 498), 451, 464, 473.
Conway v. Hannibal &c. R. Co. (24 Mo. App. 235), 26.
Cook v. Central R. Co. (12 Rep. 356), 63, 66.
Cook v. Champlain &c. R. Co. (1 Denio, 91), 92, 357.
Cook v. City of Milwaukee (24 Wis. 270; 1 Am. Rep. 183), 403, 404.
Cook v. Hannibal &c. R. Co. (63 Mo. 397), 465, 471.
Cook v. Houston Nav. Co. (76 Tex. 8; 13 S. W. Rep. 475), 196.
Cook v. Johnston (58 Mich. 437; 55 Am. Rep. 703), 43.
Cook v. Metropolitan R. Co. (98 Mass. 361), 424.
Cook v. Missouri Pac. Ry. Co. (19 Mo. App. 329), 634.
Cook v. Parham (24 Ala. 21), 63.
Cook v. St. Paul &c. Ry. Co. (34 Minn. 45), 497, 536.

[The references are to pages.]

Cook v. Western &c. R. Co. (69 Ga. 619), 626, 634.
Coolbroth v. Maine &c. R. Co. (77 Me. 165; 1 East. Rep. 140), 523, 538.
Coombs v. New Bedford &c. R. Co. (102 Mass. 572; 3 Am. Rep. 506), 58, 514, 517, 538, 541.
Coombs v. Purrington (42 Me. 332), 49, 379.
Coon v. Syracuse &c. R. Co. (5 N. Y. 492), 476.
Cooper v. E. T. Co. (75 N. Y. 116), 157.
Cooper v. Iowa Central R. Co. (44 Iowa, 134), 465.
Cooper v. Lake Shore &c. Ry. Co. (66 Mich. 261; 33 N. W. Rep. 306), 288.
Cooper v. Massachusetts &c. Ins. Co. (102 Mass. 227), 574.
Cooper v. Milwaukee &c. R. Co. (23 Wis. 668), 464.
Cooper v. Pittsburgh &c. Ry. Co. (24 W. Va. 37), 477.
Copley v. New Haven &c. R. Co. (136 Mass. 6), 264, 600.
Coppins v. New York &c. R. Co. (43 Hun, 26), 504.
Coppins v. New York &c. R. Co. (122 N. Y. 557; 25 N. E. Rep. 915), 506, 546.
Corbett v. City of Leavenworth (27 Kan. 673), 56, 372, 374.
Corbett v. St. Louis &c. R. Co. (26 Mo. App. 621), 476, 478.
Corby v. Hill (4 C. B. (N. S.) 566; 4 Jur. (N. S.) 512; 27 L. J. (C. P.) 318), 81, 382.
Corcoran v. Boston &c. R. Co. (133 Mass. 507), 600.
Corcoran v. Holbrook (59 N. Y. 517; 17 Am. Rep. 369), 466, 495, 512.
Cordell v. New York &c. R. Co. (6 Hun, 461; 64 N. Y. 535; 70 N. Y. 119; 26 Am. Rep. 550; 75 N. Y. 330), 285, 286, 615, 618.
Corey v. Bath (35 N. H. 531), 255.
Corey v. Northern Pac. R. Co. (32 Minn. 457), 380.
Corlies v. Cumming (6 Cowen, 181), 616.
Corliss v. Worcester &c. R. Co. (63 N. H. 404), 98.
Cornman v. Eastern Counties Ry. Co. (4 Hurl. & N. 781), 631.
Corrigan v. Union Sugar Refinery (98 Mass. 577), 448.
Corrister v. Kansas City &c. R. Co. (25 Mo. App. 619), 44.
Corson v. Maine Cent. R. Co. (76 Me. 244), 509.
Corwin v. New York &c. R. Co. (13 N. Y. 42), 327, 342, 351, 353.
Cosgrove v. New York &c. R. Co. (87 N. Y. 88; 41 Am. Rep. 355; 13 Hun, 329), 33, 38, 269.
Cosgrove v. Ogden (49 N. Y. 255; 10 Am. Rep. 361), 172, 200, 203, 410.
Cosner v. City of Centerville (90 Iowa, 33; 57 N. W. Rep. 636), 405.
Coskery v. Nagle (83 Ga. 696), 589.
Cosulich v. Standard Oil Co. (55 N. Y. Super. Ct. 384), 43.
Cotchett v. Savannah &c. Ry. Co. (84 Ga. 687; 11 S. E. Rep. 553), 216.
Cotterill v. Starkey (8 Car. & P. 691), 379, 390, 399.
Cotton v. Edwards (123 Mass. 484), 510.
Cotton v. Wood (8 C. B. (N. S.) 568), 399, 631.
Cottrill v. Chicago &c. R. Co. (47 Wis. 634; 32 Am. Rep. 796), 64, 67, 69, 546.
Couch v. Charlotte &c. R. Co. (22 S. C. 557), 522.
Couch v. Steel (3 El. & Bl. 402; 18 Jur. 575; 23 L. J. (Q. B.) 121), 451.
Coulter v. Am. &c. Express Co. (56 N. Y. 585), 63, 65.
Counsell v. Hall (145 Mass. 468), 543.
Counter v. Couch (8 Allen, 436), 77.
County Commissioners v. Burgess (61 Md. 29), 374, 605, 626, 633.
County Commissioners v. Hamilton (60 Ind. 340), 17.
County of Howard v. Legg (11 N. E. Rep. 612), 53.
Course v. New York &c. R. Co. (2 N. Y. Supl. 312), 447.
Coursen v. Ely (37 Ill. 338), 119.
Courson v. Chicago &c. Ry. Co. (71 Iowa, 28; 32 N. W. Rep. 8), 350.
Courtney v. Baker (60 N. Y. 1; 5 Jones & S. 249), 448.
Covey v. Hannibal &c. R. Co. (27 Mo. App. 170; 86 Mo. 635), 500, 545.
Covington v. Western &c. R. Co. (81 Ga. 273; 6 S. E. Rep. 593), 211.
Covington, City of, v. Bryant (7 Bush, 248), 137.

[The references are to pages.]

Cowan v. Snyder (5 N. Y. Supl. 340), 380.
Cowan v. Third Ave. Ry. Co. (9 N. Y. Supl. 610; 1 N. Y. Supl. 612), 428.
Cowan v. Union Pac. Ry. Co. (35 Fed. Rep. 43), 330.
Cowgill v. Hannibal &c. R. Co. (33 Mo. App. 677), 338.
Cowles v. Balzer (47 Barb. 562), 324.
Cowles v. Richmond &c. R. Co. (84 N. C. 309), 443, 466, 496, 507, 512, 541.
Cox v. Minneapolis &c. Ry. Co. (41 Minn. 101; 42 N. W. Rep. 924), 350.
Cox v. Railway (3 Exch.) 268), 241.
Cox v. Westchester Turnpike Co. (33 Barb. 413), 573.
Coxe v. Robbins (9 N. J. Law, 384), 324.
Coyle v. Conway (35 Mo. App. 490), 77.
Coyle v. Pierrepont (37 Hun, 379; 33 Hun, 311), 487.
Crabell v. Wapello Coal Co. (68 Iowa, 751), 442.
Crafton v. Hannibal &c. R. Co. (55 Mo. 580), 330.
Crafts v. Boston (109 Mass. 519), 599.
Cragin v. N. Y. &c. R. Co. (51 N. Y. 61; 10 Am. Rep. 559), 246.
Craig v. New York &c. R. Co. (118 Mass. 437), 285, 612.
Craighead v. Brooklyn City R. Co. (5 N. Y. Supl. 431), 435.
Cramer v. Burlington (42 Iowa, 315), 563.
Crandall v. New York &c. R. Co. (19 R. I. 594; 35 Atl. Rep. 307), 524.
Crandell v. Goodrich Trans. Co. (11 Biss. 516; 16 Fed. Rep. 75), 33, 49, 92.
Cranston v. New York &c. R. Co. (39 Hun, (N. Y.), 308), 290.
Cratty v. Bangor (57 Me. 423; 2 Am. Rep. 56), 255, 395.
Craven v. Cent. Pac. R. Co. (72 Cal. 345), 211.
Crawford v. Delaware &c. R. Co. (54 N. Y. Super. Ct. 262), 162.
Crawford v. The Wells City (38 Fed. Rep. 47), 486.
Creed v. Pennsylvania R. Co. (86 Penn. St. 139; 27 Am. Rep. 693), 223.
Cregan v. Marston (10 N. Y. Supl. 681), 511.
Cremer v. Portland (36 Wis. 92), 23, 24, 46, 49.
Crescent v. Anderson (114 Penn. St. 643), 162.
Cressy v. Northern &c. R. Co. (59 N. H. 564; 47 Am. Rep. 227; 56 N. H. 390), 323, 340, 348, 354.
Cressy v. Postville (59 Iowa, 62), 372.
Crew v. St. Louis &c. R. Co. (20 Fed. Rep. 87), 605.
Crine v. East Tenn. &c. Ry. Co. (84 Ga. 651; 11 S. E. Rep. 555), 224.
Crispin v. Babbitt (81 N. Y. 516; 37 Am. Rep. 521), 466, 469, 471, 512.
Criswell v. Pittsburgh &c. Ry. Co. (30 W. Va. 798; 6 S. E. Rep. 31), 465.
Crocheren v. North Shore &c. Ferry Co. (1 N. Y. Super. Ct. 446; 56 N. Y. 656), 404, 418.
Crofts v. Waterhouse (3 Bing. 319), 376.
Crogan v. Schiele (53 Conn. 186; 55 Am. Rep. 88), 83.
Cromarty v. City of Boston (127 Mass. 329; 34 Am. Rep. 381), 404.
Crommelin v. Coxe (30 Ala. 329), 22.
Cronin v. Delavan (50 Wis. 375), 18, 24, 30.
Crosby v. Detroit &c. Ry. Co. (58 Mich. 458), 347.
Cross v. Lake Shore &c. Ry. Co. (69 Mich. 363; 37 N. W. Rep. 361), 231.
Crossman v. City of Lynn (121 Mass. 301), 256, 394.
Crowley v. Appleton (148 Mass. 98; 15 N. E. Rep. 675), 533.
Crowley v. Burlington &c. Ry. Co. (65 Iowa, 658), 43.
Crowley v. Cutting (165 Mass. 436; 43 N. E. Rep. 197), 553.
Crowley v. Pacific Mills (148 Mass. 228; 19 N. E. Rep. 344), 527.
Crowley v. Richmond &c. R. Co. (70 Miss. 340; 13 So. Rep. 74), 275.
Crowley v. St. Louis &c. Ry. Co. (24 Mo. App. 119), 632.
Crown v. Orr (140 N. Y. 450; 35 N. E. Rep. 648), 468, 518.
Crusselle v. Pugh (67 Ga. 430, 435; 44 Am. Rep. 724), 453, 485.
Crutchfield v. Richmond &c. R. Co. (76 N. C. 320; 78 Ill. 300), 446, 532, 541.

[The references are to pages.]

Cruty v. Erie Ry. Co. (3 N. Y. Sup. Ct. (T. & C.) 244), 489.
Cuddy v. Horn (46 Mich. 596; 41 Am. Rep. 178), 145, 155, 156.
Culbertson, Village of, v. Holliday (50 Neb. 229; 69 N. W. Rep. 853), 117.
Culbertson v. Metropolitan St. Ry. Co. (140 Mo. 35; 36 S. E. Rep. 834), 282.
Cullen v. Delaware & H. Canal Co. (113 N. Y. 667; 21 N. E. Rep. 716), 76, 275.
Cullen v. Delaware &c. R. Co. (8 App. D. C. 69), 89.
Cullen v. Norton (4 N. Y. Supl. 774; 52 Hun, 9), 498.
Culpepper v. International &c. Ry. Co. (90 Texas, 627; 40 S. W. Rep. 386), 482, 552.
Cumberland Coal Co. v. Scally (27 Md. 589), 481.
Cumberland &c. Ins. Co. v. Douglas (58 Penn. St. 419), 573.
Cumberland &c. Iron Co. v. Scally (27 Md. 589), 631.
Cumberland &c. R. Co. v. Fazenbaker (37 Md. 156), 98.
Cumberland &c. R. Co. v. Hogan (45 Md. 229), 472, 496.
Cumberland &c. R. Co. v. Mangans (61 Md. 53), 212.
Cumberland &c. R. Co. v. Moran (44 Md. 283), 472.
Cumberland &c. R. Co. v. State (44 Md. 283), 466.
Cumford v. Delaware &c. R. Co. (121 N. Y. 652; 24 N. E. Rep. 1092), 163.
Cumming v. Brooklyn City R. Co. (38 Hun (N. Y.) 362), 76.
Cumming v. Brooklyn City R. Co. (104 N. Y. 669; 10 N. E. Rep. 855), 176.
Cummings v. Collins (61 Mo. 520), 461.
Cummings v. Grand Trunk Ry. Co. (4 Cliff. 478), 510.
Cummins v. Presley (4 Harr. (Del.) 315), 36, 91.
Cunard Steam-Ship Co. v. Carey (119 U. S. 245), 501.
Cunningham v. Chicago &c. R. Co. (5 McCrary, 465), 531, 536.
Cunningham v. Lyness (22 Wis. 245), 117, 417.
Curley v. Harris (11 Allen, 113), 19 487.
Curley v. Illinois Cent. R. Co. (40 La. Ann. 810; 6 So. Rep. 103), 281.
Curran v. Merchants' Mfg. Co. (130 Mass. 374; 39 Am. Rep. 457), 509, 513.
Curran v. Warren Chemical Mfg. Co. (36 N. Y. 153), 615, 629.
Current v. Missouri Pac. Ry. Co. (86 Mo. 62), 502.
Curry v. Chicago &c. R. Co. (43 Wis. 665), 76, 327, 340, 343, 354.
Curtiss v. Rochester &c. R. Co. (20 Barb. 285), 238.
Cusick v. Adams (115 N. Y. 55), 80.
Cuyler v. Decker (20 Hun, 173), 66.

D.

Dacey v. N. Y., N. H. & H. R. Co. (168 Mass. 479), 600.
Dahl v. Milwaukee City Ry. Co. (65 Wis. 371), 203.
Dahl v. Milwaukee &c. Ry. Co. (62 Wis. 652), 632.
Dahlberg v. Minnesota St. R. Co. (32 Minn. 404; 19 Am. Law Rev. 332; 50 Am. Rep. 585), 226, 437.
Dahlstrom v. St. Louis &c. Ry. Co. (96 Mo. 99; 8 S. W. Rep. 777), 297, 319.
Daily v. Richmond &c. R. Co. (106 N. C. 301; 11 S. E. Rep. 320), 301.
Dale v. St. Louis &c. R. Co. (63 Mo. 455), 497, 538, 540.
Dale v. Webster County (76 Iowa, 370; 41 N. W. Rep. 1), 54.
Daley v. Norwich &c. R. Co. (26 Conn. 591), 23, 35, 78, 79, 185, 187, 279, 315.
Daley v. Shaaf (28 Hun, 314), 496, 539.
Dallas &c. Ry. Co. v. Able (72 Tex. 150; 9 S. W. Rep. 871), 285.
Dallas &c. R. Co. v. Spicker (61 Tex. 427; 48 Am. Rep. 297), 606, 607.
Damon v. Inhabitants of Scituate (119 Mass. 66; 20 Am. Rep. 315), 414.
Damon v. Scituate (119 Iowa, 66), 77.
Damont v. New Orleans &c. R. Co. (9 La. Ann. 441; 61 Am. Dec. 214), 212.
Damour v. Lyons (44 Iowa, 276), 59.
Damrill v. St. Louis &c. Ry. Co. (27 Mo. App. 202), 269.
Dan v. Street Ry. Co. (99 Tenn. 88; 41 S. W. Rep. 339), 202.
Dandie v. Southern Pac. R. Co. (7 So. Rep. 792), 441.

[The references are to pages.]

Daniel v. Metropolitan Ry. Co. (L. R. 3 C. B. 591; 5 H. L. 45), 260, 270.
Daniels v. Clegg (28 Mich. 32), 24, 391, 416.
Daniels v. Railroad Co. (154 Mass. 349; 28 N. E. Rep. 283), 86, 194, 310.
Daniels v. Union Pac. Ry. Co. (23 Pac. Rep. 762), 478.
Danner v. South Carolina &c. R. Co. (4 Rich. (Law) 329; 55 Am. Dec. 678), 6, 8, 331, 606.
Danville &c. Turnpike Co. v. Stewart (2 Metc. (Ky.) 119), 156, 161.
Darcey v. Farmers' Lumber Co. (87 Mo. 245; 58 N. W. Rep. 382), 518.
Darling v. Boston &c. R. Co. (121 Mass. 118), 323, 328.
Darracutts v. Chesapeake &c. R. Co. (83 Va. 288; 2 S. E. Rep. 511), 544.
Darrigan v. New York &c. R. Co. (52 Conn. 285; 52 Am. Rep. 590), 469, 476, 482.
Dartmouth Spinning Co. v. Achard (84 Ga. 14; 10 S. E. Rep. 449), 521.
Davenport v. Ruckman (37 N. Y. 568; 10 Bosw. 20), 401, 571, 573.
Davey v. London &c. Ry. Co. (11 L. R. Q. B. Div. 213), 290, 607.
Davey v. London &c. Ry. Co. (12 Q. B. D. 70; 53 L. J. Q. B. 58; 49 L. T. 749), 275.
Davidson v. Central Iowa Ry. Co. (75 Iowa, 22; 39 N. W. Rep. 163), 346, 350.
Davidson v. City of Portland (69 Me. 116; 31 Am. Rep. 253), 72, 255, 396.
Davidson v. Lake Shore &c. Ry. Co. (171 Penn. St. 3), 268.
Davidson v. Pittsburgh &c. Ry. Co. (41 W. Va. 407; 23 S. E. Rep. 593), 300, 303.
Davies v. Mann (10 M. & W. 546; 6 Jur. 954; 12 L. J. (Exch.) 10), 10, 11, 12, 18, 37, 38, 39, 89, 94, 111, 115, 130, 131, 136, 173, 180, 183, 184, 300, 592, 593.
Davis v. Burlington &c. R. Co. (26 Iowa, 549), 343.
Davis v. Button (78 Cal. 247; 18 Pac. Rep. 133). 498.
Davis v. Central Congregational Society of Jamaica Plain (129 Mass. 367), 81.
Davis v. Central Vermont R. Co. (55 Vt. 34; 45 Am. Rep. 590), 466, 478, 479.
Davis v. Chicago &c. R. Co. (40 Iowa, 292), 339.
Davis v. Chicago &c. R. Co. (58 Wis. 646; 46 Am. Rep. 667), 81, 315.
Davis v. Columbia &c. R. Co. (21 S. C. 102), 6, 499.
Davis v. Detroit &c. R. Co. (20 Mich. 105), 502, 508, 538, 540, 542.
Davis v. Falconbridge (45 Am. Rep. 650, n.), 376.
Davis v. Garrett (6 Bing. 716), 548.
Davis v. Guarnieri (45 Ohio St. 470; 15 N. E. Rep. 350), 165.
Davis v. Hannibal &c. Ry. Co. (19 Mo. App. 425), 338.
Davis v. Hill (41 N. H. 329), 382.
Davis v. Inhabitants of Dudley (4 Allen, 558), 370, 387, 390.
Davis v. Leominster (1 Allen, 184), 369.
Davis v. Miller (109 Ala. 589), 18.
Davis v. N. Y. &c. R. Co. (47 N. Y. 400), 268, 270, 290, 291.
Davis v. St. Louis &c. Ry. Co. (53 Ark. 117; 13 S. W. Rep. 801), 536.
Davis v. Somerville (128 Mass. 594; 35 Am. Rep. 399), 394.
Davis v. Utah Southern R. Co. (3 Utah, 218), 633.
Dawes v. Flint & Pere Marquette Ry. Co. (102 Mich. 307; 60 N. W. Rep. 838), 277.
Day v. Brooklyn City &c. R. Co. (12 Hun, 435), 439.
Day v. Crossman (4 Thomp. & Cook (N. Y. Sup. Ct.) 122), 34.
Day v. Highland Street R. Co. (135 Mass. 113; 46 Am. Rep. 447), 254, 394, 439.
Day v. Milford (5 Allen, 98), 409.
Day v. Mt. Pleasant (70 Iowa, 193), 384.
Day v. New Orleans &c. Ry. Co. (36 La. Ann. 291), 536.
Dayrell v. Tyrer (28 L. J. (Q. B.) 52), 149.
Dayton R. Co. v. Miami Co. Infirmary (32 Ohio St. 566), 346.
Dealey v. Muller (149 Mass. 432; 21 N. E. Rep. 763), 168.
Dean v. American Mutual Life Ins. Co. (4 Allen, 102; 1 Big. Life & Acc. Ins. Cas. 195), 574.
Dean v. Sullivan &c. R. Co. (22 N. H. 316), 340.

[The references are to pages.]

Deane v. Penn. R. Co. (129 Penn. St. 514; 18 Atl. Rep. 718), 153, 162.
DeArmand v. New Orleans &c. R. Co. (23 La. Ann. 264), 264.
DeBenedetti v. Mauchin (1 Hilt. 213), 614.
Debevoise v. New York &c. R. Co. (98 N. Y. 377; 50 Am. Rep. 683), 615, 619.
De Camp v. Sioux City (74 Iowa, 392; 37 N. W. Rep. 971), 42.
Decker v. Gammon (44 Me. 332), 388.
Deeds v. Chicago &c. Ry. Co. (69 Iowa, 164), 35, 46.
Deeds v. Chicago &c. Ry. Co. (74 Iowa, 154; 37 N. W. Rep. 124), 531.
Deegan v. Chapel (6 N. Y. Supl. 166), 380.
Degg v. Midland Ry. Co. (1 Hurl. & N. 773; 3 Jur. (N. S.) 395; 26 L. J. (Exch.) 171), 490, 546.
DeGraff v. New York &c. R. Co. (76 N. Y. 125), 506.
DeKay v. Chicago &c. Ry. Co. (41 Minn. 178; 43 N. W. Rep. 182), 235.
Delamatyr v. Milwaukee &c. R. Co. (24 Wis. 578), 214.
Delaney v. Errickson (11 Neb. 533), 331.
Delaware &c. R. Co. v. Salmon (39 N. J. Law, 299; 23 Am. Rep. 214), 356, 360, 363.
Delaware &c. R. Co. v. Trautwein (52 N. J. Law, 169; 19 Atl. Rep. 178), 231, 255.
Delaware, L. & W. R. Co. v. Cadow (120 Penn. St. 559; 14 Atl. Rep. 450), 55.
Delaware, L. & W. R. Co. v. Hefferan (57 N. J. Law, 149; 30 Atl. Rep. 578), 275.
Delaware, L. & W. R. Co. v. Reich (40 Atl. Rep. 682), 86, 310.
Delgar v. City of St. Paul (4 McCrary, 634), 626.
Demarest v. Little (47 N. J. L. 28), 98.
Dempsey v. City of Rome (Ga.) (27 S. E. Rep. 668), 132.
Denman v. St. Paul &c. R. Co. (26 Minn. 357), 293, 567.
Dennick v. Railroad Co. (103 U. S. 11), 98.
Denver &c. Ry. Co. v. Henderson (10 Colo. 11; 13 Pac. Rep. 910), 330, 335.
Denver &c. R. Co. v. Pickard (8 Colo. 163), 209.
Denver & Berkeley Park Rapid Transit Co. v. Dwyer (20 Colo. 132), 89.
Denver Tramway Co. v. Reid (22 Colo. 349; 45 Pac. Rep. 378), 117, 432.
Derby's Adm'r v. Kentucky Cent. R. Co. (4 S. W. Rep. 303), 96.
Derry v. Flitner (118 Mass. 134), 47.
Deslottes v. Baltimore &c. Tel. Co. (40 La. Ann. 183; 3 So. Rep. 566), 576.
Detroit v. Blakeby (21 Mich. 84; 4 Am. Rep. 450), 368.
Detroit &c. R. Co. v. Van Steinberg (17 Mich. 99), 600, 626, 630, 633, 634.
Deville v. Southern Pacific R. Co. (50 Cal. 383), 387.
Devitt v. Pacific &c. R. Co. (50 Mo. 302), 497, 504, 529, 540.
Devlin v. Smith (89 N. Y. 470; 42 Am. Rep. 311), 486, 488, 505.
Devlin v. Wabash &c. Ry. Co. (87 Mo. 545), 524.
Dewire v. Bailey (131 Mass. 169; 41 Am. Rep. 219), 58, 372, 373, 375, 403, 405.
Dewire v. Boston &c. R. Co. (148 Mass. 343; 19 N. E. Rep. 523), 215.
Dexter v. McCrary (54 Conn. 171), 626.
Deyo v. Stewart (4 Denio, 101), 337.
Diamond State Iron Co. v. Giles (11 Atl. Rep. 189), 498.
Dibble v. Brown (12 Ga. 217; 56 Am. Dec. 560), 250.
Dice v. Williamette Trans. &c. Co. (8 Or. 60; 34 Am. Rep. 575), 231, 238.
Dickey v. Maine Tel. Co. (46 Me. 483), 599.
Dickin v. Liverpool Salt &c. Co. (41 W. Va. 511; 23 S. E. Rep. 582), 186.
Dickinson v. London &c. Ry. Co. (1 Harr. & R. 399), 323.
Dickinson v. Port Huron &c. Ry. Co. (53 Mich. 43), 215.
Dickinson v. Winchester (4 Cush. 121), 586.
Dickinson v. Hollister (123 Penn. St. 421; 23 W. N. C. 128; 16 Atl. Rep. 484), 384, 385.
Dickson v. McCoy (39 N. Y. 400), 388.

[The references are to pages.]

Dickson v. Parker (3 How. 219; 34 Am. Dec. 78), 330.
Dickson v. Railroad Co. (80 Ga. 212), 107.
Diebold v. Pennsylvania R. Co. (50 N. J. Law, 478; 14 Atl. Rep. 576), 258.
Diethick v. Balto. &c. R. Co. (58 Md. 347), 431.
Dietrich v. Northampton (138 Mass. 14; 52 Am. Rep. 242), 96.
Digby v. Kenton Iron Works (8 Bush, 166), 117, 137, 458, 460.
Dillon v. Union Pac. Ry. Co. (3 Dill. 319), 497, 538, 540, 602.
Dimes v. Petley (15 Q. B. 276), 78.
Dimick v. Chicago &c. R. Co. (80 Ill. 338), 285, 286.
Dimmey v. Wheeling &c. R. Co. (27 W. Va. 32), 63.
Dimmock v. North Staffordshire Ry. Co. (4 Fost. & Fin. 1058), 355.
Dinwoodie v. Chicago &c. Ry. Co. (70 Wis. 160; 35 N. W. Rep. 296), 344.
Dipper v. Inhabitants of Milford (167 Mass. 555; 46 N. E. Rep. 122), 405.
Distler v. Long Island R. Co. (151 N. Y. 424; 45 N. E. Rep. 937), 209.
District of Columbia v. McElligott (117 U. S. 621), 543.
Ditchett v. Spuyten Duyvil &c. R. Co. (5 Hun, 165; 67 N. Y. 425), 292, 563.
Dittrich v. The City of Detroit (98 Mich. 245; 57 N. W. Rep. 125), 376.
Dixon v. New York &c. R. Co. (4 N. Y. Supl. 296), 344.
Dixon v. Rankin (1 Am. R. Cas. 567), 465.
Dixon v. Rankin (14 Ct. of Ses. Cas. 420), 558, 559.
Dobbin v. Richmond &c. R. Co. (81 N. C. 446; 31 Am. Rep. 512), 466, 471.
Dobbins v. Brown (119 N. Y. 188; 23 N. E. Rep. 537), 501.
Doctor and Student, The (Dial. 2, c. 38), 243, 448.
Doeher v. Fitchburg (22 Wis. 675), 370.
Doggett v. Richmond &c. Ry. Co. (78 N. C. 305), 26, 32, 34, 91, 357, 362, 600.
Dolan v. Newburgh, D. & C. R. Co. (120 N. Y. 571; 24 N. E. Rep. 824), 352.
Donahoe v. Wabash &c. Ry. Co. (83 Mo. 560; 53 Am. Rep. 594), 67.
Donaldson v. Milwaukee &c. R. Co. (21 Minn. 293), 296, 299, 315.
Donkey Case (10 M. & W. 546), 72.
Donnelly v. Boston &c. R. Co. (151 Mass. 210; 24 N. E. Rep. 38), 276, 299.
Donohue v. St. Louis &c. Ry. Co. (91 Mo. 357; 2 S. W. Rep. 424; 3 S. W. Rep. 848), 279, 281, 290.
Donovan v. Hannibal &c. R. Co. (89 Mo. 147; 1 S. W. Rep. 232), 94, 338, 354.
Dooley v. City of Meriden (44 Conn. 117; 26 Am. Rep. 433), 373, 402.
Dooley v. Missouri Pac. Ry. Co. (36 Mo. App. 381), 338.
Doran v. Chicago &c. R. Co. (73 Iowa, 115; 34 N. W. Rep. 619), 350.
Dorman v. Broadway R. Co. (5 N. Y. Supl. 769), 168.
Dorsey v. Phillips &c. Co. (42 Wis. 583), 497, 539, 540.
Doss v. Missouri &c. R. Co. (59 Mo. 27; 21 Am. Rep. 371), 211, 258.
Dougan v. Champlain Trans. Co. (56 N. Y. 1), 418.
Dougherty v. Chicago &c. R. Co. (86 Ill. 467), 213.
Dougherty v. Missouri &c. R. Co. (81 Mo. 325; 51 Am. Rep. 239), 420.
Dougherty v. Missouri R. Co. (97 Mo. 647; 11 S. W. Rep. 251), 35, 46.
Dougherty v. Missouri R. Co. (8 S. W. Rep. 900), 206.
Dougherty v. West Superior Iron & Steel Co. (88 Wis. 343; 60 N. W. Rep. 274), 514.
Doughty v. Penobscot Log Driving Co. (76 Me. 143), 462.
Douglas v. Texas &c. Ry. Co. (63 Tex. 564), 511.
Dowd v. Chicopee (116 Mass. 93), 303, 369.
Dowdy v. Georgia &c. R. Co. (88 Ga. 726; 16 S. E. Rep. 62), 628.
Dowell v. General Steam Navigation Co. (5 El. & Bl. 195), 16, 49.
Dowell v. Guthrie (99 Mo. 653; 12 S. W. Rep. 900), 591.
Dowling v. Allen (74 Mo. 13; 41 Am. Rep. 298), 466, 471, 483, 497, 514.
Dowling v. Allen (88 Mo. 293), 196.

[The references are to pages.]

Downey v. Chesapeake &c. Ry. Co. (28 W. Va. 732), 441.
Downs v. N. Y. &c. R. Co. (47 N. Y. 83), 202.
Doyle v. Baird (6 N. Y. Supl. 517), 537.
Doyle v. Lynn &c. R. Co. (118 Mass. 195; 19 Am. Rep. 431), 254, 394.
Drake v. Kiely (93 Penn. St. 492), 32, 44.
Drake v. Lowell (13 Metc. 292), 409.
Drake v. Mount (33 N. J. Law, 441), 416.
Drake v. Phila. &c. R. Co. (51 Penn. St. 240), 324, 336.
Drake v. Union Pac. Ry. Co. (21 Pac. Rep. 560), 523.
Drane v. Missouri Pac. Ry. Co. (87 Mo. 588), 532.
Dreher v. Fitchburg (22 Wis. 675), 24.
Dressler v. Davis (7 Wis. 527), 607.
Drew v. Sixth Ave. R. Co. (26 N. Y. 49), 203.
Drew v. Town of Sutton (55 Vt. 586; 45 Am. Rep. 644), 369, 372, 380, 381.
Droyer v. New York &c. Ry. Co. (48 N. J. Law, 373; 7 Atl. Rep. 417), 418.
Duane v. Chicago &c. Ry. Co. (72 Wis. 523; 40 N. W. Rep. 394), 287.
Du Bois v. Decker (130 N. Y. 325), 110.
Dublin &c. Ry. Co. v. Slattery (3 L. R. App. Cas. 1155), 34, 263, 270, 282, 317, 627.
Dunley v. Bolles (24 Wend. 465), 416.
Dudley v. Camden Ferry Co. (45 N. J. Law, 368), 17, 32, 34, 626, 633.
Dudley v. Camden & Phila. Ferry Co. (33 N. J. Eq. 25; 38 Am. Rep. 501), 418.
Duff v. Alleghany R. Co. (91 Penn. St. 458; 36 Am. Rep. 675), 242, 438.
Duff v. G. N. R. Co. (4 L. R. Ir. 178), 249.
Duffees v. Judd (48 Iowa, 256), 337.
Duffy v. Missouri Pac. Ry. Co. (19 Mo. App. 380), 76.
Duffy v. New York &c. R. Co. (2 Hilt. 496), 346, 351.
Dufour v. Cent. Pac. R. Co. (67 Cal. 319), 634.
Duggins v. Watson (15 Ark. 118; 60 Am. Dec. 560), 154, 161.
Dukes v. Eastern Distilling Co. (4 N. Y. Supl. 562; 51 Hun, 605), 529.
Dunbier v. Day (12 Neb. 596; 41 Am. Rep. 772), 586.
Duncan v. St. Louis &c. Ry. Co. (91 Mo. 68), 347.
Dunham Towing Co. v. Dandelin (143 Ill. 409), 64.
Dunkman v. Wabash &c. Ry. Co. (95 Mo. 232; 4 S. W. Rep. 670), 297.
Dunlap v. Northeastern R. Co. (130 U. S. 649), 544.
Dunmead v. Am. &c. Co. (4 McCrary, 244), 605.
Dunn v. Grand Trunk R. Co. (58 Me. 187; 4 Am. Rep. 267; 10 Am. Law Reg. (N. S.) 615), 219, 223.
Dunn v. McNamee (59 N. J. Law, 498; 37 Atl. Rep. 61), 527.
Dunn v. Seaboard &c. R. Co. (78 Va. 645; 49 Am. Rep. 388), 225, 228.
Dunnigan v. Chicago &c. R. Co. (18 Wis. 28), 354.
Dunning v. Bond (38 Fed. Rep. 813), 263.
Durant v. Palmer (39 N. J. Law, 544), 368, 372, 377, 382, 606.
Durbin v. Oregon Ry. & Nav. Co. (17 Or. 5; 17 Pac. Rep. 5), 289.
Durgin v. Munson (9 Allen, 396), 446.
Durham v. Wilmington &c. R. Co. (82 N. C. 352), 333.
Durkin v. Troy (61 Barb. 437), 374, 404, 405.
Dush v. Fitzhugh (2 Lea, 307), 24, 53, 111, 134, 135.
Dutton v. Weare (17 N. H. 34; 43 Am. Dec. 590), 255, 367, 369.
Dutzi v. Geisel (23 Mo. App. 676), 63, 463.
Dwinnell v. Abbott (74 Wis. 514; 43 N. W. Rep. 496), 282, 289.
Dyer v. Erie Ry. Co. (71 N. Y. 228), 66, 154, 156, 163.
Dyer v. Talcott (16 Ill. 300), 33, 601.
Dynen v. Leach (26 L. J. (Exch.) 221), 98, 504, 541.
Dyson v. New York &c. R. Co. (57 Conn. 9; 17 Atl. Rep. 137), 285.

E.

Eades v. Clark (55 N. Y. Super. Ct. 132), 629.
Eames v. Boston &c. R. Co. (14 Allen, 151), 340, 345, 346, 350.

[The references are to pages.]

Eames v. Salem &c. R. Co. (98 Mass. 560), 323, 326, 349, 354.
Earing v. Lansing (7 Wend. 185), 414.
Earlville v. Carter (2 Bradw. 34; 6 Bradw. 421), 126.
Early v. Lake Shore &c. Ry. Co. (66 Mich. 349; 33 N. W. Rep. 813), 56, 308.
Easley v. Missouri Pacific Ry. Co. (113 Mo. 236; 20 S. W. Rep. 1073), 265.
Eason v. Sabine &c. Ry. Co. (65 Tex. 577; 57 Am. Rep. 606), 492.
East &c. R. Co. v. Hightower (92 Ill. 139), 497, 506.
East Line &c. Ry. Co. v. Rushing (69 Tex. 306; 6 S. W. Rep. 834), 233.
East Line &c. Ry. Co. v. Smith (65 Tex. 167), 98.
East Saginaw &c. City R. Co. v. Bohn (27 Mich. 503), 175, 178, 203, 439.
East Tennessee &c. R. Co. v. Bayliss (77 Ala. 429; 54 Am. Rep. 69; 75 Ala. 466), 334, 335.
East Tennessee &c. R. Co. v. Collins (85 Tenn. 227; 1 S. W. Rep. 883), 471, 475.
East Tennessee &c. R. Co. v. Duffield (12 La. 68; 47 Am. Rep. 319), 483, 496, 504, 505, 518, 543.
East Tennessee &c. Ry. Co. v. Hughes (92 Ga. 388), 28.
East Tennessee &c. Ry. Co. v. Hull (88 Tenn. 33; 12 S. W. Rep. 419), 136.
East Tennessee &c. R. Co. v. Johnston (75 Ala. 596; 51 Am. Rep. 489), 248.
East Tennessee &c. R. Co. v. King, (81 Ala. 177), 298.
East Tennessee &c. R. Co. v. Lockhart (79 Ala. 315), 44.
East Tennessee &c. R. Co. v. Maloy (77 Ga. 237), 445.
East Tennessee &c. R. Co. v. Pratt (85 Tenn. 9; 31 S. W. Rep. 618), 318.
East Tennessee &c. R. Co. v. Rush (15 Lea (Tenn.) 145), 442, 476.
East Tennessee &c. R. Co. v. St. John (5 Sneed, 524), 302, 318.
East Tennessee &c. R. Co. v. Stewart (15 Lea (Tenn.) 432), 446.
East Tennessee &c. R. Co. v. Watson (7 So. Rep. 813), 334.
East Tennessee &c. R. Co. v. Winters (85 Tenn. 240; 1 S. W. Rep. 790), 318.
Eastern R. Co. v. Relief Fire Ins. Co. (98 Mass. 423), 357.
Eastman v. Meredith (36 N. H. 284), 367.
Eastman v. Sanborn (3 Allen, 4, 596), 63, 215.
Easton v. Houston &c. Ry. Co. (32 Fed. Rep. 893), 479.
Eaton v. Boston &c. R. Co. (11 Allen, 500), 144, 157.
Eaton v. Delaware &c. R. Co. (57 N. Y. 382; 15 Am. Rep. 513), 222, 241, 352.
Eaton v. Erie Ry. Co. (51 N. Y. 544), 76, 260, 289.
Eaton v. Oregon Ry. & Nav. Co. (19 Or. 371; 24 Pac. Rep. 413), 25, 94, 342, 343, 362.
Ebright v. Mineral R. & M. Co. (15 Atl. Rep. 709), 59.
Eckerd v. Chicago &c. Ry. Co. (70 Iowa, 353; 30 N. W. Rep. 615), 234, 236.
Eckert v. Long Island R. Co. (57 Barb. 555; 43 N. Y. 503; 3 Am. Rep. 721), 64, 67.
Eddy v. Aurora Iron Min. Co. (81 Mich. 548; 48 N. W. Rep. 17), 536.
Eddy v. Kinney (60 Vt. 554; 15 Atl. Rep. 198), 94.
Edgerton v. New York &c. R. Co. (39 N. Y. 227), 219, 223.
Edwards v. Hannibal &c. R. Co. (66 Mo. 571), 343.
Edwards v. New York &c. R. Co. (98 N. Y. 245), 534.
Egan v. Berkshire Apartment Ass'n (10 N. Y. Supl. 116), 83.
Egyptian Monarch, The (36 Fed. Rep. 773), 483.
Ehret v. Kansas City &c. R. Co. (20 Mo. App. 251), 344.
Ehrgott v. The Mayor &c. (96 N. Y. 264; 48 Am. Rep. 622), 44.
Eicheler v. St. Paul Furniture Co. (40 Minn. 263; 41 N. W. Rep. 975), 501, 538.
Eighme v. Rome &c. R. Co. (10 N. Y. Supl. 600), 362.
Eisenberg v. Missouri Pac. Ry. Co. (33 Mo. App. 85), 80.
Eldridge v. Atlas S. S. Co. (55 Hun, 309; 8 N. Y. Supl. 433), 541.
Elkins v. Boston &c. R. Co. (115 Mass. 190), 271, 571.
Elkins v. Boston &c. R. Co. (23 N. H. 275), 222, 241.

[The references are to pages.]

Eller v. Church (121 N. C. 269; 28 S. E. Rep. 364), 634.
Ellerbe v. Carolina Cent. R. Co. (118 N. C. 1024; 24 S. E. Rep. 808), 566.
Elliot v. Chicago &c. Ry. Co. (5 Dak. 523; 41 N. W. Rep. 758), 441.
Elliott v. Newport Street Ry. Co. (18 R. I. 707; 28 Atl. Rep. 338; 31 Atl. Rep. 604), 436, 633.
Elliott v. Pray (10 Allen, 384), 71.
Elliott v. St. Louis &c. R. Co. (67 Mo. 272), 98.
Ellis v. Houston (4 N. Y. Supl. 732), 441.
Ellis v. London &c. Ry. Co. (2 Hurl. & N. 424; 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008), 323, 332, 346.
Ellis v. New York &c. R. Co. (95 N. Y. 546), 496.
Ellis v. Pacific &c. R. Co. (48 Mo. 231), 348.
Elwood v. N. Y. &c. R. Co. (4 Hun, 808), 298, 314.
Elyton Land Co. v. Mingea (89 Ala. 521; 7 So. Rep. 666), 57, 154, 163.
Emerson v. Peteler (35 Minn. 481), 199.
Empire Trans. Co. v. Wamsutta Oil Co. (63 Penn. St. 14; 3 Am. Rep. 515), 248.
Emporia v. Schmidling (33 Kan. 485), 55.
Engel v. Smith, 82 Mich. 1; 46 N. W. Rep. 21), 83.
Engle v. Chicago &c. R. Co. (77 Iowa, 661; 42 N. W. Rep. 512), 359.
English v. Chicago &c. Ry. Co. (24 Fed. Rep. 906), 538.
Eppendorf v. Brooklyn City &c. R. Co. (69 N. Y. 195; 25 Am. Rep. 171), 431, 432.
Equitable Life Ass. Soc. v. Paterson (41 Ga. 338; 5 Am. Rep. 535; 3 Big. Life & Acc. Ins. Cas. 534), 574.
Erd v. Chicago &c. R. Co. (41 Wis. 65), 358, 360.
Erickson v. St. Paul &c. R. Co. (41 Minn. 500; 43 N. W. Rep. 332), 499.
Erdman v. Ill. Steel Co. (95 Wis. 6; 69 N. W. Rep. 993), 544.
Ericson v. Duluth &c. R. Co. (57 Minn. 26; 58 N. W. Rep. 822), 350.
Erie v. Magill (101 Penn. St. 616; 47 Am. Rep. 739), 17, 56, 372, 374, 405.
Erie v. Schwingle (22 Penn. St. 384), 380, 606.
Erie City &c. Passenger Ry. Co. v. Schuster (113 Penn. St. 412; 57 Am. Rep. 471), 168, 184.
Erie Ry. Co. v. Wilcox (84 Ill. 239; 25 Am. Rep. 451), 248.
Ernst v. Hudson &c. R. Co. (35 N. Y. 9; 39 N. Y. 61; 32 Barb. 159; 19 How. Pr. 205; 24 How. Pr. 97; 32 How. Pr. 262), 59, 106, 264, 276, 277, 317, 614, 618, 620. 622, 635.
Estelle v. Lake Crystal (27 Minn. 243), 58, 374.
Estes v. Atlantic &c. R. Co. (63 Me. 308), 327.
Estes v. St. Paul &c. R. Co. (7 N. Y. Supl. 863), 253.
Eureka Co. v. Bass (81 Ala. 200), 443.
Evans v. Adams Exp. Co. (122 Ind. 362; 23 N. E. Rep. 1039), 379.
Evans v. American Iron & Tube Co. (42 Fed. Rep. 519), 513.
Evans v. Atlantic &c. R. Co. (62 Mo. 49), 476.
Evans v. City of Utica (69 N. Y. 166; 25 Am. Rep. 165), 58, 371, 374, 377, 405.
Evans v. Pittsburgh &c. Ry. Co. (142 Ind. 264; 41 N. E. Rep. 527), 299.
Evans v. Railroad Co. (88 Mich. 442; 50 N. W. Rep. 386), 277.
Evans v. Rudy (34 Ark. 385), 418.
Evans Brick Co. v. St. Louis &c. Ry. Co. (17 Mo. App. 624), 76.
Evansich v. Gulf &c. R. Co. (57 Tex. 126; 44 Am. Rep. 586), 198, 303, 308.
Evansville &c. R. Co. v. Barbee (74 Ind. 169), 350.
Evansville &c. R. Co. v. Baum (26 Ind. 74), 473.
Evansville &c. R. Co. v. Carvener (113 Ind. 51; 14 N. E. Rep. 738), 57, 285.
Evansville &c. R. Co. v. Crist (116 Ind. 446; 19 N. E. Rep. 446), 56.
Evansville &c. R. Co. v. Dexter (24 Ind. 411), 601.
Evansville &c. R. Co. v. Duncan (28 Ind. 442), 232, 238.
Evansville &c. R. Co. v. Griffin (100 Ind. 221; 50 Am. Rep. 783), 84.

[The references are to pages.]

Evansville &c. R. Co. v. Hiatt (17 Ind. 102), 69, 601, 602.
Evansville &c. R. Co. v. Lowdermilk (15 Ind. 120), 101, 102.
Evansville &c. R. Co. v. Wolf (59 Ind. 89), 168, 172, 296.
Everett v. Los Angeles Consolidated Electric Ry. Co. (115 Cal. 105; 43 Pac. Rep. 207; 46 Pac. Rep. 889), 34, 430.
Everhart v. Terre Haute &c. R. Co. (78 Ind. 292; 41 Am. Rep. 567), 88, 490.
Everson v. Rollinson (8 Atl. Rep. 194), 510.
Ewald v. Chicago &c. Ry. Co. (70 Wis. 420; 36 N. W. Rep. 12), 480.
Ewan v. Lippencott (47 N. J. Law, 192; 54 Am. Rep. 148), 487.
Ewen v. Chicago &c. R. Co. (38 Wis. 613), 189.
Ewing v. Chicago &c. R. Co. (72 Ill. 25), 326, 327.
Exp. Stell (4 Hughes, 157), 304.

F.

Faber v. Carlisle Mfg. Co. (126 Penn. St. 387; 17 Atl. Rep. 621), 468.
Faber v. St. Paul &c. R. Co. (29 Minn. 465), 289.
Fagundes v. Central Pac. R. Co. (79 Cal. 97; 26 Fed. Rep. 437), 481.
Fairbank v. Haentzsche (73 Ill. 236), 120, 460, 539.
Fairbanks v. Kerr (70 Penn. St. 86; 10 Am. Rep. 664), 40, 410, 591.
Fairchild v. New Orleans &c. R. Co. (62 Miss. 177), 330.
Fales v. Dearborn (1 Pick. 344), 416.
Fallon v. Central Park (64 N. Y. 13), 203.
Fallon v. O'Brien (12 R. I. 518; 34 Am. Rep. 713), 388.
Farren v. Sellers (39 La. Ann. 1011; 3 So. Rep. 303), 446.
Farish v. Reigle (11 Gratt. 697; 62 Am. Dec. 666), 206, 600.
Farley v. Chicago &c. R. Co. (56 Iowa, 337), 530, 539.
Farley v. Mayor (152 N. Y. 222; 46 N. E. Rep. 506), 519, 632.
Farlow v. Kelly (108 U. S. 288), 226, 227.
Farmer v. Central Iowa Ry. Co. (67 Iowa, 136), 442.
Farmer, The, v. McCraw (27 Ala. 109), 50.
Farnum v. Concord (2 N. H. 392), 367.
Farrar v. Greene (32 Me. 574), 390.
Farve v. Louisville &c. R. Co. (42 Fed. Rep. 441), 299, 300.
Farwell v. Boston & Worcester R. Co. (4 Metc. 49; 38 Am. Dec. 339), 452, 455, 456, 461, 462, 475, 548.
Fassett v. Roxbury (55 Vt. 552), 30, 372, 627, 633.
Faulkner v. Aurora (85 Ind. 130; 44 Am. Rep. 1), 401.
Faulkner v. Erie Ry. Co. (49 Barb. 324), 510.
Favor v. Boston &c. R. Co. (114 Mass. 350; 19 Am. Rep. 364), 389.
Fawcett v. Pittsburgh &c. Ry. Co. (24 W. Va. 755), 43.
Fawcett v. York &c. Ry. Co. (16 Q. B. 610; 15 Jur. 173; 20 L. J. (Q. B.) 222), 332, 338.
Fay v. Minneapolis &c. R. Co. (36 Minn. 231), 531, 545.
Fay v. Parker (53 N. H. 342; 16 Am. Rep. 270), 111.
Federal St. R. Co. v. Gibson (96 Penn. St. 83), 437, 606.
Feeny v. Long Island R. Co. (116 N. Y. 375; 22 N. E. Rep. 402), 264, 284.
Feital v. Middlesex R. Co. (109 Mass. 398; 12 Am. Rep. 720), 254, 394.
Fejdowski v. D. & H. C. Co. (12 App. Div. 589), 619.
Felder v. Louisville &c. R. Co. (2 McMull. 403), 293, 567.
Felice v. N. Y. C. & H. R. R. Co. (14 App. Div. (N. Y.), 345), 64.
Feltham v. England (2 L. R. (Q. B.) 33; 4 Fost. & Fin. 460; 7 Best & S. 676), 462.
Felton v. Aubrey (43 U. S. App. 278), 29, 78.
Fent v. Toledo &c. R. Co. (59 Ill. 349; 14 Am. Rep. 13), 33, 44, 363.
Fenton v. Second Ave. R. Co. (56 Hun, 99; 9 N. Y. Supl. 162), 400, 424.
Fenton's Case (1 Lewin, 179), 593.
Ferguson v. Columbus &c. Ry. Co. (75 Ga. 637), 308.
Ferguson v. Columbus &c. Ry. Co. (77 Ga. 102), 185, 308.
Fernandes v. Sacramento City Ry. Co. (52 Cal. 45), 32, 625, 628.
Fernow v. Dubuque &c. R. Co. (22 Iowa, 528), 336.

[The references are to pages.]

Fero v. Buffalo &c. R. Co. (22 N. Y. 209), 357, 359.
Ferris v. St. Louis &c. Ry. Co. (30 Mo. App. 122), 338.
Feunenbrach v. South Pac. R. Co. (59 Cal. 269), 299.
Field v. Chicago &c. R. Co. (4 McCrary, 573), 263, 276.
Fifield v. Northern &c. R. Co. (42 N. H. 225), 496.
Filbert v. Delaware &c. Canal Co. (121 N. Y. 207; 23 N. E. Rep. 1104), 511.
Filer v. Boston &c. R. Co. (149 Mass. 204; 31 N. E. Rep. 311), 221.
Filer v. New York &c. R. Co. (49 N. Y. 47; 10 Am. Rep. 327), 63, 107, 214.
Finegan v. London & N. W. Ry. Co. (53 J. P. 663), 414, 634.
Finegan v. Moore (46 N. J. Law, 602), 377.
Finklestein v. N. Y. &c. R. Co. (41 Hun, 34), 196.
Finlayson v. Chicago &c. R. Co. (1 Dill. 579), 297, 316.
Finn v. Vallejo St. Wharf Co. (7 Cal. 255), 605.
Fisher v. Cook (125 Ill. 280; 17 N. E. Rep. 763), 83, 119.
Fisher v. Farmers &c. Co. (21 Wis. 74), 326, 327.
Fisher v. Golladay (38 Mo. App. 531), 97.
Fisher v. Monongahela &c. R. Co. (131 Penn. St. 292; 18 Atl. Rep. 1016), 288.
Fisher v. Town of Franklin (89 Wis. 42), 54, 628.
Fisher v. W. Va. & P. R. Co. (39 W. Va. 366; 19 S. E. Rep. 578), 216.
Fisher v. W. Va. &c. R. Co. (42 W. Va. 183; 24 S. E. Rep. 570), 562.
Fisk v. Central Pac. R. Co. (72 Cal. 38; 13 Pac. Rep. 144), 513.
Fish v. Wait (104 Mass. 71), 59.
Fitch v. Buffalo &c. R. Co. (13 Hun, 668), 352.
Fitch v. Missouri &c. R. Co. (45 Mo. 322), 357, 360.
Fitch v. Pacific &c. R. Co. (45 Mo. 325), 361.
Fitts v. Cream City &c. R. Co. (59 Wis. 323), 626.
Fitzgerald v. City of Berlin (64 Wis. 207), 368, 380.
Fitzgerald v. Chicago &c. Ry. Co. (18 Mo. App. 391), 342.
Fitzgerald v. Connecticut River Paper Co. (155 Mass. 155; 29 N. E. Rep. 464), 519.
Fitzgerald v. St. Paul &c. R. Co. (29 Minn. 336; 43 Am. Rep. 212), 172, 189, 325, 341.
Fitzgerald v. Weston (52 Wis. 354), 565.
Fitzpatrick v. Fitchburg R. Co. (128 Mass. 13), 303, 313, 315.
Fitzpatrick v. Garrison &c. Ferry Co. (1 N. Y. Supl. 794), 80, 84.
Fitzpatrick v. Great Western Ry. Co. (12 Up. Can. (Q. B.) 645), 238.
Flaherty v. Minneapolis &c. Ry. Co. (39 Minn. 328; 40 N. W. Rep. 160), 155.
Flanders v. Meath (27 Ga. 358), 132.
Flannagan v. Railroad Co. (45 Wis. 98; 50 Am. Rep. 462), 497.
Fleck v. Union Ry. Co. (134 Mass. 481), 433, 435.
Fleming v. Brooklyn City &c. R. Co. (1 Abb. New Cas. 433), 438.
Fleming v. City of Lockhaven (15 W. N. C. 216), 374.
Flemming v. Western &c. R. Co. (49 Cal. 253), 49.
Fletcher v. Atlantic &c. R. Co. (64 Mo. 484), 270.
Fletcher v. Fitchburg R. Co. (149 Mass. 127; 21 N. E. Rep. 302), 287.
Flewelling v. Lewiston & Auburn Horse R. Co. (89 Me. 585; 36 Atl. Rep. 1056), 390, 431.
Fleytas v. Ponchartrain R. Co. (18 La. 339; 36 Am. Dec. 658), 16.
Flike v. Boston &c. R. Co. (53 N. Y. 550; 13 Am. Rep. 545), 445, 466, 469, 495, 508, 512.
Flinn v. Phila. &c. R. Co. (1 Houst. (Del.) 472), 249, 250.
Flint v. Norwich &c. Trans. Co. (34 Conn. 554; 6 Blatchf. 158), 422.
Flint &c. R. Co. v. Lull (28 Mich. 510), 327, 353.
Flint &c. R. Co. v. Weir (37 Mich. 111; 26 Am. Rep. 499), 207.
Flori v. St. Louis (3 Mo. App. 231), 166, 631.
Florida v. Pullman Palace Car Co. (37 Mo. App. 598), 252.
Florida Ry. & Nav. Co. v. Webster (25 Fla. 394; 5 So. Rep. 714), 223.
Florida &c. Ry. Co. v. Hirst (30 Fla. 1; 11 So. Rep. 506), 217, 219.

[The references are to pages.]

Flower v. Adams (2 Taunt. 314), 33, 390.
Flower v. Penn. &c. R. Co. (59 Penn. St. 210; 8 Am. Rep. 251), 241, 490.
Flowergate, The (31 Fed. Rep. 762), 505.
Floytrup v. Boston & Maine R. Co. (163 Mass. 152; 39 N. E. Rep. 797), 211.
Flynn v. Kansas &c. R. Co. (78 Mo. 195; 47 Am. Rep. 99), 497, 539.
Flynn v. San Francisco &c. R. Co. (40 Cal. 14; 6 Am. Rep. 595), 32, 357, 360.
Flynn v. Wabash &c. Ry. Co. (18 Ill. App. 235), 498.
Fogg v. Inhabitants of Nahant (98 Mass. 576), 370.
Foley v. California Horseshoe Co. (115 Cal. 184; 47 Pac. Rep. 42), 528.
Foley v. Chicago &c. R. Co. (48 Mich. 622; 42 Am. Rep. 481), 490, 496, 503, 540.
Follman v. Mankota (35 Minn. 522), 154.
Fones v. Phillips (39 Ark. 17; 43 Am. Rep. 264), 513, 518, 540.
Fopper v. Wheatland (59 Wis. 623), 415.
Ford v. Fitchburg R. Co. (110 Mass. 240; 14 Am. Rep. 598), 445, 496, 502, 516, 543, 545.
Ford v. Lake Shore &c. R. Co. (2 N. Y. Supl. 1), 500.
Ford v. London &c. Ry. Co. (2 Fost. & Fin. 730), 206.
Ford v. Lyons (41 Hun, 512), 498.
Ford v. Umatilla County (15 Or. 313; 16 Pac. Rep. 33), 292, 563. 564.
Fordham v. London &c. Ry. Co. (L. R. 4 C. P. 619), 230.
Fordyce v. Merrill (49 Ark. 277; 5 S. W. Rep. 329), 232.
Forshay v. Glen Haven (25 Wis. 288; 3 Am. Rep. 73), 388.
Forsyth v. Boston &c. R. Co. (103 Mass. 510), 232.
Fort v. Union Pac. R. Co. (17 Wall. 355; 2 Dill. 259), 514, 517.
Fort Scott &c. Ry. Co. v. Sparks (55 Kan. 288; 39 Pac. Rep. 1032), 222.
Fort Wayne &c. R. Co. v. Gildersleeve (33 Mich. 134), 496, 504, 532, 540.
Fort Wayne &c. R. Co. v. Herbold (99 Ind. 91), 343.
Fort Wayne &c. R. Co. v. Woodward) 112 Ind. 118; 13 N. E. Rep. 260), 333.
Foss v. Chicago &c. Ry. Co. (33 Minn. 392), 258.
Foster v. Chicago &c. R. Co. (84 Ill. 165), 121, 460.
Foster v. Dixfield (18 Me. 380), 599.
Foster v. Minnesota &c. R. Co. (14 Minn. 360), 454, 463, 479.
Foster v. St. Louis &c. R. Co. (90 Mo. 116; 2 S. W. Rep. 138), 344.
Fowler v. Chicago &c. Ry. Co. (61 Wis. 159), 475.
Fox v. Borkey (126 Penn. St. 164; 24 W. N. C. 49; 17 Atl. Rep. 604), 43.
Fox v. Glastenbury (29 Conn. 204), 23, 31, 391, 620.
Fox v. Missouri Pac. Ry. Co. (85 Mo. 679), 281.
Fox v. Oakland Street Ry. (118 Cal. 55; 50 Pac. Rep. 25; 50 Pac. Rep. 561), 190, 202, 302.
Fox v. Sackett (10 Allen, 535), 59.
Fox v. Sandford (Sneed, 36), 454.
Foy v. Brighton &c. R. Co. (18 C. B. (N. S.) 225), 60.
Foy v. London &c. Ry. Co. (18 C. B. (N. S.) 225), 238.
Fracker v. St. Paul &c. Ry. Co. (32 Minn. 54), 480, 523.
Fraler v. Sears Union Water Co. (12 Cal. 555), 60.
Francis v. New York Steam Co. (114 N. Y. 380; 21 N. E. Rep. 988), 437.
Francis v. St. Louis Transfer Co. (5 Mo. App. 7), 238.
Franklin v. Forty-second St. R. Co. (3 N. Y. Supl. 229), 423.
Franklin v. Winona &c. R. Co. (37 Minn. 409; 34 N. W. Rep. 898), 446, 498.
Frazer v. S. & N. Ala. R. Co. (81 Ala. 185; 1 So. Rep. 85), 54, 58, 300, 320.
Frazier v. Nortinus (38 Iowa, 82), 329.
Frazier v. Penn. &c. R. Co. (38 Penn. St. 104), 508, 534, 541.
Frech v. Phila. &c. R. Co. (39 Md. 574), 301, 605.
Frederick v. Taylor (14 Abb. Pr. (N. S.) 77), 33.
Freeman v. Duluth &c. Ry. Co. (74 Mich. 86; 41 N. W. Rep. 872), 269.
Freer v. Cameron (4 Rich. (Law) 228; 55 Am. Dec. 663), 16, 83.

[The references are to pages.]

French v. Brunswick (21 Me. 29; 38 Am. Dec. 250), 369, 371, 599.
French v. Cresswell (13 Or. 418), 330.
French v. Taunton &c. R. Co. (116 Mass. 537), 321.
Frick v. Potter (17 Ill. 406), 63, 215.
Frick v. St. Louis &c. R. Co. (75 Mo. 542; 75 Mo. 595), 168, 185, 303.
Fritz v. First Division &c. R. Co. (22 Minn. 404), 332.
Fritz v. Milwaukee &c. R. Co. (34 Iowa, 737), 327, 332, 353.
Frost v. Eastern R. Co. (64 N. H. 220; 9 Atl. Rep. 790), 79, 86, 310.
Frost v. Grand Trunk &c. Ry. Co. (10 Allen, 387), 79, 235.
Frost v. Hull (4 N. H. 153), 255.
Frost v. Plumb (40 Conn. 111; 16 Am. Rep. 18), 396.
Frost v. Waltham (12 Allen, 85), 57, 374, 573.
Fuller v. Boston &c. R. Co. (134 Mass. 491), 623.
Fuller v. Coats (18 Ohio St. 343), 589.
Fuller v. Jewett (80 N. Y. 46; 36 Am. Rep. 575), 466, 495, 502.
Fulliam v. Muscatine (70 Iowa, 436), 55, 57.
Fulton Iron Works v. Kimball (52 Mich. 146), 372.
Funston v. C., R. I. & P. Ry. Co. (61 Iowa, 452), 263.
Furnish v. Missouri Pac. Ry. Co. (13 S. W. Rep. 1044), 206.

G.

Gaffney v. Brown (150 Mass. 479; 23 N. E. Rep. 233), 83.
Gahagan v. Boston &c. R. Co. (1 Allen, 187), 319.
Gale v. Lisbon (52 N. H. 174), 77.
Galena &c. R. Co. v. Crawford (25 Ill. 529), 331, 342.
Galena &c. R. Co. v. Dill (22 Ill. 264), 76.
Galena &c. R. Co. v. Fay (16 Ill. 558; 63 Am. Dec. 323), 118, 205, 206, 213, 216, 601.
Galena &c. R. Co. v. Jacobs (20 Ill. 478), 24, 88, 101, 113, 115, 118, 121, 122, 293, 316, 601.
Galena &c. R. Co. v. Loomis (13 Ill. 548), 278.
Galena &c. R. Co. v. Yarwood (17 Ill. 500; 15 Ill. 468), 63, 66, 216.
Gallagher v. Coney I. &c. R. Co. (4 N. Y. Supl. 870), 59.
Galligan v. Metacomet Mfg. Co. (143 Mass. 527), 71, 80.
Gallin v. London &c. Ry. Co. (L. R. 10 Q. B. 212), 208.
Galloway v. Western &c. R. Co. (57 Ga. 512), 19, 558.
Galpin v. Chicago &c. R. Co. (19 Wis. 604), 325.
Galt v. Adams Express Co. (MacArth. & Mack. 124; 48 Am. Rep. 742), 248.
Galveston v. Posnainsky (62 Tex. 118; 50 Am. Rep. 517), 42.
Galveston City R. Co. v. Hewitt (67 Tex. 473), 424.
Galveston &c. R. Co. v. Chambers (73 Tex. 296; 11 S. W. Rep. 279), 303.
Galveston &c. R. Co. v. Crispi (73 Tex. 236; 11 S. W. Rep. 187), 237.
Galveston &c. R. Co. v. Drew (59 Tex. 10; 46 Am. Rep. 261), 443.
Galveston &c. R. Co. v. Evansich (61 Tex. 3), 176.
Galveston &c. R. Co. v. Faber (77 Tex. 153; 8 S. W. Rep. 64; 63 Tex. 344), 477, 507.
Galveston &c. R. Co. v. Graves (59 Tex. 330), 263.
Galveston &c. R. Co. v. Kutac (72 Tex. 643; 11 S. W. Rep. 127), 162, 276.
Galveston &c. R. Co. v. Kutac (76 Tex. 473; 13 S. W. Rep. 327), 162.
Galveston &c. R. Co. v. Moore (59 Tex. 64; 46 Am. Rep. 265), 185, 186. 196.
Galveston &c. R. Co. v. Ryon (70 Tex. 56; 7 S. W. Rep. 687), 296.
Galveston &c. R. Co. v. Smith (59 Tex. 406), 211.
Galveston &c. R. Co. v. Smith (76 Tex. 611; 13 S. W. Rep. 562), 510.
Galveston Oil Co. v. Morton (70 Tex. 400; 7 S. W. Rep. 756), 84.
Galveston R. Co. v. Bracken (59 Tex. 71), 263.
Galvin v. New York (112 N. Y. 223; 19 N. E. Rep. 675), 385.
Gamble v. Hine (2 N. Y. Supl. 778), 526.
Gannon v. Union Ferry Co. (29 Hun, 631), 417.

[The references are to pages.]

Gardner v. Grace (1 Fost. & Fin. 359), 179.
Gardner v. Michigan Central R. Co. (58 Mich. 584), 545.
Gardner v. N. H. &c. Co. (51 Conn. 143; 5 Am. Rep. 12), 207, 240.
Gardner v. Smith (7 Mich. 410), 341.
Garfield Manuf. Co. v. McLean (18 Ill. App. 447), 126.
Garland v. Towne (55 N. H. 55; 20 Am. Rep. 164), 409.
Garrahy v. Kansas City &c. R. Co. (28 Fed. Rep. 262; 25 Fed. Rep. 258), 461, 470.
Gartland v. Toledo &c. R. Co. (67 Ill. 498), 513.
Gates v. Burlington &c. R. Co. (39 Iowa, 45), 326, 545.
Gates v. Madison &c. Ins. Co. (5 N. Y. 469; 55 Am. Dec. 360), 573.
Gautret v. Egerton (L. R. 2 C. P. 271), 84.
Gavin v. Chicago (97 Ill. 66; 37 Am. Rep. 99), 168, 173, 203, 309.
Gay v. Essex Electric St. Ry. Co. (159 Mass. 238; 34 N. E. Rep. 186, 258), 86, 194.
Gay v. Winter (34 Cal. 153), 97, 605.
Gaynor v. Old Colony R. Co. (100 Mass. 208), 231, 296, 314, 316, 317, 599.
Gebhard v. Detroit &c. R. Co. (79 Mich. 586; 44 N. W. Rep. 1045), 287.
Gee v. Metropolitan &c. Ry. Co. (L. R. 8 Q. B. 161; 5 Eng. Rep. 169), 60, 225, 229.
Geiselman v. Scott (25 Ohio St. 86), 583.
Geitz v. Milwaukee City Ry. Co. (72 Wis. 307; 39 N. W. Rep. 866), 434.
George v. Gobey (128 Mass. 289; 35 Am. Rep. 376), 545.
George v. Haverhill (110 Mass. 511), 368.
George v. Mobile & Ohio R. Co. (109 Ala. 245; 19 So. Rep. 784), 443, 516.
George v. Smith (Ired. (N. C.) Law, 273), 43.
George H. Hammond & Co. v. Schweitzer (112 Ind. 246; 13 N. E. Rep. 869), 500.
Georgia &c. R. Co. v. Anderson (33 Ga. 110), 330, 347, 348.
Georgia &c. R. Co. v. Harris (83 Ga. 393; 9 S. E. Rep. 786), 335.
Georgia &c. R. Co. v. Kenney (58 Ga. 485), 516, 517, 541.
Georgia &c. R. Co. v. McCurdy (45 G. 288; 12 Am. Rep. 577), 214.
Georgia &c. R. Co. v. Neely (50 Ga. 540), 91, 134, 330, 334.
Georgia &c. R. Co. v. Rhodes (56 Ga. 645), 66, 453.
Georgia &c. R. Co. v. Watkins (97 Ga. 381), 29, 215.
Georgia Pac. Ry. Co. v. Hughes (87 Ala. 610; 6 So. Rep. 413), 155.
Georgia R. &c. Co. v. Friddell (79 Ga. 489; 7 S. E. Rep. 214), 489.
Georgia R. & B. Co. v. Hicks (95 Ga. 301; 22 S. E. Rep. 613), 482.
Georgia R. & B. Co. v. Nelms (83 Ga. 70; 9 S. E. Rep. 1049), 516.
Georgia R. & B. Co. v. Wall (80 Ga. 202; 7 S. E. Rep. 639), 335.
Gerald v. City of Boston (108 Mass. 586), 371, 379, 407, 626.
Germantown Pass. R. Co. v. Brophy (105 Penn. St. 38), 224, 438.
Germantown Pass. R. Co. v. Walling (97 Penn. St. 55; 37 Am. Rep. 711; 2 Am. & Eng. Ry. Cas. 20), 433, 434, 435, 626, 629.
Gessley v. Missouri Pac. Ry. Co. (32 Mo. App. 413), 59.
Geveke v. Grand Rapids &c. R. Co. (57 Mich. 589), 291.
Gheens v. Golden (90 Ind. 427), 602.
Ghormly v. Dinsmore (51 N. Y. Super. Ct. 196), 247.
Gibbons v. Chicago &c. Ry. Co. (66 Iowa, 231), 441.
Gibbons v. Williams (135 Mass. 333), 411.
Gibbons v. Wisconsin Valley R. Co. (66 Wis. 161), 360.
Giberson v. Bangor &c. R. Co. (89 Me. 337; 36 Atl. Rep. 400), 260.
Gibson v. Erie Ry. Co. (63 N. Y. 449; 20 Am. Rep. 552), 529, 534, 541.
Gibson v. Pacific &c. R. Co. (46 Mo. 163; 2 Am. Rep. 497), 454, 497.
Giger v. Chicago &c. Ry. Co. (80 Iowa, 492; 45 N. W. Rep. 906), 347.
Gilbert v. Boston (139 Mass. 313), 406.
Gilbert v. Guild (144 Mass. 601; 12 N. E. Rep. 368), 517.

[The references are to pages.]

Gilbert v. Nagle (118 Mass. 278), 83.
Gilbert v. Roxbury (100 Mass. 185), 404.
Giles v. Boston &c. R. Co. (55 N. H. 552), 323, 349, 354.
Giles v. Diamond S. I. Co. (8 Atl. Rep. 368), 524, 537.
Giles v. Railroad (55 N. H. 555), 184.
Gill v. Libby (36 Barb. 70), 587.
Gillam v. Sioux City &c. R. Co. (26 Minn. 268), 341.
Gillenwater v. Madison &c. R. Co. (5 Ind. 339; 61 Am. Dec. 101), 478, 479, 509.
Gillespie v. City (54 N. Y. 468), 264.
Gillespie v. McGowen (100 Penn. St. 144; 45 Am. Rep. 365), 168, 200, 316, 383, 410.
Gilligan v. New York &c. R. Co. (1 E. D. Smith, 453), 189.
Gillis v. Pennsylvania R. Co. (59 Penn. St. 129), 258, 324.
Gillispie v. Newburgh (54 N. Y. 468), 615.
Gillshannon v. Stony Brook R. Co. (10 Cush. 228), 223, 464, 479, 481.
Gilman v. Eastern R. Co. (10 Allen, 233; 13 Allen, 433), 445, 502.
Gilman v. European &c. R. Co. (60 Me. 235), 42.
Gilmore v. Cape Fear &c. R. Co. (115 N. C. 657; 20 S. E. Rep. 371), 273.
Ginna v. Second Ave. R. Co. (67 N. Y. 596), 33, 434, 435.
Given v. Western Union Tel. Co. (24 Fed. Rep. 119), 576.
Glandon v. Chicago &c. Ry. Co. (68 Iowa, 457), 339.
Glascock v. Central Pac. R. Co. (73 Cal. 137; 14 Pac. Rep. 518), 269.
Glassey v. Hestonville &c. R. Co. (57 Penn. St. 172; 7 P. E. Smith, 172), 184, 187, 190, 413.
Gleason v. Bremen (50 Me. 222), 599.
Gleason v. Excelsior Manfg. Co. (7 S. W. Rep. 188), 521.
Glenn v. Columbia &c. R. Co. (21 S. C. 466), 35.
Goddard v. Grand Trunk Ry. Co. (57 Me. 202; 2 Am. Rep. 39), 420.
Goddard, Petitioner &c. (16 Pick. 504; 28 Am. Dec. 259), 407.
Godefroy v. Jay (7 Bing. 413), 582.
Goins v. Chicago &c. Ry. Co. (37 Mo. App. 221), 500, 527.
Goldstein v. Chicago &c. R. (46 Wis. 404), 54.
Goldsworthy v. Town of Linden (75 Wis. 24; 43 N. W. Rep. 656), 370.
Gonzales v. N. Y. &c. R. Co. (50 How. Pr. 126), 298.
Goodfellow v. Mayor &c. (100 N. Y. 15), 368.
Goodhue v. Dix (2 Gray, 181), 414.
Gooding v. Atcheson &c. R. Co. (32 Kan. 150), 354.
Goodlett v. Louisville &c. R. Co. (122 U. S. 391), 442, 629.
Goodman v. Gay (15 Penn. St. 188), 388.
Goodman v. Richmond &c. R. Co. (81 Va. 576), 500.
Goodrich v. New York &c. R. Co. (116 N. Y. 398; 22 N. E. Rep. 397), 530.
Gordon v. Reynolds Card Manfg. Co. (47 Hun, 278), 504, 527.
Gorman v. Lowell (117 Mass. 65), 256, 395.
Gorman v. Morrison (12 Ct. of Ses. Cas. 1073 (Sc.)), 487.
Gorman v. Pacific &c. R. Co. (26 Mo. 441, 442), 329, 333, 334, 337, 338.
Gormley v. Ohio &c. R. Co. (72 Ind. 31), 476, 601.
Gormly v. Vulcan Iron Works (61 Mo. 492), 454, 472.
Gorton v. Erie Ry. Co. (45 N. Y. 660), 38, 270, 276.
Goshen, City of, v. England (119 Ind. 368; 21 N. E. Rep. 977), 48.
Gossport, Town of, v. Evans (112 Ind. 133; 13 N. E. Rep. 256), 57.
Gothard v. Alabama &c. R. Co. (67 Ala. 114), 33, 34, 63, 91, 103, 117, 263, 298, 313.
Gottlieb v. New York &c. R. Co. (100 N. Y. 462), 532.
Gould v. Bangor &c. R. Co. (82 Me. 122; 19 Atl. Rep. 84), 340.
Gould v. City of Topeka (32 Kan. 485; 49 Am. Rep. 496), 368, 369.
Gould v. McKenna (86 Penn. St. 297; 27 Am. Rep. 705), 49, 95, 109, 110, 111.
Goulin v. Canada Southern Bridge Co. (64 Mich. 190; 31 N. W. Rep. 44), 531.
Gourdine v. Cook (1 Nott & M. 19), 417.

[The references are to pages.]

Goutret v. Egerton (L. R. 2 C. P. 371; 36 L. J. (C. P.) 191; 15 Week. Rep. 638; 16 L. T. (N. S.) 17), 79.
Government St. R. Co. v. Hanlon (53 Ala. 70, 81), 103, 184, 185, 427, 428.
Graham v. Manhattan Ry. Co. (149 N. Y. 336; 43 N. E. Rep. 917), 632.
Graham v. Pacific R. Co. (66 Mo. 536), 249.
Graham v. Pennsylvania R. Co. (39 Fed. Rep. 596), 418.
Graham v. Toronto &c. Ry. Co. (23 Up. Can. (C. P.) 514), 223.
Grahlman v. Chicago &c. Ry. Co. (78 Iowa, 564; 43 N. W. Rep. 529), 347.
Gramlich v. Wurst (86 Penn. St. 74; 27 Am. Rep. 684), 70, 79.
Gramlick v. Railroad Co. (9 Phila. 78), 285.
Grand Rapids &c. R. Co. v. Monroe (47 Mich. 152), 341.
Grandtower Manfg. Co. v. Hawkins (72 Ill. 386), 120.
Grand Trunk R. Co. v. Cobleigh (51 U. S. App. 15; 78 Fed. Rep. 784), 262.
Granger v. Boston &c. R. Co. (146 Mass. 276; 15 N. E. Rep. 619), 283.
Grant v. Baker (12 Or. 329), 606.
Grant v. City of Fitchburg (160 Mass. 16; 35 N. E. Rep. 84), 201.
Grant v. Hannibal &c. Ry. Co. (25 Mo. App. 227), 335.
Grant v. Mosly (29 Ala. 302), 33.
Grant v. Thomas (96 Ind. 361; 48 Am. Rep. 727), 80, 315, 316.
Graville v. Manhattan R. Co. (105 N. Y. 525), 215, 216.
Gray v. Brassey (15 Ct. of Ses. Cas. 135), 559.
Gray v. Gaslight Co. (114 Mass. 149; 18 Am. Rep. 344), 385.
Gray v. McDonald (28 Mo. App. 477), 96.
Gray v. Phila. &c. R. Co. (23 Blatchf. 263), 144.
Gray v. Phila. &c. R. Co. (24 Fed. Rep. 168), 155.
Gray v. Scott (66 Penn. St. 345), 45, 53, 194, 279.
Gray v. Second Avenue R. Co. (65 N. Y. 561), 387.
Grayville v. Whitaker (85 Ill. 439), 121.
Great Northern &c. Ry. Co. v. Morville (21 L. J. (N. S.) Q. B. 319), 244.
Great Western R. Co. v. Haworth (39 Ill. 346, 347), 119, 358, 359.
Green v. Danby (12 Vt. 338), 380.
Green v. Erie Ry. Co. (11 Hun, 333), 38, 296, 298.
Green v. Pennsylvania R. Co. (36 Fed. Rep. 66), 231.
Green &c. St. Ry. Co. v. Bresner (97 Penn. St. 103), 594.
Greene v. Minneapolis &c. R. Co. (31 Minn. 248; 47 Am. Rep. 785), 497, 543.
Greenland v. Chaplin (5 Exch. 243), 44, 95, 109, 149.
Greenleaf v. Ill. &c. R. Co. (29 Iowa, 14; 4 Am. Rep. 181), 465, 496, 504, 532, 534, 601, 630, 631.
Greenwood v. Philadelphia &c. R. Co. (124 Penn. St. 572; 23 W. N. C. 425; 17 Atl. Rep. 188), 276.
Gregg v. Gregg (55 Penn. St. 227), 324, 338.
Gregg v. Wyman (4 Cush. 322), 394.
Gregory v. Adams (14 Gray, 242), 386.
Gregory v. Cleveland &c. R. Co. (112 Ind. 385; 14 N. E. Rep. 228), 296.
Grethen v. Chicago &c. Ry. Co. (22 Fed. Rep. 609), 299.
Gridlay v. City of Bloomington (88 Ill. 554; 30 Am. Rep. 566), 407.
Griffin v. Auburn (58 N. H. 121), 374, 405.
Griffin v. Boston &c. R. Co. (148 Mass. 143; 19 N. E. Rep. 166), 500.
Griffin v. Chicago &c. Ry. Co. (68 Iowa, 638), 263.
Griffith v. Cave (22 Cal. 235), 417.
Griffin v. Willow (43 Wis. 509), 24.
Griffith v. Gidlow (3 Hurl. & N. 648), 541.
Griffith v. Missouri Pac. Ry. Co. (98 Mo. 168; 11 S. W. Rep. 559), 107.
Griffiths v. Gidlow (3 Hurl. & N. 648), 56.
Griffiths v. London Docks &c. Co. (50 L. T. (N. S.) 755; 12 Q. B. Div. 493), 451, 495.
Griffiths v. The Earl of Dudley (L. R. 9 Q. B. Div. 357), 554, 555, 556, 557.

[The references are to pages.]

Griffiths v. Woltram (22 Minn. 185), 546.
Griggs v. Fleckenstein (14 Minn. 81), 72, 103, 157, 388.
Grill v. General Iron Screw Collier Co. (L. R. 1 C. P. 600), 22, 99, 114, 181.
Grimes v. Pennsylvania Co. (36 Fed. Rep. 72), 232.
Grimmell v. Chicago &c. Ry. Co. (73 Iowa, 93; 34 N. W. Rep. 758), 335.
Grippen v. New York Central R. Co. (40 N. Y. 34), 23, 36, 39, 48, 270, 280, 285, 288.
Griswold v. N. Y. &c. R. Co. (53 Conn. 371), 249.
Grizzle v. Frost (3 Fost. & Fin. 622), 514, 517, 541.
Grogan v. Adams Exp. Co. (114 Penn St. 523; 7 Atl. Rep. 134), 247.
Groll v. Prospect Park &c. R. Co. (4 N. Y. Supl. 80), 232.
Grove v. Burlington &c. Ry. Co. (75 Iowa, 163; 39 N. W. Rep. 248), 332.
Grover v. Gray (9 Ill. 329), 121.
Grows v. Maine &c. R. Co. (67 Me. 100, 412), 264, 269, 280, 281, 320.
Grube v. Missouri Pac. Ry. Co. (98 Mo. 330; 11 S. W. Rep. 736), 540.
Grundy v. Louisville &c. R. Co. (2 S. W. Rep. 899), 335.
Gubasko v. New York (12 Daly (N. Y.) 183), 368.
Guenther v. St. Louis &c. Ry. Co. (95 Mo. 286; 8 S. W. Rep. 371), 275.
Guess v. South Carolina Ry. Co. (30 S. C. 163; 9 S. E. Rep. 18), 345.
Guggenheim v. Lake Shore &c. Ry. Co. (66 Mich. 150; 33 N. W. Rep. 161), 270, 282.
Gulf &c. Ry. Co. v. Anderson (76 Tex. 244; 13 S. W. Rep. 196), 267.
Gulf &c. Ry. Co. v. Blohn (73 Tex. 637; 11 S. W. Rep. 867), 475.
Gulf &c. Ry. Co. v. Breitling (12 S. W. Rep. 1121), 76.
Gulf &c. Ry. Co. v. Campbell (76 Tex. 174; 13 S. W. Rep. 19), 222.
Gulf &c. Ry. Co. v. Donnelly (70 Tex. 371; 8 So. Rep. 52), 542.
Gulf &c. Ry. Co. v. Dorsey (66 Tex. 148), 489.
Gulf &c. Ry. Co. v. Evansich (61 Tex. 3), 303.
Gulf &c. Ry. Co. v. Fox (6 S. W. Rep. 569), 58.
Gulf &c. Ry. Co. v. Gasscamp (69 Tex. 545; 7 S. W. Rep. 227), 57.
Gulf &c. Ry. Co. v. Greenlee (70 Tex. 553, 8 S. W. Rep. 129), 280.
Gulf &c. Ry. Co. v. Hodges (76 Tex. 90; 13 S. W. Rep. 64), 259.
Gulf &c. Ry. Co. v. Keith (74 Tex. 287; 11 S. W. Rep. 1117), 342.
Gulf &c. Ry. Co. v. Levy (19 Am. Law Rev. 480), 100.
Gulf &c. Ry. Co. v. McGown (65 Tex. 640), 206, 249.
Gulf &c. Ry. Co. v. McLean (74 Tex. 646), 360.
Gulf &c. Ry. Co. v. McWhirter (77 Tex. 356; 14 S. W. Rep. 26), 145. 308.
Gulf &c. Ry. Co. v. Pendy (87 Tex. 553; 29 S. W. Rep. 1038), 155.
Gulf &c. Ry. Co. v. Pettis (69 Tex. 689; 7 S. W. Rep. 93), 446, 447, 501.
Gulf &c. Ry. Co. v. Rediker (67 Tex. 190; 2 S. W. Rep. 513), 498.
Gulf &c. Ry. Co. v. Ryan (69 Tex. 665; 7 S. W. Rep. 83), 544.
Gulf &c. Ry. Co. v. Silliphant (70 Tex. 623; 8 S. W. Rep. 673), 500, 501.
Gulf &c. Ry. Co. v. Styron (66 Tex. 421), 308.
Gulf &c. Ry. Co. v. Trawick (68 Tex. 314; 4 S. W. Rep. 567), 247.
Gulf &c. Ry. Co. v. Walker (70 Tex. 126; 7 S. W. Rep. 831), 285, 425.
Gulf &c. Ry. Co. v. Warner (89 Tex. 475; 35 S. W. Rep. 364), 482.
Gulf &c. Ry. Co. v. Williams (70 Tex. 159; 8 S. W. Rep. 78), 233.
Gulf &c. Ry. Co. v. York (74 Tex. 364; 12 S. W. Rep. 68), 301, 320.
Gumb v. Twenty-third St. Ry. Co. (9 N. Y. Supl. 316; 53 N. Y. Super. Ct. 466), 29, 59, 425.
Gunz v. Chicago &c. R. Co. (52 Wis. 672), 64.
Gunn v. Cambridge R. Co. (144 Mass. 430), 96.
Gunn v. Ohio River R. Co. (42 W. Va. 676). 28, 303.

[The references are to pages.]

Gunn v. Wisconsin &c. Ry. Co. (70 Wis. 203; 35 N. W. Rep. 281), 271.
Gunter v. Graniteville Manfg. Co. (18 S. C. 262; 44 Am. Rep. 573), 466, 471, 512.
Gunter v. Wicker (85 N. C. 310), 32, 34, 91.
Guta v. Lake Shore &c. Ry. Co. (81 Mich. 291; 45 N. W. Rep. 821), 263.
Guthrie v. Louisville &c. R. Co. (11 Lea, 372; 47 Am. Rep. 286), 483, 496, 518, 534.
Guthrie v. Maine Cent. R. Co. (81 Me. 572; 18 Atl. Rep. 295), 532.
Guthrie v. Missouri Pac. Ry. Co. (Neb.) 71 N. W. Rep. 722), 628.
Gwynn v. Duffield (61 Iowa, 64; 47 Am. Rep. 802; 66 Iowa, 708), 80, 583.

H.

Haas v. Buffalo &c. R. Co. (40 Hun, 145), 538.
Haas v. Grand Rapids &c. R. Co. (47 Mich. 401), 263.
Haas v. Phila. Steamship Co. (88 Penn. St. 269; 32 Am. Rep. 462), 487.
Haase v. Oregon Ry. & Nav. Co. (19 Or. 354; 24 Pac. Rep. 238), 232.
Hackett v. Manfg. Co. (101 Mass. 101), 496.
Hackford v. New York &c. R. Co. (53 N. Y. 654; 43 How. Pr. 222; 6 Lans. 381), 280, 290, 614, 616.
Hadencamp v. Second Ave. R. R. Co. (1 Sweeney (N. Y. Super. Ct. 490), 434.
Hadley v. Baxendale (9 Exch. 341; 23 L. J. (Exch.) 179), 44.
Hadley v. Taylor (L. R. 1 C. P. 53), 382.
Hadley v. Upshaw (27 Tex. 547), 587.
Haff v. Minneapolis &c. R. Co. (4 McCrary, 622), 32.
Hagan v. Philadelphia, &c. Ry. Co. (15 Phila. 278), 431.
Haigh v. London &c. Ry. Co. (1 Fost. & Fin. 646; 8 Week. Rep. 6), 326, 346.
Haines v. Illinois &c. R. Co. (41 Iowa, 227), 271.
Haire v. Reese (7 Phila. 138), 583.
Hale v. New Jersey Steam Nav. Co. (15 Conn. 539; 39 Am. Dec. 398), 246.
Hale v. Smith (78 N. Y. 480), 615, 618.
Haley v. Chicago &c. R. Co. (21 Iowa, 25), 92.
Haley v. N. Y. &c. R. Co. (7 Hun, 84), 321.
Haley v. Railroad Co. (7 Baxt. 242), 98.
Haley v. Western Transit Co. (76 Wis. 344; 45 N. W. Rep. 16), 498.
Hall v. Corcoran (107 Mass. 63, 251; 9 Am. Rep. 30), 77, 255, 394, 395, 396.
Hall v. Galveston &c. Ry. Co. (39 Fed. Rep. 18), 511.
Hall v. Johnson (3 Hurl. & C. 589), 483.
Hall v. Lowell (10 Cush. 260), 407.
Hall v. N. E. R. Co. (10 Q. B. 437), 249.
Hall v. Ogden City St. Ry. Co. (13 Utah, 243; 44 Pac. Rep. 1046), 428.
Hall v. Ripley (119 Mass. 135), 72.
Hall v. Town of Manson (99 Iowa, 698; 68 N. W. Rep. 922), 373.
Hall v. Union Pacific Ry. Co. (4 McCrary, 257), 529, 626.
Halladay v. Marsh (3 Wend. 142; 20 Am. Dec. 678), 336.
Hallie v. City of Gloversville (4 App. Div. (N. Y.) 343), 406.
Hallikan v. Hannibal &c. R. Co. (71 Mo. 113), 531.
Hallock v. Hughes (42 Iowa, 516), 329.
Halloran v. New York &c. R. Co. (2 E. D. Smith, 257), 324, 332, 343, 352.
Hallower v. Henley (6 Cal. 209), 496.
Halverson v. Minneapolis &c. Ry. Co. (32 Minn. 88), 341.
Ham v. Delaware & H. Canal Co. (155 Penn. St. 548; 26 Atl. Rep. 757), 297.
Hamilton v. Boston (14 Allen, 475), 254, 394, 395.
Hamilton v. Delaware &c. R. Co. (50 N. J. Law, 263; 13 Atl. Rep. 29), 262.
Hamilton v. Goding (55 Me. 428), 72.
Hamilton v. Hannibal &c. R. Co. (39 Kan. 56; 18 Pac. Rep. 57), 97.
Hamilton v. Missouri Pac. Ry. Co. (87 Mo. 85), 353.

[The references are to pages.]

Hamilton v. Texas &c. Ry. Co. (64 Tex. 251; 53 Am. Rep. 756), 231.
Hammersmith &c. Ry. Co. v. Brand (L. R. 4 H. L. 171), 355.
Hammond v. Chicago &c. R. Co. (43 Iowa, 168), 339, 347.
Hammond v. Mukwa (40 Wis. 35), 24, 46.
Hammond v. North Eastern R. Co. (6 S. C. 130; 24 Am. Rep. 467), 207, 240.
Han v. Minneapolis &c. R. Co. (4 McCreary, 622), 63.
Hance v. Cayuga &c. R. Co. (26 N. Y. 428), 92, 345, 350, 352.
Haney v. Pittsburgh, C. C. & St. L. Ry. Co. (38 W. Va. 570), 65.
Hankins v. New York &c. R. Co. (142 N. Y. 416; 37 N. E. Rep. 466), 512.
Hanks v. Boston &c. R. Co. (147 Mass. 495; 18 N. E. Rep. 218), 275, 289.
Hanna v. Terre Haute &c. R. Co. (119 Ind. 316; 21 N. E. Rep. 903), 345.
Hannem v. Pence (40 Minn. 127; 41 N. W. Rep. 657), 409.
Hannibal &c. R. Co. v. Kanaley (39 Kan. 1; 17 Pac. Rep. 324), 503.
Hannibal &c. R. Co. v. Kenney (41 Mo. 271), 329.
Hannibal &c. R. Co. v. Martin (111 Ill. 219), 217.
Hanover &c. R. Co. v. Coyle (54 Penn. St. 396), 264, 271, 571.
Hanrathy v. Northern &c. R. Co. (46 Md. 280), 453, 541.
Hansford's Adm'r v. Payne (11 Bush, 380), 100, 458.
Hanson v. Mansfield Ry. &c. Co. (38 La. Ann. 111; 58 Am. Rep. 162), 223.
Hard v. Vermont &c. R. Co. (32 Vt. 472), 454, 505.
Hardcastle v. The South Yorkshire Ry. Co. (4 Hurl. & N. 67; 28 L. J. (Exch.) 139), 79.
Harder v. Rome &c. R. Co. (2 N. Y. Supl. 70), 269.
Hardy v. Carolina &c. R. Co. (76 N. C. 5), 454, 496.
Hare v. McIntire (82 Me. 240; 19 Atl. Rep. 453), 546.
Hargis v. St. Louis &c. Ry. Co. (75 Tex. 19; 12 S. W. Rep. 953), 291.
Hargreaves v. Deacon (25 Mich. 1), 20, 79, 83.
Haring v. New York &c. R. Co. (13 Barb. 9), 270, 280.
Harkins v. Philadelphia &c. R. Co. (15 Phila. (Penn.) 286, 96.
Harkins v. Standard Sugar Refinery (122 Mass. 400), 445, 489.
Harlan v. St. Louis &c. R. Co. (64 Mo. 480; 65 Mo. 22), 76, 271, 276, 297.
Harlow v. Humiston (6 Cowen, 189), 383, 614, 616.
Harmon v. Columbia &c. R. Co. (10 S. E. Rep. 877), 333.
Harney v. Rose (26 Ark. 3; 7 Am. Rep. 595), 417.
Harpell v. Curtis (1 E. D. Smith, 78), 59, 416.
Harper v. Delaware, L. & W. R. Co. (22 App. Div. (N. Y.) 273), 633.
Harper v. Erie Ry. Co. (32 N. J. Law, 88), 209.
Harper v. Indianapolis &c. R. Co. (47 Mo. 567), 512.
Harper v. Milwaukee (30 Wis. 365), 386.
Harriman v. Pittsburgh &c. R. Co. (45 Ohio St. 11; 12 N. E. Rep. 451), 34, 86, 88, 275, 316.
Harrington v. New York &c. R. Co. (4 N. Y. Supl. 640), 507.
Harris v. Central R. Co. (78 Ga. 525; 3 S. E. Rep. 355), 235.
Harris v. Hannibal &c. R. Co. (89 Mo. 233; 1 S. W. Rep. 325), 224.
Harris v. Hewitt (64 Minn. 54; 65 N. W. Rep. 1085), 542.
Harris v. Minneapolis &c. R. Co. (37 Minn. 47; 33 N. W. Rep. 12), 263.
Harris v. Mobbs (3 L. R. Exch. Div. 268), 389.
Harris v. Township of Clinton (54 Mich. 447; 31 N. W. Rep. 325), 374, 377.
Harris v. Union Pac. Ry. Co. (4 McCrary, 454), 8, 32, 626.
Harrison v. Berkley (1 Strobh. (S. C.) 549; 47 Am. Dec. 578), 40, 44.
Harrison v. Brown (5 Wis. 27), 324.
Harrison v. Central &c. R. Co. (31 N. J. Law, 293), 496.
Harrison v. Great Northern Ry. Co. (3 Hurl. & C. 231), 145.
Hart v. Chicago &c. R. Co. (56 Iowa, 166; 41 Am. Rep. 93), 278.
Hart v. Devereux (41 Ohio St. 565), 59.

[The references are to pages.]

Hart v. Hudson River Bridge Co. (80 N. Y. 622; 84 N. Y. 56), 615, 618, 619.
Hart v. Pennsylvania R. Co. (112 U. S. 331), 249.
Hart v. Western &c. R. Co. (13 Metc. 99; 46 Am. Dec. 719), 357, 363.
Hartfield v. Roper (21 Wend. 615; 34 Am. Dec. 273), 101, 102, 103, 169, 171, 172, 179, 592, 593.
Hartford v. Brady (114 Mass. 468), 336.
Hartford, City of, v. Talcott (48 Conn. 525; 40 Am. Rep. 189), 407.
Hartford v. Northern Pacific R. Co. (91 Wis. 374; 64 N. W. Rep. 1033), 479, 483.
Hartman v. Muscatine (70 Iowa, 511), 55.
Hartwig v. Bay State S. & L. Co. (118 N. Y. 664; 23 N. E. Rep. 24; 43 Hun, 425), 442, 500.
Harty v. Central &c. R. Co. (42 N. Y. 468), 301, 314, 315.
Harvey v. Dunlop (Lalor's Sup. Hill & Denio, 193), 53.
Harvey v. Eastern &c. R. Co. (116 Mass. 269), 210.
Harvey v. New York &c. R. Co. (10 N. Y. Supl. 645; 19 Hun, 556), 33, 508.
Hassenger v. Mich. &c. R. Co. (48 Mich. 205; 42 Am. Rep. 470), 30, 31, 298, 313, 391.
Hatfield v. Chicago &c. R. Co. (61 Iowa, 434), 633.
Hathaway v. East Tennessee &c. R. Co. (29 Fed. Rep. 489), 631, 634.
Hathaway v. Michigan &c. R. Co. (51 Mich. 253; 47 Am. Rep. 569), 496, 532, 536.
Hathaway v. Toledo &c. R. Co. (46 Md. 25), 172, 288, 601.
Hatt v. Nay (144 Mass. 186; 10 N. E. Rep. 807), 540.
Haugh v. Chicago &c. Ry. Co. (73 Iowa, 66; 35 N. W. Rep. 116), 503, 530.
Haughey v. Hart (62 Iowa, 96; 49 Am. Rep. 138), 382.
Havens v. Erie Ry. Co. (41 N. Y. 296), 276.
Haverly v. State Line &c. R. Co. (135 Penn. St. 50; 19 Atl. Rep. 1013; 26 W. N. C. 321), 44, 94.
Hawes v. Burlington &c. Ry. Co. (64 Iowa, 315), 601.
Hawes v. Fox Lake (33 Wis. 438), 390.
Hawk v. Pennsylvania R. Co. (11 Atl. Rep. 459), 540.
Hawker v. Baltimore &c. R. Co. (15 W. Va. 628), 333.
Hawkins v. Great Western R. Co. (17 Mich. 57; 18 Mich. 427), 246.
Hawkins v. Johnson (105 Ind. 29; 55 Am. Rep. 169), 498.
Hawkins v. New York, L. E. & W. R. Co. (142 N. Y. 416; 37 N. E. Rep. 466), 481, 510.
Hawks v. Northampton (116 Mass. 423), 369.
Hawks v. Winans (74 N. Y. 609; 42 N. Y. Super. Ct. 451), 417.
Hawley v. New York &c. R. Co. (82 N. Y. 370), 496, 539.
Hay v. LeNeve (2 Shaw's App. Cases, 395), 578.
Haycroft v. Lake Shore &c. R. Co. (64 N. Y. 636), 286.
Hayden v. Manfg. Co. (29 Conn. 548), 496, 504, 505, 513, 540.
Hayden v. Railway Co. (124 Mo. 566; 28 S. W. Rep. 74), 46, 271.
Hayes v. Bush & Denslow Manuf. Co. (41 Hun, 407), 526.
Hayes v. Forty-second St. &c. R. Co. (97 N. Y. 259; 14 N. Y. Week. Dig. 28), 45, 422.
Hayes v. Gainesville St. Ry. Co. (70 Tex. 602; 8 S. W. Rep. 491), 91.
Hayes v. Michigan &c. R. Co. (111 U. S. 228), 292.
Hayes v. Norcross (162 Mass. 546; 39 N. E. Rep. 282), 29, 411.
Hayes v. Northern Pac. R. Co. (46 U. S. App. 41; 74 Fed. Rep. 279), 605.
Hayes v. Western R. Co. (3 Cush. 270), 446, 477, 480.
Hayman v. Pennsylvania R. Co. (118 Penn. St. 508), 418.
Hays v. Gallagher (72 Penn. St. 136), 606, 607.
Hays v. Millar (77 Penn. St. 238), 29.
Hayward v. Miller, (94 Ill. 349; 34 Am. Rep. 229), 81, 83, 121, 589.
Hazen v. West Superior Lumber Co. (91 Wis. 208; 64 N. W. Rep. 857), 518, 519.
Headen v. Rust (39 Ill. 186), 329.
Healey v. Dry Dock &c. R. Co. (46 N. Y. Super. Ct. Rep. 473) 33, 38, 91.
Healy v. New York (3 Hun, 708), 563.

[The references are to pages.]

Healy v. New York, N. H. & H. R. Co. (R. I.) (37 Atl. Rep. 676), 475.
Heaney v. Long Island R. Co. (112 N. Y. 122; 19 N. E. Rep. 422), 271, 286.
Heard v. Chesapeake &c. Ry. Co. (26 W. Va. 455), 335.
Hearn v. St. Charles St. Ry. Co. (34 La. Ann. 160), 425.
Hearne v. Southern &c. R. Co. (50 Cal. 482), 34, 49.
Heaston v. Wabash &c. Ry. Co. (18 Mo. App. 403), 347.
Heath v. Whitebreast Coal & Mining Co. (65 Iowa, 737), 501.
Heaven v. Pender (11 Q. B. Div. 508), 311.
Heavey v. Hudson River Water Power & Paper Co. (10 N. Y. Supl. 585), 525.
Heckrott v. Buffalo St. R. Co. (Super. Ct. of Buffalo, 13 Am. Law Rec. 295), 436.
Hector Mining Co. v. Robertson (22 Colo. 491), 78, 89.
Heddles v. Chicago &c. Ry. Co. (74 Wis. 239; 42 N. W. Rep. 237), 282.
Hedges v. Kansas (18 Mo. App. 62), 377.
Hedin v. Suburban Ry. Co. (26 Or. 155; 37 Pac. Rep. 540), 202.
Heffinger v. Minneapolis &c. Ry. Co. (43 Minn. 503; 45 N. W. Rep. 1131), 298.
Hegeman v. Western &c. R. Co. (13 N. Y. 9), 504.
Heil v. Glanding (42 Penn. St. 493), 13, 92, 113, 117.
Heinlein v. Boston &c. R. Co. (147 Mass. 136; 16 N. E. Rep. 608), 231.
Heland v. Lowell (3 Allen, 407), 92, 387, 391.
Helfenstein v. Medart (136 Mo. 595; 36 S. W. Rep. 863; 37 S. W. Rep. 829; 38 S. W. Rep. 294), 546.
Hemmingway v. Chicago &c. Ry. Co. (72 Wis. 42; 37 N. W. Rep. 804; 67 Wis. 668), 62, 64, 195, 202, 235.
Henderson v. Wabash &c. Ry. Co. (81 Mo. 605), 338.
Henderson v. Western &c. Ins. Co. (10 Rob. (La.) 164; 43 Am. Dec. 179), 573.
Henderson's Adm'r v. Kentucky &c. R. Co. (86 Ky. 389; 5 S. W. Rep. 875), 97.
Hendricks v. Western &c. R. Co. (52 Ga. 467), 111, 134, 558.
Hendrix v. St. Joseph &c. Ry. Co. (38 Mo. App. 520), 338.
Heney v. Dennis (93 Ind. 452; 47 Am. Rep. 378), 44.
Henn's Case (W. Jones, 296), 383.
Hennessy v. Boston (161 Mass. 502; 37 N. E. Rep. 668), 515.
Hennessy v. Brooklyn City R. Co. (73 Hun, 569; 147 N. Y. 721; 42 N. E. Rep. 723), 166.
Hennessey v. Brooklyn City R. Co. (6 App. Div. 206, 207), 172, 176.
Henry v. St. Louis &c. R. Co. (76 Mo. 288; 43 Am. Rep. 762), 44, 238.
Henry v. Sioux City &c. Ry. Co. (66 Iowa, 52), 531.
Henry v. Southern &c. R. Co. (50 Cal. 176), 363.
Henry Co. Turnpike Co. v. Jackson (86 Ind. 111; 44 Am. Rep. 274), 58, 372, 373, 374, 405.
Henshaw v. Raleigh &c. R. Co. (118 N. C. 1047; 24 S. E. Rep. 426), 213.
Henze v. St. Louis &c. R. Co. (71 Mo. 636), 263.
Herbert v. Markwell (Q. B. Div. 1881), 586.
Herbert v. Northern Pac. R. Co. (3 Dak. 38), 499.
Herdler v. Buck's Stove & Range Co. (136 Mo. 3; 37 S. W. Rep. 115), 517, 536.
Herold v. Meyer (20 Iowa, 378), 329.
Herriman v. Chicago &c. R. Co. (27 Mo. App. 435), 471.
Herring v. Wilmington &c. R. Co. (10 Ired. (Law) 402; 51 Am. Dec. 395), 78, 292, 293, 296, 301, 566, 625.
Hershey v. Township of Millcreek (9 Atl. Rep. 452), 372.
Heucke v. Milwaukee City Ry. Co. (69 Wis. 401; 34 N. W. Rep. 243), 423.
Hewiston v. City of New Haven (37 Conn. 475; 9 Am. Rep. 342), 408.
Hewitt v. Flint &c. R. Co. (67 Mich. 61; 34 N. W. Rep. 659), 497, 500, 522, 540.
Hey v. Philadelphia (81 Penn. St. 44; 22 Am. Rep. 733), 370, 381.
Hibbard v. Thompson (109 Mass. 288), 91, 110, 371, 583.
Hickey v. Boston &c. R. Co. (14 Allen, 429), 50, 108, 216, 599.

[The references are to pages.]

Hickey v. St. Paul City Street Ry. Co. (60 Minn. 119; 61 N. W. Rep. 893), 430.
Hickey v. Taaffe (105 N. Y. 26; 12 N. E. Rep. 286; 99 N. Y. 204; 32 Hun, 7; 1 East. Rep. 7), 495, 503, 513, 526, 527.
Hickey v. Waltham (159 Mass. 460; 34 N. E. Rep. 681), 519.
Hickman v. Missouri Pac. Ry. Co. (91 Mo. 433; 4 S. W. Rep. 127), 233.
Hicks v. Pacific &c. R. Co. (65 Mo. 34; 64 Mo. 430), 196, 606.
Higgins v. Cherokee R. Co. (73 Ga. 149), 241.
Higgins v. Deeney, 78 Cal. 578; 21 Pac. Rep. 428), 203.
Higgins v. Harlem &c. R. Co. (2 Bosw. (N. Y.) 131), 216.
Higgins v. Watervliet &c. R. Co. (46 N. Y. 23; 7 Am. Rep. 293), 420.
Higgins v. Williams (114 Cal. 176; 45 Pac. Rep. 1041), 495.
Higgins Carpet Co. v. O'Keefe (51 U. S. App. 74; 79 Fed. Rep. 900), 520.
Higginson v. Nahant (11 Allen, 530), 386.
High v. Carolina Central R. Co. (112 N. C. 385; 17 S. E. Rep. 79), 302.
Highlands, City of, v. Raine (23 Colo. 295; 47 Pac. Rep. 283), 374.
Higley v. Gilmer (3 Mon. 90; 35 Am. Rep. 450), 213, 218.
Hill v. Board of Aldermen of Charlotte (72 N. C. 55; 21 Am. Rep. 451), 389, 591.
Hill v. Boston (122 Mass. 344; 23 Am. Rep. 332), 367.
Hill v. Caledonian Ry. Co. (16 Ct. of Ses. Cas. 569), 560.
Hill v. Callahan (82 Ga. 109; 8 S. E. Rep. 720), 133.
Hill v. City of Fon du Lac (56 Wis. 246), 634.
Hill v. Gast (55 Ind. 45), 514, 541.
Hill v. Louisville &c. R. Co. (9 Heisk. 823), 98, 134, 318.
Hill v. New Haven (37 Vt. 501), 607, 620.
Hill v. New Orleans &c. R. Co. (11 La. Ann. 292), 22.
Hill v. Ninth Ave. R. Co. (109 N. Y. 239; 16 N. E. Rep. 61), 423.
Hillan v. Newington (57 Cal. 56), 157.
Hiller v. English (4 Strobh. (Law) 486), 391.
Hillier v. Allegheny &c. Ins. Co. (3 Penn. St. 470; 45 Am. Dec. 656), 573.
Hilts v. Chicago &c. Ry. Co. (55 Mich. 437), 509.
Hinckley v. Cape Cod R. Co. (120 Mass. 259), 76, 276, 321, 599, 612.
Hinckley v. Penobscot (42 Me. 89), 231, 395.
Hinckley v. Town of Somerset (145 Mass. 326; 14 N. E. Rep. 166), 370.
Hinds v. Harbou (58 Ind. 121), 546.
Hinds v. Overacker (66 Ind. 547; 32 Am. Rep. 114), 546.
Hine v. Cushing (6 N. Y. Supl. 850; 53 Hun, 519), 42.
Hine v. Munson (32 Conn. 219), 337.
Hinmans v. Chicago &c. R. Co. (28 Iowa, 491), 339.
Hinshaw v. Gilpin (64 Ind. 116), 337.
Hinton v. Dibbin (2 Q. B. 661), 99, 114, 244.
Hinz v. Starin (3 N. Y. Supl. 290), 56.
Hitte v. Republican Valley R. Co. (19 Neb. 620), 487.
Hixon v. Lowell (13 Gray, 59), 409.
Hoag v. Lake Shore &c. R. Co. (85 Penn. St. 293; 27 Am. Rep. 653), 47, 361, 365.
Hoag v. N. Y. &c. R. Co. (111 N. Y. 199; 18 N. E. Rep. 648), 162, 163, 166, 273.
Hoar v. Maine Central R. Co. (70 Me. 65; 35 Am. Rep. 299), 222.
Hobbs v. Stauer (62 Wis. 108; 19 Alb. Law Jour. 490), 497, 500, 504.
Hobson v. New Mexico &c. R. Co. (11 Pac. Rep. 545), 59, 477, 606.
Hoby v. Built (3 Barn. & Ad. 350), 582.
Hocum v. Weitherick (22 Minn. 152), 605.
Hodge v. Bennington (43 Vt. 450), 390.
Hodge v. New York &c. R. Co. (27 Hun, 394), 351.
Hodgkins v. Eastern R. Co. (119 Mass. 419), 464.
Hoehl v. Muscatine (57 Iowa, 444), 17, 34.
Hoffman v. Chicago &c. Ry. Co. (40 Minn. 60; 41 N. W. Rep. 301), 361.

[The references are to pages.]

Hoffman v. New York &c. R. Co. (87 N. Y. 25; 41 Am. Rep. 337), 420.
Hoffman v. Union Ferry Co. (68 N. Y. 385), 77.
Hofnagle v. New York &c. R. Co. (55 N. Y. 608), 464.
Hogan v. Central Pac. &c. R. Co. (49 Cal. 128), 508.
Hogan v. Field (44 Hun, 72), 498.
Hogan v. Smith (9 N. Y. Supl. 881), 498.
Hoke v. St. Louis &c. Ry. Co. (88 Mo. 360), 511.
Holbrook v. Aldrich (168 Mass. 16; 46 N. E. Rep. 115), 87.
Holbrook v. Utica &c. R. Co. (16 Barb. 113; 12 N. Y. 236), 225, 614.
Holden v. Fitchburg R. Co. (129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. Ry. Cas. 94), 445, 464, 496, 502.
Holden v. Liverpool Gas Co. (3 C. B. 1), 607.
Holden v. Rutland &c. R. Co. (30 Vt. 298), 340.
Holden v. Shattuck (34 Vt. 336), 323, 388.
Holland v. Bartch (120 Ind. 46; 22 N. E. Rep. 83), 414.
Holland v. Brown (35 Fed. Rep. 43), 97.
Holland v. Chicago &c. R. Co. (5 McCrary, 549), 314, 497.
Holland v. Lynn &c. R. Co. (144 Mass. 425; 11 N. E. Rep. 674), 96.
Holland v. West End &c. Ry. Co. (16 Mo. App. 172), 338.
Hollender v. New York &c. R. Co. (14 Daly, 219; 19 Abb. N. C. 18), 258.
Holly v. Atlanta St. Railroad (61 Ga. 215; 34 Am. Rep. 97), 419.
Holly v. Boston Gas Light Co. (8 Gray, 123), 172, 179, 180.
Holmes v. Central &c. R. Co. (37 Ga. 593), 301, 314.
Holmes v. Clarke (6 Hurl. & N. 349; 7 Hurl. & N. 937), 539.
Holmes v. North Eastern Ry. Co. (L. R. 4 Exch. 254; L. R. 6 Exch. 123), 81, 316, 491.
Holmes v. Or. & Cal. Ry. Co. (6 Sawyer, 262), 565.
Holmes v. Seeley (19 Wend. 507), 383.
Holstine v. Oregon &c. R. Co. (8 Or. 163), 103, 125, 279.
Holzab v. New Orleans &c. R. Co. (38 La. Ann. 185; 58 Am. Rep. 177), 62, 156.
Homan v. Franklin County (90 Iowa, 185), 55.
Homan v. Stanley (66 Penn. St. 464; 5 Am. Rep. 389), 382.
Honegsberger v. Second Ave. R. Co. (1 Keyes, 552; 33 How. Pr. 193; 2 Abb. App. Dec. 378), 171.
Honor v. Albrighton (93 Penn. St. 475), 490.
Hooker v. Chicago &c. R. Co. (76 Wis. 542), 80, 187.
Hooksett v. Concord &c. R. Co. (38 N. H. 242), 363.
Hooper v. Boston &c. R. Co. (81 Me. 260; 17 Atl. Rep. 64), 289.
Hooper v. Chicago &c. Ry. Co. (33 N. W. Rep. 314), 344.
Hoover v. Texas &c. R. Co. (61 Tex. 503), 299.
Hopkins v. Kansas &c. R. Co. (18 Kan. 462), 342.
Hopkins v. Town of Rush River (70 Wis. 10; 34 N. W. Rep. 909), 55, 368.
Hopkius v. Utah Northern Ry. Co. (13 Pac. Rep. 343), 606.
Hoppe v. Chicago &c. Ry. Co. (61 Wis. 357), 190, 203.
Horbison v. Metropolitan Traction Co. (9 App. D. C. 60), 436.
Horn v. Atlantic &c. R. Co. (35 N. H. 169), 340.
Horner v. Williams (100 N. C. 230; 5 S. E. Rep. 734), 331.
Hortin v. Vulcan Iron Works (13 App. Div. (N. Y.) 508), 520.
Horton v. Ipswich (12 Cush. 493), 371, 405.
Hospes v. Chicago &c. Ry. Co. (29 Fed. Rep. 763), 240.
Hotel Ass'n v. Walters (23 Neb. 280; 36 N. W. Rep. 561), 83.
Hoth v. Peters (55 Wis. 405), 18, 607.
Houfe v. Fulton (29 Wis. 296; 9 Am. Rep. 568), 381, 390.
Hough v. Railroad Co. (100 U. S. 213), 475, 495, 502, 605.
Hough v. Texas &c. R. Co. (100 U. S. 213), 505, 541, 543.
Houghey v. Hart (62 Iowa, 96; 49 Am. Rep. 138), 594.
Houghkirk v. President &c. (92 N. Y. 219; 44 Am. Rep. 370), 278.

[The references are to pages.]

Hounsell v. Smyth (7 C. B. (N. S.) 731; 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227; 97 Eng. Com. Law, 731), 79, 297, 316, 382, 383.
Hourney v. Brooklyn City R. Co. (7 N. Y. Supl. 602), 436.
Housatonic &c. R. Co. v. Knowles (30 Conn. 313), 324.
Housatonic &c. R. Co. v. Waterbury (23 Conn. 101), 332, 351.
House v. Erie R. Co. (26 App. Div. (N. Y.) 559), 266.
House v. Inhabitants of Fulton (29 Wis. 296; 9 Am. Rep. 568), 370.
Houser v. Chicago &c. R. Co. (60 Iowa, 230; 46 Am. Rep. 65), 472, 483, 633.
Houser v. Fully (62 Penn. St. 92; 1 Am. Rep. 390), 586, 589.
Houston v. Traphagen (47 N. J. Law, 23), 384.
Houston v. Vicksburg &c. R. Co. (39 La. Ann. 796; 2 So. Rep. 562), 301.
Houston &c. Ry. Co. v. Adams (63 Tex. 200), 348.
Houston &c. Ry. Co. v. Brin (77 Tex. 174; 13 S. W. Rep. 886), 259.
Houston &c. Ry. Co. v. Carson (66 Tex. 345), 91.
Houston &c. Ry. Co. v. Clemmons (55 Tex. 88; 40 Am. Rep. 799), 50, 217, 218.
Houston &c. Ry. Co. v. Conrad (62 Tex. 627), 442.
Houston &c. Ry. Co. v. Cowser (57 Tex. 293), 606.
Houston &c. Ry. Co. v. Dunham (49 Tex. 181), 497.
Houston &c. Ry. Co. v. Gorbett (49 Tex. 573), 24, 46, 117, 213.
Houston &c. Ry. Co. v. Hampton (64 Tex. 427), 207, 228.
Houston &c. Ry. Co. v. Leslie (57 Tex. 83), 213.
Houston &c. Ry. Co. v. Lowe (11 S. W. Rep. 1065), 446.
Houston &c. Ry. Co. v. Moore (49 Tex. 31; 30 Am. Rep. 98), 222, 241.
Houston &c. Ry. Co. v. O'Hare (64 Tex. 600), 537.
Houston &c. Ry. Co. v. Oram (49 Tex. 341), 497, 507.
Houston &c. Ry. Co. v. Reason (61 Tex. 613), 569.
Houston &c. Ry. Co. v. Richards (59 Tex. 373), 18.
Houston &c. Ry. Co. v. Rider (62 Tex. 267), 443.
Houston &c. Ry. Co. v. Simpson (60 Tex. 103), 185, 196.
Houston &c. Ry. Co. v. Smith (52 Tex. 178), 567, 568.
Houston &c. Ry. Co. v. Smith (77 Tex. 179; 13 S. W. Rep. 972), 27, 320.
Houston &c. Ry. Co. v. Sympkins (54 Tex. 615; 38 Am. Rep. 632), 78, 292, 298, 302, 314, 567.
Houston &c. Ry. Co. v. Wilson (60 Tex. 142), 267.
Hovorka v. Minneapolis &c. Ry. Co. (34 Minn. 281), 347.
Howard v. Delaware & H. Canal Co. (40 Fed. Rep. 195), 479.
Howard v. Denver &c. Ry. Co. (26 Fed. Rep. 837), 475.
Howard v. Kansas City &c. R. Co. (41 Kan. 403; 21 Pac. Rep. 267), 129, 291.
Howard v. Louisville &c. Ry. Co. (67 Miss. 247; 7 So. Rep. 216), 335.
Howard v. Northern Cent. Ry. Co. (1 N. Y. Supl. 528), 262, 280.
Howard v. St. Paul &c. Ry. Co. (32 Minn. 214), 288.
Howard, County of, v. Legg (11 N. E. Rep. 612), 53.
Howd v. Mississippi &c. R. Co. (50 Miss. 178), 454.
Howe v. M. S. P. & S. M. R. Co. (62 Minn. 71; 64 N. W. Rep. 102), 163, 272.
Howells v. Landore Siemen's Steel Co. (L. R. 10 Q. B. 62; 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433), 464, 473.
Howland v. Vincent (10 Metc. 671), 383.
Hoye v. Chicago &c. R. Co. (67 Wis. 1; 62 Wis. 666; 23 N. W. Rep. 14), 282, 628, 632, 634.
Hoyt v. Hudson, 41 Wis. 105), 607.
Hoyt v. New York &c. R. Co. (118 N. Y. 399; 23 N. E. Rep. 565), 27.
Hubbard v. Mason City (60 Iowa, 400), 571.
Hubener v. New Orleans &c. R. Co. (23 La. Ann. 492), 178.
Hubgh v. New Orleans &c. R. Co. (6 La. Ann. 495; 54 Am. Dec. 565), 96, 443, 545.
Huddleston v. Machine Shop (106 Mass. 282), 543.

[The references are to pages.]

Hudson v. Wabash &c. Ry. Co. (32 Mo. App. 667; 101 Mo. 13; 14 S. W. Rep. 15), 291, 605, 623.
Huelsenkamp v. Citizens' R. Co. (34 Mo. 45; 37 Mo. 567), 435, 633.
Huerzeler v. Central Cross Town R. Co. (139 N. Y. 490; 39 N. E. Rep. 1111), 202.
Huey v. Gahlenbeck (121 Penn. St. 238; 15 Atl. Rep. 520), 83.
Huff v. Ames (16 Neb. 139; 49 Am. Rep. 716), 185, 186.
Huff v. Austin (46 Ohio, 386; 21 N. E. Rep. 864), 445.
Hughes v. Galveston &c. Ry. Co. (67 Tex. 595; 4 S. W. Rep. 219), 301, 320.
Hughes v. Great Western &c. Ry. Co. (14 C. B. 637), 244.
Hughes v. Macfie (2 Hurl. & Colt. 744; 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315), 179, 197, 199, 200, 306.
Hughes v. Muscatine (44 Iowa, 672), 22.
Huhn v. Missouri Pac. Ry. Co. (92 Mo. 440; 4 S. W. Rep. 937), 498, 536.
Huizega v. Cutler &c. Lumber Co. (51 Mich. 272), 497.
Hulehan v. Green Bay &c. R. Co. (68 Wis. 520; 32 N. W. Rep. 529), 541.
Hulett v. St. Louis &c. R. Co. (67 Mo. 240), 502, 531.
Hull v. City of Kansas (54 Mo. 601; 14 Am. Rep. 487), 37.
Hull v. Hall (78 Me. 114), 499.
Hull v. Richmond (2 Woodb. & M. 337), 605.
Hund v. Geier (72 Ill. 393), 120, 172.
Hungerford v. Syracuse &c. R. Co. (46 Hun, 339), 346.
Hunn v. Michigan Cent. R. Co. (78 Mich. 513; 44 N. W. Rep. 502), 446, 469, 482.
Hunt v. Lowell Gas Co. (1 Allen, 343), 109.
Hunt v. Salem (121 Mass. 294), 411.
Hunt v. Town of Pownall (9 Vt. 411), 370.
Hunter v. Cooperstown &c. R. Co. (112 N. Y. 371; 19 N. E. Rep. 820), 96, 108.
Hunter v. Cooperstown &c. R. Co. (126 N. Y. 18; 26 N. E. Rep. 958), 209, 210.
Huntington, City of, v. Breen (77 Ind. 29), 372, 602.
Huntoon v. Trumbull (2 McCrary, 314), 165.
Hurd v. Rutland &c. R. Co. (25 Vt. 116), 323, 336, 348.
Hurst v. Burnside (12 Or. 520), 537.
Hurt v. St. Louis &c. Ry. Co. (94 Mo. 255; 7 S. W. Rep. 1, 5), 117, 234.
Hussey v. Coger (39 Hun (N. Y.) 639; 112 N. Y. 114), 465, 470, 471, 483.
Hussey v. Ryan (64 Md. 426; 54 Am. Rep. 772), 195, 591.
Hutchins v. Priestley Express Wagon &c. Co. (61 Mich. 252; 28 N. W. Rep. 85), 83.
Hutchinson v. Collins (90 Ill. 410), 372, 375, 385.
Hutchinson v. Concord (41 Vt. 271), 401.
Hutchinson v. The York, New Castle and Berwick Ry. Co. (5 Exch. 343; 14 Jur. 837; 6 Eng. Rail. Cas. 588; 19 L. J. (Exch.) 296), 98, 450.
Hyatt v. Hannibal &c. R. Co. (19 Mo. App. 287), 498.
Hyde v. Jamaica (27 Vt. 443), 367, 620.
Hydraulic Works Co. v. Orr (83 Penn. St. 332), 199, 306.
Hyland v. Burns (10 App. Div. (N. Y. 386), 29, 202.
Hyland v. Yonkers R. Co. (1 N. Y. Supl. 363), 424.
Hyland v. Yonkers R. Co. (4 N. Y. Supl. 305), 203.

I.

Ihl v. Forty-second St. R. Co. (47 N. Y. 317; 7 Am. Rep. 450; 49 N. Y. 323), 172, 174, 203, 410.
Illinois Cent. R. Co. v. Handy (63 Miss. 609), 251.
Illinois Cent. R. Co. v. Morrison (19 Ill. 136), 249.
Illinois Cent. R. Co. v. Person (65 Miss. 319; 3 So. Rep. 375), 335.
Illinois Cent. R. Co. v. Read (37 Ill. 484), 249.
Illinois &c. R. Co. v. Able (59 Ill. 131), 63, 209.
Illinois &c. R. Co. v. Adams (42 Ill. 474), 246.
Illinois &c. R. Co. v. Arnold (47 Ill. 173), 346.
Illinois &c. R. Co. v. Baches (55 Ill. 379), 120, 264, 321.
Illinois &c. R. Co. v. Baker (47 Ill. 295), 327, 329.

[The references are to pages.]

Illinois &c. R. Co. v. Benton (69 Ill. 174), 120, 126, 285.
Illinois &c. R. Co. v. Buckner (28 Ill. 299), 292.
Illinois &c. R. Co. v. Cox (21 Ill. 20), 477, 478, 481.
Illinois &c. R. Co. v. Cragin (71 Ill. 177), 120, 292, 565, 570.
Illinois &c. R. Co. v. Ebert (74 Ill. 399), 272, 289, 571.
Illinois &c. R. Co. v. Fears (53 Ill. 115), 120.
Illinois &c. R. Co. v. Frazier (47 Ill. 505), 120, 358.
Illinois &c. R. Co. v. Goddard (72 Ill. 567), 120, 126.
Illinois &c. R. Co. v. Godfrey (71 Ill. 500; 22 Am. Rep. 112), 79, 120, 258, 296, 316.
Illinois &c. R. Co. v. Goodwin, 30 Ill. 117), 325.
Illinois &c. R. Co. v. Green (81 Ill. 19; 25 Am. Rep. 255), 213, 232, 235, 238.
Illinois &c. R. Co. v. Hall (72 Ill. 222), 25, 120, 298.
Illinois &c. R. Co. v. Hammer (72 Ill. 347; 85 Ill. 526), 120, 126, 315, 316, 317, 321.
Illinois &c. R. Co. v. Hetherington (83 Ill. 510), 16, 19, 25, 76, 113, 121, 126, 127, 298, 316, 317.
Illinois &c. R. Co. v. Hoffman (67 Ill. 287), 91.
Illinois &c. R. Co. v. Honck (72 Ill. 285), 545.
Illinois &c. R. Co. v. Hutchinson (47 Ill. 408), 293, 567, 572.
Illinois &c. R. Co. v. Jewell (46 Ill. 99), 509, 536.
Illinois &c. R. Co. v. McClelland (42 Ill. 355), 93, 362.
Illinois &c. R. Co. v. McKay (69 Miss. 139; 12 So. Rep. 447), 362.
Illinois &c. R. Co. v. McKee (43 Ill. 120), 346.
Illinois &c. R. Co. v. Maffit (67 Ill. 431), 114, 120, 126.
Illinois &c. R. Co. v. Middlesworth (43 Ill. 64, 65; 40 Ill. 494), 114, 119, 125, 326.
Illinois &c. R. Co. v. Mills (42 Ill. 407, 409), 119, 358.
Illinois &c. R. Co. v. Modglin (85 Ill. 481), 301.
Illinois &c. R. Co. v. Nunn (51 Ill. 78), 120, 358.
Illinois &c. R. Co. v. Pondrom (51 Ill. 333; 2 Am. Rep. 306), 120.
Illinois &c. R. Co. v. Sanders (166 Ill. 270; 46 N. E. Rep. 799), 524, 532.
Illinois &c. R. Co. v. Simmons (38 Ill. 242), 119.
Illinois &c. R. Co. v. Slater (129 Ill. 91; 21 N. E. Rep. 575), 190, 196, 203.
Illinois &c. R. Co. v. Sweeny (52 Ill. 325), 120.
Illinois &c. R. Co. v. Welch (52 Ill. 183; 4 Am. Rep. 593), 19, 497, 507.
Illinois &c. R. Co. v. Whalen (19 Ill. App. 116), 498.
Illinois &c. R. Co. v. Williams (27 Ill. 49), 343.
Illinois Steel Co. v. Schymanowski (162 Ill. 447; 44 N. E. Rep. 876), 469, 472, 515, 525.
Iltis v. Chicago &c. Ry. Co. (40 Minn. 273; 41 N. W. Rep. 1040), 59.
Ilwaco Ry. Co. v. Hadrick (1 Wash. St. 446; 25 Pac. Rep. 335), 308.
Imhoff v. Chicago &c. R. Co. (20 Wis. 364), 231.
In re Rensselaer &c. R. Co. (4 Paige, 553), 336.
Indermaur v. Dames (L. R. 1 C. P. 274; 12 Jur. (N. S.) 432; 35 L. J. (C. P.) 184; 14 Week. Rep. 586; 14 L. J. (N. S.) 484; 36 L. J. (C. P.) 181; L. R. 2 C. P. 311; 15 Week. Rep. 434; 16 L. T. (N. S) 293), 20, 81, 84, 305, 383.
Indiana Car Co. v. Parker (100 Ind. 181), 511.
Indiana Cent. R. Co. v. Mundy (21 Ind. 48), 249.
Indiana &c. Ry. Co. v. Dailey (110 Ind. 75), 495, 507, 509.
Indiana &c. Ry. Co. v. Hammock (113 Ind. 1; 14 N. E. Rep. 737), 276.
Indiana &c. Ry. Co. v. Hudelson (13 Ind. 325), 296, 316.
Indiana &c. Ry. Co. v. Quick (109 Ind. 295), 343, 344.
Indiana &c. Ry. Co. v. Sawyer (100 Ind. 342), 343.
Indianapolis v. Cook (99 Ind. 10), 55.
Indianapolis &c. R. Co. v. Adkins (23 Ind. 340), 346, 350.
Indianapolis &c. R. Co. v. Birney (71 Ill. 391), 238.
Indianapolis &c. R. Co. v. Brownenburg (32 Ind. 199), 337.
Indianapolis &c. R. Co. v. Carr (35 Ind. 510), 65.
Indianapolis &c. R. Co. v. Evans (88 Ill. 63), 114, 121, 126.

[The references are to pages.]

Indianapolis &c. R. Co. v. Flanigan (77 Ind. 365), 497, 532, 534.
Indianapolis &c. R. Co. v. Galbraith (63 Ill. 436), 292.
Indianapolis &c. R. Co. v. Hall (88 Ill. 368), 342.
Indianapolis &c. R. Co. v. Hartu (38 Ind. 557), 325.
Indianapolis &c. R. Co. v. Horst (93 U. S. 291), 206, 223, 224, 605.
Indianapolis &c. R. Co. v. Johnson (102 Ind. 352), 454.
Indianapolis &c. R. Co. v. Keely (23 Ind. 133), 601, 602.
Indianapolis &c. R. Co. v. Kinney (8 Ind. 402), 341.
Indianapolis &c. R. Co. v. Love (10 Ind. 554), 496, 505, 510.
Indianapolis &c. R. Co. v. McClaren (62 Ind. 566), 301, 567.
Indianapolis &c. R. Co. v. McClure (26 Ind. 370), 325.
Indianapolis &c. R. Co. v. Petty (25 Ind. 414), 346, 348.
Indianapolis &c. R. Co. v. Rutherford (29 Ind. 82), 225.
Indianapolis &c. R. Co. v. Shimer (17 Ind. 295), 345, 346, 350.
Indianapolis &c. R. Co. v. Smith (78 Ill. 112), 285.
Indianapolis &c. R. Co. v. Stables (62 Ill. 313), 120, 285.
Indianapolis &c. R. Co. v. Stout (53 Ind. 143; 41 Ind. 149), 23, 63, 66, 98, 260, 281, 285.
Indianapolis &c. R. Co. v. Townsend (10 Ind. 39), 351.
Indianapolis &c. R. Co. v. Troy (91 Ill. 474; 33 Am. Rep. 57), 497, 505, 506.
Indianapolis &c. R. Co. v. Watson (114 Ind. 20; 15 N. E. Rep. 824), 629.
Indianapolis &c. R. Co. v. Wright (13 Ind. 213; 22 Ind. 377), 326, 332, 346.
Indianapolis P. & C. R. Co. v. Pitzer (109 Ind. 179; 10 N. E. Rep. 70), 58.
Ingalls v. Bills (9 Metc. 1; 43 Am. Dec. 346), 63, 205, 215.
Ingersoll v. New York &c. R. Co. (6 N. Y. Super. Ct. 416), 286.
Ingersoll v. Stockbridge &c. R. Co. (8 Allen, 438), 357.
Inman v. Chicago &c. R. Co. (60 Iowa, 459), 329, 332, 349.
Insurance Co. v. Seaver (19 Wall. 542), 364.
Insurance Co. v. Transportation Co. (12 Wall. 199), 364.
Insurance Co. v. Tweed (7 Wall. 44), 364.
International &c. R. Co. v. Bell (75 Tex. 50; 12 S. W. Rep. 321), 500.
International &c. R. Co. v. Cock (68 Tex.) 713; 5 S. W. Rep. 635), 222.
International &c. R. Co. v. Dyer (76 Tex. 156; 13 S. W. Rep. 377), 27, 267.
International &c. R. Co. v. Eckford (71 Tex. 274; 8 S. W. Rep. 679), 238.
International &c. R. Co. v. Folliard (66 Tex. 603; 1 S. W. Rep. 624), 238.
International &c. R. Co. v. Garcia (75 Tex. 583; 13 S. W. Rep. 223), 291, 301.
International &c. R. Co. v. Hester (72 Tex. 40; 11 S. W. Rep. 1041; 64 Tex. 401), 521, 544.
International &c. R. Co. v. Hughes (68 Tex. 290; 4 S. W. Rep. 492), 344.
International &c. R. Co. v. Irvine (64 Tex. 529), 223.
International &c. R. Co. v. Kuehn (70 Tex. 582; 8 S. W. Rep. 484), 280.
International &c. R. Co. v. McDonald (75 Tex. 41; 12 S. W. Rep. 860), 259.
International &c. R. Co. v. Neff (87 Tex. 303), 65.
International &c. R. Co. v. Satterwhite (Tex.) (47 S. W. Rep. 41), 211.
International &c. R. Co. v. Smith (62 Tex. 252), 302.
International R. Co. v. Doyle (49 Tex. 190), 497, 517.
Interstate &c. Ry. Co. v. Fox (41 Kan. 715; 21 Pac. Rep. 797), 441.
Ireland v. Oswego &c. R. Co. (13 N. Y. 533), 635.
Irey v. Pennsylvania R. Co. (132 Penn. St. 563; 26 W. N. C. 58; 19 Atl. Rep. 341), 269.
Iron Mountain R. Co. v. Dies (Tenn.) (41 S. W. Rep. 860), 266.
Iron Ry. Co. v. Mowery (36 Ohio St. 418; 38 Am. Rep. 597), 64, 65, 215.
Irvine v. Wood (51 N. Y. 224); 10 Am. Rep. 603), 378.
Irwin v. Spriggs (5 Gill. (Md.) 200), 32, 33, 605.

[The references are to pages.]

Isaacs v. Beth Hamodash Society (1 Hilt. 469), 391.
Isaacs v. Third Ave. R. Co. (47 N. Y. 122), 420.
Isaacson v. New York &c. R. Co. (94 N. Y. 278; 46 Am. Rep. 142), 252.
Isabel v. Hannibal &c. R. Co. (60 Mo. 475), 78, 175, 187, 190, 297, 302, 303.
Isabell v. New York &c. R. Co. (27 Conn. 393), 32, 34, 79, 91, 324, 327, 328, 635.
Ivens v. Cincinnati &c. Ry. Co. (103 Ind. 27), 76.
Ivory v. Town of Deer Park (116 N. Y. 476; 22 N. E. Rep. 1080), 370.

J.

Jackson v. County Com'rs (76 N. C. 282), 25.
Jackson v. Indianapolis &c. R. Co. (47 Ind. 454), 601.
Jackson v. Kansas &c. R. Co. (31 Kan. 761), 530, 538.
Jackson v. Metropolitan Ry. Co. (3 App. Cas. 193), 631.
Jackson v. Nashville &c. R. Co. (13 Lea, 491; 49 Am. Rep. 663), 42, 134.
Jackson v. Rutland &c. R. Co. (25 Vt. 150; 60 Am. Dec. 246), 323, 336.
Jackson v. St. Louis &c. Ry. Co. (29 Mo. App. 495), 211.
Jackson v. Second Ave. R. Co. (47 N. Y. 274; 7 Am. Rep. 448), 420.
Jackson Tp. v. Wagner (127 Penn. St. 184; 17 Atl. Rep. 903; 24 W. N. C. 217), 368.
Jacobs v. Bangor (16 Me. 187; 33 Am. Dec. 652), 369, 376.
Jacobs v. Louisville &c. R. Co. (10 Bush, 263), 18, 137, 138, 458.
Jacob's Case (20 Ill. 478), 119.
Jacobus v. St. Paul &c. R. Co. (20 Minn. 125; 18 Am. Rep. 360), 206, 219, 240, 249.
Jaeger v. Chicago &c. Ry. Co. (75 Wis. 130; 43 N. W. Rep. 732), 344.
Jager v. Adams (123 Mass. 26; 25 Am. Rep. 7), 409.
Jalie v. Cardinal (35 Wis. 118), 23, 589.
James v. Emmet Mining Co. (55 Mich. 335), 484.
James v. Great Western Rv. Co. (L. R. 2 C. P. 635, n.), 286.
Jamison v. San Jose &c. R. Co. (55 Cal. 593), 17, 209.
Jaquith v. Richardson (8 Metc. 213), 414.
Jarret v. Atlanta &c. R. Co. (83 Ga. 347; 9 S. E. Rep. 681), 212.
Jefferis v. Phila. &c. R. Co. (3 Houst. 447), 357, 360.
Jefferson, Village of, v. Chapman (127 Ill. 438; 20 N. E. Rep. 33), 119.
Jeffersonville &c. R. Co. v. Adams (43 Ind. 403), 325.
Jeffersonville &c. R. Co. v. Bowen (40 Md. 545; 49 Md. 154), 168, 172.
Jeffersonville &c. R. Co. v. Goldsmith (47 Ind. 43), 296, 316.
Jeffersonville &c. R. Co. v. Hendricks (26 Ind. 228), 208, 213, 601, 602.
Jeffersonville &c. R. Co. v. Lyon (72 Ind. 107), 601.
Jeffersonville &c. R. Co. v. Ross (37 Ind. 545), 341, 345, 351.
Jeffersonville &c. R. Co. v. Underhill (48 Ind. 389), 325.
Jeffords v. Crump (5 Week. Notes Cas. 10), 590.
Jeffrey v. Keokuk &c. R. Co. (56 Iowa, 546), 18, 23, 53, 54.
Jenkins v. Mahopac Iron Ore Co. (10 N. Y. Supl. 484), 538.
Jenks v. Wilbraham (11 Gray, 142), 389.
Jennings v. Van Schaick (108 N. Y. 530; 15 N. E. Rep. 424), 373, 384.
Jennings v. Wayne (63 Me. 468), 77.
Jessen v. Swelgert (66 Cal. 182), 409.
Jetter v. New York &c. R. Co. (2 Keyes, 154), 203.
Jewell v. Chicago &c. R. Co. (54 Wis. 610; 41 Am. Rep. 63), 212, 215.
Jewell v. Parr (13 C. B. 916), 631.
Jewett v. Kansas City &c. Ry. Co. (38 Mo. App. 48), 335.
Jewett v. Keene (62 N. H. 701), 199.
Jewson v. Gath (1 C. & E. 564), 80.
Jochem v. Robinson (72 Wis. 199; 39 N. W. Rep. 383), 55.
Johanus v. National Accident Society (16 App. Div. (N. Y.) 117), 432.
John B. Lyon, The (33 Fed. Rep. 184), 442.
John's Admr. v. Louisville &c. R. Co. (10 S. W. Rep. 417), 299.
Johnson v. Ashland Water Co. (71 Wis. 553; 37 N. W. Rep. 823), 508.

[The references are to pages.]

Johnson v. Ashland Water Co. (77 Wis. 51; 45 N. W. Rep. 807), 470, 517.
Johnson v. Baltimore &c. R. Co. (25 W. Va. 570; 6 Mackey, 232), 278, 335.
Johnson v. Berkshire Ins. Co. (4 Allen, 388), 573.
Johnson v. Boston (118 Mass. 114), 489.
Johnson v. Boston &c. R. Co. (125 Mass. 75), 103.
Johnson v. Boston Towboat Co. (135 Mass. 209; 46 Am. Rep. 458), 454, 465, 483, 534, 626, 633.
Johnson v. Brnner (61 Penn. St. 58), 496, 634.
Johnson v. Canal St. Ry. Co. (27 La. Ann. 53), 49, 91, 425.
Johnson v. Chicago &c. R. Co. (77 Mo. 546; 27 Mo. App. 379), 263, 270, 290, 343.
Johnson v. Chicago &c. R. Co. (56 Wis. 274), 298, 303, 313.
Johnson v. Chicago &c. R. Co. (58 Iowa, 348), 420.
Johnson v. Hudson River &c. R. Co. (20 N. Y. 65; 6 Duer, 633; 5 Duer, 27), 33, 38, 50, 91, 613, 614, 618.
Johnson v. Irasburgh (47 Vt. 28; 19 Am. Rep. 111), 255.
Johnson v. Lindsay (65 L. T. R. 97 (H. of L.), 23 Q. B. Div. 508), 488.
Johnson v. Lowell (12 Allen, 572), 404.
Johnson v. Missouri Pac. Ry. Co. (18 Neb. 690), 443, 634.
Johnson v. Reading City Pass. Ry. Co. (160 Penn. St. 647; 28 Atl. Rep. 1001), 201.
Johnson v. St. Paul &c. R. Co. (43 Minn. 53), 536.
Johnson v. Small (5 B. Mon. 25), 414.
Johnson v. Spear (76 Mich. 139; 42 N. W. Rep. 1092), 500, 510.
Johnson v. Town of Irasburgh (47 Vt. 28; 19 Am. Rep. 111), 255, 396.
Johnson v. West Chester &c. R. Co. (70 Penn. St. 357), 26, 63, 66, 209.
Johnson v. Whitefield (18 Me. 218; 36 Am. Dec. 721), 23, 368, 371.
Johnson v. Wilcox (135 Penn. St. 217; 19 Atl. Rep. 939), 83.
Johnson v. Wing (3 Mich. 163), 324.
Johnson v. Pittsburgh &c. R. Co. (114 Penn. St. 443; 7 Atl. Rep. 184), 480, 507.
Joliet v. Seward (86 Ill. 402), 114, 121, 126.
Joliet &c. R. Co. v. Jones (20 Ill. 221), 336, 354.
Jonasch v. Standard Gas Light Co. (56 N. Y. Super. Ct. 447), 200.
Jones v. Alabama Mineral R. Co. (107 Ala. 400; 18 So. Rep. 30), 443.
Jones v. Andover (10 Allen, 18), 254, 393, 414.
Jones v. Boston (104 Mass. 75; 6 Am. Rep. 194), 408.
Jones v. Boyce (1 Stark. 493), 62, 64, 215, 416.
Jones v. Chicago &c. R. Co. (43 Minn. 279; 45 N. W. Rep. 444), 218.
Jones v. Chicago &c. R. Co. (42 Minn. 183; 43 N. W. Rep. 1114), 107.
Jones v. Columbia &c. R. Co. (20 S. C. 249), 331.
Jones v. Corporation of Liverpool (14 Q. B. D. 890), 149.
Jones v. East Tenn. &c. R. Co. (128 U. S. 443), 290.
Jones v. Florence Mining Co. (60 Wis. 268; 57 Am. Rep. 269), 446, 526.
Jones v. Granite Mills (126 Mass. 84), 504.
Jones v. Inhabitants of Waltham (4 Cush. 299; 50 Am. Dec. 783), 367, 369.
Jones v. Missouri Pac. Ry. Co. (31 Mo. App. 614), 233.
Jones v. New York &c. R. Co. (10 Abb. N. C. 200; 62 How. Pr. 450), 615, 619.
Jones v. Nichols (46 Ark. 207; 55 Am. Rep. 575), 382.
Jones v. North Carolina &c. R. Co. (67 N. C. 125), 279, 292.
Jones v. Sheboygan &c. R. Co. (42 Wis. 306), 346, 354.
Jones v. Utica &c. R. Co. (36 Hun, 115), 168.
Jones v. Voorhees (10 Ohio, 145), 248.
Jones v. Western N. C. R. Co. (95 N. C. 328), 331.
Jones v. Witherspoon (7 Jones (Law) 555), 337.
Jones v. Yeager (2 Dill. 64), 497, 540.

[The references are to pages.]

Jones' Adm'r v. Louisville &c. R. Co. (82 Ky. 610), 105, 137, 458, 528.
Joseph Garneau Cracker Co. v. Palmer (28 Neb. 307; 44 N. W. Rep. 463), 500.
Joslin v. Grand Rapids Ice Co. (50 Mich. 516; 45 Am. Rep. 54), 448, 454.
Joyce v. Worcester (140 Mass. 245), 58.
Joyner v. Great Barrington (118 Mass. 463), 380.
Joyner v. South Carolina R. Co. (26 S. C. 49; 1 S. E. Rep. 52), 331.
Jucht v. Behrens (7 N. Y. Supl. 195), 83.
Judkins v. Maine Cent. R. Co. (81 Me. 351; 14 Atl. Rep. 735), 500.
Judson v. Great Northern Ry. Co. (63 Minn. 248; 65 N. W. Rep. 447), 273, 275.

K.

Kahn v. Love (3 Or. 206), 601.
Kain v. Larkin (9 N. Y. Supl. 89; 56 Hun, 79), 97, 104.
Kain v. New York &c. R. Co. (3 N. Y. Supl. 311), 271.
Kain v. Smith (25 Hun, 149), 502.
Kalbfleisch v. Long Island R. Co. (102 N. Y. 520; 55 Am. Rep. 832), 360.
Kane v. New York &c. R. Co. (9 N. Y. Supl. 879), 282.
Kane v. New York &c. R. Co. (132 N. Y. 160; 30 N. E. Rep. 256), 283.
Kansas &c. R. Co. v. Allen (22 Kan. 285), 308.
Kansas &c. R. Co. v. Cranmer (4 Colo. 534), 91.
Kansas &c. R. Co. v. Dorough (72 Tex. 108; 10 S. W. Rep. 711), 107, 209.
Kansas &c. R. Co. v. Fitzhugh (61 Ark. 341; 33 S. W. Rep. 960), 444.
Kansas &c. R. Co. v. Fitzsimmons (22 Kan. 686), 31 Am. Rep. 203; 18 Kan. 34), 128, 198, 303, 308.
Kansas &c. R. Co. v. Little (19 Kan. 267), 465, 469.
Kansas &c. R. Co. v. McHenry (24 Kan. 501), 325, 342, 345.
Kansas &c. R. Co. v. Mower (16 Kan. 573), 325, 342.
Kansas &c. R. Co. v. Owen (25 Kan. 419), 357.
Kansas &c. R. Co. v. Peavy (29 Kan. 170; 44 Am. Rep. 630), 117, 128, 129, 555.
Kansas &c. R. Co. v. Phillibert (25 Kan. 583), 605.
Kansas &c. R. Co. v. Pointer (9 Kan. 620; 14 Kan. 37), 23, 101 128, 315, 605, 610.
Kansas &c. R. Co. v. Salmon (11 Kan. 83), 98, 464, 550.
Kansas &c. R. Co. v. Simpson (30 Kan. 645; 46 Am. Rep. 104), 248.
Kansas &c. R. Co. v. Ward (4 Colo. 30), 626, 634.
Kansas &c. Ry. Co. v. White's Adm'r (32 U. S. App. 192; 67 Fed. Rep. 481), 216, 222.
Kansas &c. R. Co. v. Wiggins (24 Kan. 588), 350.
Kansas City &c. R. Co. v. Becker (63 Ark. 477; 39 S. W. Rep. 358), 475, 482.
Kansas City &c. R. Co. v. Bolson (36 Kan. 534; 14 Pac. Rep. 5), 335.
Kansas City &c. R. Co. v. Burge (40 Kan. 736; 21 Pac. Rep. 589), 343.
Kansas City &c. R. Co. v. Cravens (43 Kan. 650), 335.
Kansas City &c. R. Co. v. Daughtry (88 Tenn. 721; 13 S. W. Rep. 698), 98.
Kansas City &c. R. Co. v. Kirksey (48 Ark. 366; 3 S. W. Rep. 190), 335.
Kansas City &c. R. Co. v. Landis (24 Kan. 406), 325, 345.
Kansas City &c. R. Co. v. Lane (33 Kan. 702), 335.
Kansas City &c. Ry. Co. v. Myers (7 So. Rep. 321), 335.
Kansas Pac. Ry. Co. v. Whipple (39 Kan. 531; 18 Pac. Rep. 730), 196.
Kaples v. Orth (61 Wis. 531), 409.
Karle v. Kansas &c. R. Co. (55 Mo. 476), 211, 260.
Karr v. Parks (40 Cal. 188), 63, 66, 172, 202.
Kaspari v. Marsh (74 Wis. 562; 43 N. W. Rep. 368), 498.
Kastl v. Wabash R. Co. (Mich.) (72 N. W. Rep. 28), 490.
Kay v. Penn. R. Co. (65 Penn. St. 269; 3 Am. Rep. 628), 184, 187, 191, 193, 196, 303, 315, 316, 321, 410.
Kean v. Baltimore &c. R. Co. (61 Md. 154), 292, 569.

[The references are to pages.]

Kean v. Detroit &c. Rolling Mills (66 Mich. 277; 33 N. W. Rep. 395), 507.
Keane v. Boycott (2 Henry B. 511), 513.
Kearney v. London &c. Ry. Co. (L. R. 6 Q. B. 759), 409.
Kearns v. Chicago &c. R. Co. (66 Iowa, 599), 499.
Kearns v. Snowden (104 Mass. 63), 77.
Keech v. Baltimore &c. R. Co. (17 Md. 33), 324.
Keefe v. Boston &c. R. Co. (142 Mass. 251), 231.
Keefe v. Milwaukee &c. R. Co. (21 Minn. 207; 18 Am. Rep. 393), 198.
Keegan v. Kavanaugh (62 Mo. 230), 444.
Keenan v. Cavanaugh (44 Vt. 262), 323.
Keffe v. Milwaukee &c. R. Co. (21 Minn. 207; 18 Am. Rep. 393), 307, 308.
Keilley v. Belcher (3 Sawyer, 500), 453.
Keim v. Union Ry. &c. Co. (90 Mo. 314; 2 S. W. Rep. 427), 286, 297.
Keitel v. St. Louis &c. R. Co. (28 Mo. App. 657), 623.
Keith v. Easton (2 Allen, 352), 389.
Keith v. Granite Mills (126 Mass. 90), 504.
Keith v. Pinkham (13 Me. 501), 219.
Keller v. New York &c. R. Co. (24 How. Pr. 172), 626, 633.
Kelley v. Cahle Co. (7 Mont. 70; 14 Pac. Rep. 633), 511.
Kelley v. Manhattan Ry. Co. (112 N. Y. 443; 20 N. E. Rep. 383), 231.
Kelley v. Mich. Cent. R. Co. (65 Mich. 186; 31 N. W. Rep. 904), 314.
Kelley v. Norcross (121 Mass. 508), 479.
Kelley v. Silver Spring Co. (12 R. I. 112; 34 Am. Rep. 615), 503, 541.
Kelley v. Union Ry. &c. Co. (18 Mo. App. 151), 279.
Kelley v. Wilson (21 Ill. App. 141), 538.
Kellny v. Mo. Pac. Ry. Co. (13 S. W. Rep. 806), 101, 103, 291.
Kellogg v. Chicago &c. R. Co. (26 Wis. 223; 7 Am. Rep. 69), 59, 357, 360, 362.
Kellogg v. Janesville (34 Minn. 132), 367.
Kelly v. Abbott (63 Wis. 307; 53 Am. Rep. 292), 532.
Kelly v. Baltimore &c. R. Co. (11 Atl. Rep. 659), 442, 523.
Kelly v. Chicago &c. R. Co. (88 Mo. 534), 267.
Kelly v. Chicago &c. R. Co. (35 Minn. 490), 523.
Kelly v. Doody (116 N. Y. 575; 22 N. E. Rep. 1084), 375.
Kelly v. Erie Telegraph &c. Co. (34 Minn. 321), 485.
Kelly v. Fond du Lac (31 Wis. 179), 380.
Kelly v. Hannibal &c. R. Co. (75 Mo. 138; 70 Mo. 604), 211, 263, 280.
Kelly v. Hendrie (26 Mich. 255), 264, 428.
Kelly v. Howell (41 Ohio St. 246), 483, 511.
Kelly v. Johnson (128 Mass. 530; 35 Am. Rep. 398), 490.
Kelly v. Minneapolis &c. R. Co. (29 Minn. 1), 289.
Kelly v. Newman (62 How. Pr. 156), 404, 406.
Kelly v. New York &c. R. Co. (9 N. Y. Supl. 90), 57.
Kelly v. Pennsylvania R. Co. (8 Atl. Rep. 856), 281.
Kelly v. Southern &c. R. Co. (28 Minn. 98), 284, 374, 405.
Kelly v. Town of Blackstone (147 Mass. 448; 18 N. E. Rep. 217), 57.
Kelly v. Union Ry. &c. Co. (95 Mo. 279; 8 S. W. Rep. 420), 91.
Kemp v. Phillips (55 Vt. 69), 627, 633.
Kendall v. Kendall (147 Mass. 482; 18 N. E. Rep. 233), 380.
Kendrick v. Towle (60 Mich. 363; 27 N. W. Rep. 567), 362.
Kennard v. Burton (25 Me. 39; 43 Am. Dec. 249), 16, 22, 33, 36, 189, 414, 416, 599.
Kennayde v. Pacific &c. R. Co. (45 Mo. 255), 289.
Kennedy v. Chicago &c. Ry. Co. (68 Iowa, 559), 287.
Kennedy v. County Comm'rs (69 Md. 65; 14 Atl. Rep. 524), 370.
Kennedy v. Denver &c. R. Co. (10 Colo. 493; 16 Pac. Rep. 210), 301.
Kennedy v. Manhattan Ry. Co. (33 Hun, 457), 521.
Kennedy v. Mayor &c. (73 N. Y. 365), 47.

[The references are to pages.]

Kennedy v. North Mo. R. Co. (36 Mo. 351), 260, 288.
Kenney v. City of Cohoes (16 N. Y. Week. Dig. 206), 404, 406.
Kenney v. New York &c. R. Co. (7 N. Y. Supl. 255), 247.
Kenny v. Cunard Steamship Co. (52 N. Y. Super. Ct. 434), 483.
Kenny v. Cunard Steamship Co. (55 N. Y. Super. Ct. 558), 462.
Kent v. Elstob (3 East. Rep. 18), 49.
Kent v. New Orleans &c. Ry. Co. (67 Miss. 608; 7 So. Rep. 391), 335.
Kentucky Cent. R. Co. v. Ackley (87 Ky. 271; 8 S. W. Rep. 691), 475.
Kentucky Cent. R. Co. v. Gastineau's Adm'r (83 Ky. 119), 100, 105.
Kentucky Cent. R. Co. v. Lebus (14 Bush, 518), 18, 324, 327, 334.
Kentucky Cent. R. Co. v. Thomas' Administrators (79 Ky. 160; 42 Am. Rep. 208), 17, 50, 137, 207, 217, 218, 605.
Kentucky Cent. R. Co. v. Wainwright's Adm'r (13 S. W. Rep. 438), 96.
Kenyon v. New York &c. R. Co. (5 Hun, 479), 38, 176, 296, 301.
Keokuk, City of, v. Independent District of Keokuk (53 Iowa, 352; 36 Am. Rep. 226), 406.
Keokuk &c. Packet Co. v. True (88 Ill. 608), 206, 420.
Kepperly v. Ramsden (83 Ill. 354), 78, 601.
Kern v. DeCastro &c. Refining Co. (5 N. Y. Supl. 648), 446, 447.
Kerr v. Forgue (54 Ill. 482; 5 Am. Rep. 146), 120, 175, 198, 303.
Kerwhacker v. Cleveland &c. R. Co. (3 Ohio St. 172; 62 Am. Dec. 246), 24, 32, 34, 46, 77, 78, 91, 101, 102, 103, 279, 326, 327, 328, 334, 337.
Kesee v. Chicago &c. R. Co. (30 Iowa, 78; 6 Am. Rep. 643), 358.
Kessler v. Brooklyn Heights R. Co. (3 App. Div. (N. Y.) 426), 163, 164.
Kevern v. Providence Mining Co. (70 Cal. 392), 446.
Kewanee v. Depew (80 Ill. 119), 120.
Keystone Bridge Co. v. Newberry (96 Penn. St. 246; 42 Am. Rep. 543), 454, 483.
Keys v. Village of Marcellas (50 Mich. 439; 45 Am. Rep. 52), 382.
Keyser v. Chicago &c. R. Co. (56 Mich. 559; 56 Am. Rep. 405; 19 Am. Law Rev. 668), 303, 304, 309.
Kibele v. Philadelphia (105 Penn. St. 41), 53, 534.
Kidder v. Dunstable (11 Gray, 342), 77.
Kielley v. Belcher &c. Co. (3 Sawyer, 500), 540.
Killea v. Faxon (125 Mass. 485), 479.
Kimball v. Friend's Ex'r (95 Va. 125; 27 S. E. Rep. 901), 265, 283, 607.
Kimball v. Rutland &c. R. Co. (26 Vt. 247), 246.
Kimes v. St. Louis &c. Ry. Co. (85 Mo. 611), 285.
Kimmer v. Weber (151 N. Y. 417; 55 N. E. Rep. 860), 520.
King v. American Trans. Co. (1 Flippin, 1), 593.
King v. Boston &c. R. Co. (9 Cush. 112; 129 Mass. 277, n.), 478, 513.
King v. Chicago &c. R. Co. (90 Mo. 520), 347.
King v. Henkie (80 Ala. 505), 42.
King v. Mo. Pac. Ry. Co. (98 Mo. 235; 11 S. W. Rep. 563), 280.
King v. Ohio &c. R. Co. (11 Biss. 326; 25 Fed. Rep. 799), 42, 530.
King v. Thompson (87 Penn. St. 365; 30 Am. Rep. 364), 371, 375, 376, 384.
Kingsbury v. Dedham (13 Allen, 186), 389.
Kinney v. Central &c. R. Co. (34 N. J. Law, 513; 3 Am. Rep. 265; 32 N. J. Law, 407), 207, 245, 249.
Kinney v. Corbin (132 Penn. St. 341; 19 Atl. Rep. 141), 462, 483, 502, 538.
Kirby v. Boylston Market (14 Gray, 251), 371, 407.
Kirk v. Atlanta &c. Ry. Co. (94 N. C. 625; 55 Am. Rep. 621), 479.
Kistner v. Indianapolis (100 Ind. 210), 44.
Klatt v. U. S. Foster Lumber Co. (92 Wis. 622; 66 N. W. Rep. 791), 518, 527.
Kline v. Central &c. R. Co. (37 Cal. 400), 16, 32.
Klipper v. Coffey (44 Md. 117), 72.
Klix v. Nieman (66 Wis. 271; 32 N. W. Rep. 223), 199.

[The references are to pages.]

Knapp v. Dagg (18 How. Pr. (N. Y.) 165), 154, 156.
Knapp v. Salsbury (2 Camp. 500), 416.
Knapp v. Sioux City &c. Ry. Co. (71 Iowa, 41; 32 N. W. Rep. 18; 65 Iowa, 91; 50 Am. Rep. 569, n.), 43, 501, 524, 525.
Knickerbocker Life Ins. Co. v. Peters (42 Md. 414), 574.
Knight v. Albert (6 Penn. St. 472; 47 Am. Dec. 478), 324.
Knight v. Goodyear Rubber Co. (38 Conn. 438; 9 Am. Rep. 406), 389.
Knight v. New Orleans &c. R. Co. (15 La. Ann. 105), 336.
Knight v. New York &c. R. Co. (99 N. Y. 25), 342.
Knight v. Ponchartrain &c. R. Co. (23 La. Ann. 462), 49, 98, 209, 626.
Knight v. Toledo &c. R. Co. (24 Ind. 402), 326, 328, 351.
Knisley v. Pratt (148 N. Y. 372; 42 N. E. Rep. 986), 518, 520.
Knowles v. Crampton (55 Conn. 336; 11 Atl. Rep. 593), 415.
Knowlton v. Erie Ry. Co. (19 Ohio St. 260; 2 Am. Rep. 395), 248, 250.
Knox v. Tucker (48 Me. 373), 323, 336.
Kobe v. Northern Pac. R. Co. (36 Minn. 518; 32 N. W. Rep. 783), 343.
Koehler v. Syracuse Specialty Co. (12 App. Div. (N. Y.) 47), 29, 518.
Kohler v. Pennsylvania R. Co. (19 Atl. Rep. 1049; 26 W. N. C. 176), 269.
Kohn v. Lovett (44 Ga. 251), 20, 79.
Koons v. St. Louis &c. R. Co. (65 Mo. 592), 187, 199, 308.
Koons v. Western Union Tel. Co. (102 Penn. St. 164), 575.
Kossman v. Stutz (5 N. Y. Supl. 764), 537.
Koutz v. Toledo &c. R. Co. (54 Ind. 515), 346.
Krebs v. Minneapolis &c. Ry. Co. (64 Iowa, 670), 332.
Kreig v. Wells (1 E. D. Smith, 76, 77), 168, 172.
Kresanowski v. Northern Pac. R. Co. (5 McCrary, 528), 531.
Kreuziger v. Chicago &c. Ry. Co. (73 Wis. 158; 40 N. W. Rep. 657), 237.
Krogg v. Atlanta &c. Ry. Co. (77 Ga. 202), 477.
Kroy v. Chicago &c. R. Co. (32 Iowa, 357), 543.
Kruger v. Louisville &c. Ry. Co. (111 Ind. 51; 11 N. E. Rep. 957), 469, 511.
Krum v. Anthony (115 Penn. St. 431; 8 Atl. Rep. 598), 25, 94.
Kuhn v. Chicago &c. R. Co. (42 Iowa, 420), 327.
Kuhn v. Jewett (33 N. J. Eq. 647), 364.
Kuhn v. Township of Walker (97 Mich. 306; 56 N. W. Rep. 556), 390.
Kuhns v. Wisconsin &c. R. Co. (70 Iowa, 561; 31 N. W. Rep. 868), 521, 522.
Kunz v. City of Troy (104 N. Y. 344; 10 N. E. Rep. 442), 203.
Kuttner v. Lindell Ry. Co. (29 Mo. App. 502), 155.
Kwiotkowski v. Chicago &c. Ry. Co. (70 Mich. 549; 38 N. W. Rep. 463), 276.
Kyne v. Wilmington &c. R. Co. (14 Atl. Rep. 922), 173.

L.

Labussier v. New York &c. R. Co. (10 Abb. Pr. 398, n.), 352.
Lack v. Seward (4 Car. & P. 106), 49.
Lackawanna &c. R. Co. v. Chendworth (53 Penn. St. 382), 279.
La Croy v. New York &c. R. Co. 132 N. Y. 570; 30 N. E. Rep. 391; 57 Hun, 67; 10 N. Y. Supl. 382), 544, 545.
Ladd v. Foster (31 Fed. Rep. 827), 63, 418.
Ladd v. New Bedford &c. R. Co. (119 Mass. 412; 20 Am. Rep. 331), 504, 505, 516, 536, 540.
Lade v. Shepherd (2 Strange, 104), 322.
Lafayette &c. R. Co. v. Adams (20 Ind. 76), 101.
Lafayette &c. R. Co. v. Huffman (28 Ind. 287), 168, 172, 276, 296.
Lafayette &c. R. Co. v. Shriner (6 Ind. 141), 325.
Laicher v. New Orleans &c. R. Co. (28 La. Ann. 320), 49, 292, 299.
Laing v. Colder (8 Penn. St. 479; 49 Am. Dec. 533), 206, 225, 228, 248.

[The references are to pages.]

Lake Erie & Western R. Co. v. Mackey (53 Ohio St. 370; 41 N. E. Rep. 980; 53 Am. St. Rep. 641), 312.
Lake Shore &c. R. Co. v. Bangs (47 Mich. 470), 213.
Lake Shore &c. R. Co. v. Berlink (2 Brad. App. 427), 76.
Lake Shore &c. R. Co. v. Clemens (5 Brad. 77), 54.
Lake Shore &c. R. Co. v. Franz (127 Penn. St. 297; 24 W. N. C. 321; 18 Atl. Rep. 22), 283, 289.
Lake Shore &c. R. Co. v. Hart (87 Ill. 529), 293, 298.
Lake Shore &c. R. Co. v. Hessions (150 Ill. 546; 37 N. E. Rep. 905), 127.
Lake Shore &c. R. Co. v. Lavalley (36 Ohio St. 221), 508.
Lake Shore &c. R. Co. v. McCormick (74 Ill. 440), 530, 536.
Lake Shore &c. R. Co. v. McIntosh (140 Ind. 261; 38 N. E. Rep. 476), 166, 260.
Lake Shore &c. R. Co. v. Miller (25 Mich. 274), 78, 264, 270, 292, 301, 567, 568, 569, 600, 626.
Lake Shore &c. R. Co. v. O'Connor (115 Ill. 254), 119.
Lake Shore &c. R. Co. v. Parker (131 Ill. 557; 23 N. E. Rep. 237), 443.
Lake Shore &c. R. Co. v. Roy (5 Bradw. 82), 56.
Lake Shore &c. R. Co. v. Stupak (123 Ind. 210; 23 N. E. Rep. 246; 108 Ind. 1), 509.
Lake Shore &c. R. Co. v. Sunderland (2 Bradw. 307), 270.
Lake Superior Iron Co. v. Erickson (39 Mich. 492; 33 Am. Rep. 423), 486.
Lakin v. Oregon Pac. R. Co. (15 Or. 220; 15 Pac. Rep. 641), 507.
Lalor v. Chicago &c. R. Co. (52 Ill. 401), 465, 481.
Lambeth v. North Carolina &c. R. Co. (66 N. C. 494; 8 Am. Rep. 508), 213, 214.
Lancaster v. Kissinger (12 Rep. 635), 26, 56, 63.
Lande v. Chicago &c. R. Co. (33 Wis. 640), 327.
Landrue v. Lund (38 Minn. 538; 38 N. W. Rep. 699), 384.
Lane v. Atlantic Works (107 Mass. 104; 111 Mass. 136), 91, 194, 200, 306, 599, 626.
Lane v. Bryant (9 Gray, 245), 416.
Lane v. Central Iowa Ry. Co. (69 Iowa, 443), 442.
Lane v. Crombie (12 Pick. 177), 371, 416, 599.
Lane v. Missouri Pac. Ry. Co. (132 Mo. 4; 33 S. W. Rep. 645, 1128), 261, 292, 606.
Laney v. Chesterfield County (29 S. C. 140; 7 S. E. Rep. 56), 372.
Laney v. Kansas City &c. Ry. Co. (83 Mo. 466), 346.
Langan v. City of Atchison (35 Kan. 318; 11 Pac. Rep. 38), 409.
Langan v. St. Louis &c. R. Co. (72 Mo. 392), 53, 60.
Langdon v. Godfrey (4 Fost. & Fin. 445), 582.
Lanier v. Youngblood (73 Ala. 587), 586, 587, 588, 626.
Laning v. New York &c. R. Co. (49 N. Y. 521; 10 Am. Rep. 417), 454, 469, 495, 502, 507, 509, 539, 541.
Lannen v. Albany Gaslight Co. (46 Barb. 264; 44 N. Y. 459), 33, 89, 172, 175, 177, 180, 448.
Lapointe v. Middlesex R. Co. (144 Mass. 18; 10 N. E. Rep. 497), 423.
Larken v. O'Neill (1 N. Y. Supl. 232), 83.
Larkin v. Taylor (5 Kan. 433), 92, 325.
Larmore v. Crown Point Iron Co. (101 N. Y. 391; 54 Am. Rep. 718), 84.
Larabee v. Peabody (128 Mass. 561), 380.
Larrabee v. Sewall (66 Me. 376), 416.
Larson v. St. Paul &c. R. Co. (43 Minn. 488; 45 N. W. Rep. 1096), 442, 522.
Larue v. Farren Hotel Co. (116 Mass. 67), 590.
Lary v. Cleveland &c. R. Co. (78 Ind. 323; 41 Am. Rep. 572), 79.
Laufer v. Bridgeport Traction Co. (68 Conn. 475; 37 Atl. Rep. 379), 415, 430.
Laverenz v. Chicago &c. R. Co. (56 Iowa, 689), 289, 290, 301.
Lawler v. Androscoggin &c. R. Co. (62 Me. 463; 16 Am. Rep. 492), 463, 479, 510.
Lawless v. Conn. &c. R. Co. (136 Mass. 1), 539.
Lawrence v. Coombs (37 N. H. 335), 336.
Lawrence v. Green (70 Cal. 417), 62.
Lawrence v. Jenkins (L. R. 3 Q. B. 274; 42 L. J. (Q. B.) 147), 41.

[The references are to pages.]

Lawrence v. Milwaukee &c. R. Co. (42 Wis. 322), 354.
Lawrence v. New York &c. R. Co. (36 Conn. 63), 246.
Lawrenceburg &c. R. Co. v. Montgomery (7 Ind. 476), 223.
Laws v. North Carolina &c. R. Co. (73 Jones (Law) 468), 331.
Lawson v. Chicago &c. R. Co. (57 Iowa, 672), 327.
Lawton v. Fitchburg R. Co. (8 Cush. 230; 54 Am. Dec. 753), 336.
Lay v. Richmond &c. R. Co. (106 N. C. 404; 11 S. E. Rep. 412), 91, 332.
Learoyd v. Godfrey (138 Mass. 315), 71.
Leary v. Boston &c. R. Co. (139 Mass. 580; 52 Am. Rep. 733), 514.
Leason v. Maine &c. R. Co. (77 Me. 85; 1 East. Rep. 100), 599.
Leavenworth, City of, v. Hatch (57 Kan. 57; 57 Am. St. Rep. 355), 163.
Leavenworth &c. Ry. Co. v. Forbes (37 Kan. 445; 15 Pac. Rep. 595), 327, 331.
Leavenworth &c. R. Co. v. Rice (10 Kan. 426), 269, 288.
Leavitt v. Chicago &c. Ry. Co. (64 Wis. 228), 634.
Le Barron v. Joslin (41 Mich. 313), 387, 416, 600.
Le Claire v. First Division &c. R. Co. (20 Minn. 9), 497, 541.
Lederman v. Penn. R. Co. (165 Penn. St. 118; 30 Atl. Rep. 735), 202.
Leduke v. St. Louis &c. R. Co. (4 Mo. App. 485, 488), 76.
Lee v. Minneapolis &c. Ry. Co. (66 Iowa, 131), 339.
Lee v. Nixey (63 L. T. 285; 54 J. P. 807), 378.
Lee v. Railroad Co. (12 R. I. 383), 48.
Lee v. Riley (18 C. B. (N. S.) 722), 388.
Lee v. Troy Citizens' Gaslight Co. (98 N. Y. 115), 615, 619, 623.
Lee v. Woolsey (109 Penn. St. 124), 608.
Lee, The R. E. (2 Abb. (U. S.) 49), 251.
Leebrick v. Republican Val. &c. R. Co. (41 Kan. 756; 21 Pac. Rep. 796), 348.
Leggett v. Rome &c. R. Co. (41 Hun, 80), 342.
Lehey v. Hudson River R. Co. (4 Robt. 204), 290.
Lehigh &c. Coal Co. v. Hayes (128 Penn. St. 294; 24 W. N. C. 559; 18 Atl. Rep. 387), 504.
Lehigh &c. Coal Co. v. Jones (86 Penn. St. 432, 439; 6 Rep. 125), 56, 463.
Lehigh &c. Coal Co. v. Lear (9 Atl. Rep. 267), 267.
Lehigh Valley R. Co. v. Greiner (113 Penn. St. 600), 441.
Lehigh Valley R. Co. v. Hall (61 Penn. St. 361), 264, 270.
Lehigh Valley R. Co. v. McKeen (90 Penn. St. 122; 35 Am. Rep. 644), 356, 363.
Lehman v. Brooklyn City R. Co. (47 Hun, 355; 29 Barb. 234), 43, 168, 171, 189, 631.
Lehman v. Louisiana &c. R. Co. (37 La. Ann. 705), 196.
Lehman v. McQueen (65 Ala. 566), 196.
Lehr v. Steinway &c. R. Co. (118 N. Y. 556; 23 N. E. Rep. 889), 143, 217.
Lemon v. Chanslor (68 Mo. 340; 30 Am. Rep. 799), 206, 207.
Lemon v. Chicago &c. Ry. Co. (59 Mich. 618), 341.
Lemont v. Washington &c. R. Co. (1 Mackey, 180; 47 Am. Rep. 238; 2 Mackey, 502; 47 Am. Rep. 268), 422.
Lenark, City of, v. Dougherty (153 Ill. 163; 38 N. E. Rep. 892), 127.
Lenix v. Mo. Pac. Ry. Co. (76 Mo. 86), 299.
Lent v. New York &c. R. Co. (120 N. Y. 467), 25.
Leonard v. Collins (70 N. Y. 93), 444, 504, 505.
Leonard v. New York &c. R. Co. (10 Jones & S. 225), 290, 291.
Lepp v. St. Louis &c. Ry. Co. (87 Mo. 139), 339.
Lesan v. Maine Cent. R. Co. (77 Me. 85), 263, 282.
Leslie v. City of Lewiston (62 Me. 468), 172, 178, 380.
Leslie v. Wabash &c. Ry. Co. (88 Mo. 50), 211.
Lester v. Pittsford (7 Vt. 158), 620.
Lettoon v. Texas &c. Ry. Co. (48 La. Ann. 807; 19 So. Rep. 759), 374.
Levering v. Union &c. R. Co. (42 Md. 88), 246.
Levy v. Carondelet Canal Co. (34 La. Ann. 181), 18.

[The references are to pages.]

Lewis v. Baltimore &c. R. Co. (38 Md. 588), 319, 320.
Lewis v. Flint &c. Ry. Co. (54 Mich. 55), 43.
Lewis v. New York Sleeping-car Co. (143 Mass. 267; 56 Am. Rep. 852, n.; 5 N. Y. Supl. 313), 251, 252, 270.
Lewis v. St. Louis &c. R. Co. (59 Mo. 495; 21 Am. Rep. 385), 497, 534.
Lewis v. Seifert (116 Penn. St. 628; 11 Atl. Rep. 514), 462, 469, 476, 482, 499, 510.
Lewis v. The London &c. Ry. Co. (L. R. 2 Q. B. 66) 235.
Lexington v. Lewis' Adm'x (10 Bush, 677), 105, 458.
Lexington, City of, v. McQuillan (9 Dana, 513; 35 Am. Dec. 159), 367.
Liddy v. St. Louis &c. R. Co. (40 Mo. 506), 423.
Lilley v. Fletcher (81 Ala. 234; 1 So. Rep. 273), 25, 94.
Lilly v. New York &c. R. Co. (107 N. Y. 566; 14 N. E. Rep. 503), 501.
Limpus v. London Omnibus Co. (1 Hurl. & C. 526), 420, 448.
Linch v. Sagamore Manfg. Co. (143 Mass. 206; 9 N. E. Rep. 728), 537, 540.
Lincoln, City of, v. Walker (18 Neb. 224; 19 Am. Law Rev. 162), 378, 606.
Lincoln Coal Mining Co. v. McNally (15 Ill. App. 181), 470.
Lincoln Rapid Transit Co. v. Nichols (37 Neb. 332), 64.
Lindall v. Bode (72 Cal. 245; 13 Pac. Rep. 660), 500.
Lindsay v. Canadian &c. R. Co. (68 Vt. 556; 35 Atl. Rep. 513), 393.
Lindvall v. Woods (41 Minn. 212; 42 N. W. Rep. 1020), 462, 468, 469.
Linfield v. Old Colony &c. R. Co. (10 Cush. 569), 264, 288, 633.
Lingenfelter v. Louisville &c. R. Co. (4 S. W. Rep. 185), 460.
Linnehan v. Sampson (126 Mass. 506; 60 Am. Rep. 692), 63, 64, 66, 67, 71.
Liston v. Central Iowa Ry. Co. (70 Iowa, 714), 350.
Litchfield Coal Co. v. Taylor (81 Ill. 590), 120.
Little v. City of Madison (42 Wis. 643; 24 Am. Rep. 435), 389.
Little v. Carolina Central R. Co. (118 N. C. 1072; 24 S. E. Rep. 514), 298.
Little v. Hackett (116 U. S. 366), 155, 157.
Little v. Lathrope (5 Greenleaf, 35), 323.
Little v. McGuire (38 Iowa, 560; 43 Iowa, 447), 329.
Little Miami &c. R. Co. v. Stevens (20 Ohio, 415), 465, 606.
Little Rock &c. Ry. Co. v. Atkins (46 Ark. 423), 211, 606.
Little Rock &c. Ry. Co. v. Dick (52 Ark. 402), 181, 200.
Little Rock &c. Ry. Co. v. Eubanks (44 Ark. 460), 557.
Little Rock &c. Ry. Co. v. Finley (37 Ark. 562), 330, 334.
Little Rock &c. Ry. Co. v. Haynes (47 Ark. 497; 1 S. W. Rep. 774), 24, 296.
Little Rock &c. Ry. Co. v. Hecht (38 Ark. 357), 362.
Little Rock &c. Ry. Co. v. Miles (40 Ark. 298; 48 Am. Rep. 10), 208, 222, 240, 320.
Little Rock &c. Ry. Co. v. Pankhurst (36 Ark. 371), 16, 78, 292, 301, 567.
Little Rock &c. Ry. Co. v. Talbot (47 Ark. 97), 247.
Little Rock &c. Ry. Co. v. Townsend (41 Ark. 382), 505.
Little Rock &c. Ry. Co. v. Turner (41 Ark. 161), 335.
Littlejohn v. Fitchburg R. Co. (148 Mass. 478; 20 N. E. Rep. 103), 239, 250.
Littlejohn v. Jones (2 McMull. 365; 39 Am. Dec. 132), 417.
Lizzie Frank, The (31 Fed. Rep. 477), 505.
Lloyd v. Albermarle &c. R. Co. (118 N. C. 1011; 24 S. E. Rep. 805), 302.
Lloyd v. Lloyd (60 Vt. 288; 13 Atl. Rep. 638), 109.
Locke v. St. Paul &c. R. Co. (15 Minn. 350), 89, 325, 334.
Locke v. Sioux City &c. R. Co. (46 Iowa, 109), 545.
Lockhart v. Lichtenthaler (46 Penn. St. 151), 152, 153.
Lockhart v. Little Rock &c. Ry. Co. (40 Fed. Rep. 631), 442.
Lockwood v. Chicago &c. R. Co. (55 Wis. 50), 531, 545.
Lockwood v. New York &c. R. Co. (17 Wall. 357; 10 Am. Rep. 366), 208.

[The references are to pages.]

Loeb v. City of Attica (82 Ind. 175; 42 Am. Rep. 494), 397.
Loeser v. Humphrey (41 Ohio St. 378; 52 Am. Rep. 86; 32 Alb. Law Jour. 56), 109, 387, 585.
Loewer v. City of Sedalia (77 Mo. 431), 375, 563, 626, 633.
Lofrano v. New York &c. Water Co. (8 N. Y. Supl. 717; 55 Hun, 452), 517.
Lofton v. Vogles (17 Ind. 105), 189.
Loftus v. Union Ferry Co. (84 N. Y. 455; 38 Am. Rep. 533), 418.
Logan v. Gedney (38 Cal. 579), 330.
Logan v. Matthews (6 Penn. St. 417), 396.
Logan v. Pontchartrain (11 Robinson (La.) 24; 43 Am. Dec. 199), 250.
Logan v. Railroad Co. (116 N. C. 940; 21 S. E. Rep. 959), 469.
Longenecker v. Penn. R. Co. (105 Penn. St. 328), 278, 608, 627, 633, 634.
Longmore v. Great Western Ry. Co. (19 C. B. (N. S.) 183; 115 Eng. Com. L. 183), 207.
Lord v. Pueblo Smelting & Refining Co. (12 Colo. 390; 21 Pac. Rep. 148), 540.
Lord v. Wormwood (29 Me. 282; 50 Am. Dec. 586), 323.
Lord Melville, The (2 Shaw's App. Cases, 395), 578.
Lords Bailiff-Jurats of Romney Marsh v. The Corporation of the Trinity House (L. R. 5 Exch. 204; L. R. 7 Exch. 247), 41.
Lorne v. Hotel Co. (116 Mass. 67), 83.
Lortz v. New York &c. R. Co. (83 Hun, 271), 271.
Loughlin v. State (105 N. Y. 159; 11 N. E. Rep. 371), 462, 467, 469, 484.
Louisville &c. Canal Co. v. Murphy's Adm'r (9 Bush, 521), 139, 188, 458, 605.
Louisville &c. R. Co. v. Allen (78 Ala. 494), 516.
Louisville &c. R. Co. v. Ballard (88 Ky. 159; 10 S. W. Rep. 420; 2 Metc. 177), 237, 324, 332, 337.
Louisville &c. R. Co. v. Bisch (120 Ind. 549; 23 N. E. Rep. 662), 216.
Louisville &c. R. Co. v. Boland (53 Ind. 402), 602.
Louisville &c. R. Co. v. Bowles (9 Heisk, 866), 465, 471.
Louisville &c. R. Co. v. Brooks' Adm'r (83 Ky. 129), 105, 459, 475.
Louisville &c. R. Co. v. Buck (116 Ind. 566; 19 N. E. Rep. 453), 530.
Louisville &c. R. Co. v. Burke (6 Cold. 45), 279, 318.
Louisville &c. R. Co. v. Cahill (63 Ind. 34), 341, 345, 353.
Louisville &c. R. Co. v. Carroll (6 Heisk. 347), 135.
Louisville &c. R. Co. v. Case's Adm'r (9 Bush, 728), 156, 458.
Louisville &c. R. Co. v. Caven's Adm'r (9 Bush, 559), 453.
Louisville &c. R. Co. v. Coleman's Adm'r (86 Ky. 556; 6 S. W. Rep. 438; 8 S. W. Rep. 875), 321.
Louisville &c. R. Co. v. Collins (2 Duv. 114), 18, 98, 101, 105, 138, 139, 279, 458, 459.
Louisville &c. R. Co. v. Commonwealth (13 Bush, 388; 26 Am. Rep. 205), 278.
Louisville &c. R. Co. v. Connor (9 Heisk. 19), 318.
Louisville &c. R. Co. v. Conroy (63 Miss. 562), 486.
Louisville &c. R. Co. v. Crunk (119 Ind. 542; 21 N. E. Rep. 31), 211, 233.
Louisville &c. R. Co. v. Filhern's Adm'x (6 Bush, 574), 137, 458.
Louisville &c. R. Co. v. Francis (58 Ind. 389), 343.
Louisville &c. R. Co. v. Frawley (110 Ind. 18; 9 N. E. Rep. 594), 443, 526.
Louisville &c. R. Co. v. Goetz (79 Ky. 442; 42 Am. Rep. 227), 18, 260, 263, 270, 605, 607, 627, 663.
Louisville &c. R. Co. v. Goodbar (102 Ind. 596), 345, 346.
Louisville &c. R. Co. v. Goodell (17 B. Mon. 586), 458.
Louisville &c. R. Co. v. Gower (1 Pick. 465; 3 S. W. Rep. 824; 85 Tenn. 465), 27, 533.
Louisville &c. R. Co. v. Graham (124 Ind. 89; 24 N. E. Rep. 668), 510.
Louisville &c. R. Co. v. Graham's Adm'r (98 Ky. 688; 34 S. W. Rep. 229), 482.
Louisville &c. R. Co. v. Hagan (87 Ind. 602), 357, 602.
Louisville &c. R. Co. v. Hall (87 Ala. 708; 6 So. Rep. 277), 528.

[The references are to pages.]

Louisville &c. R. Co. v. Hart (119 Ind. 273; 21 N. E. Rep. 753), 361.
Louisville &c. R. Co. v. Head (80 Ind. 117), 602.
Louisville &c. R. Co. v. Herd (80 Ind. 117), 284.
Louisville &c. R. Co. v. Howard (82 Ky. 212), 295.
Louisville &c. R. Co. v. Hurst (98 Ind. 330), 344.
Louisville &c. R. Co. v. Jones (108 Ind. 551), 49.
Louisville &c. R. Co. v. Katzenberger (16 Lea (Tenn.) 380; 57 Am. Rep. 232; 1 S. W. Rep. 44), 251, 252.
Louisville &c. R. Co. v. Kelly (92 Ind. 371; 47 Am. Rep. 149), 107, 216.
Louisville &c. R. Co. v. Kelsey (89 Ala. 287; 7 So. Rep. 648), 42.
Louisville &c. R. Co. v. Krinning (87 Ind. 351), 357, 602.
Louisville &c. R. Co. v. Lahr (2 Pick. 335; 6 S. W. Rep. 663), 470.
Louisville &c. R. Co. v. Lockridge (93 Ind. 191), 602.
Louisville &c. R. Co. v. Lucas (119 Ind. 583; 21 N. E. Rep. 968), 231.
Louisville &c. R. Co. v. McVay (98 Ind. 391; 49 Am. Rep. 770), 491.
Louisville &c. R. Co. v. Mask (64 Miss. 738; 2 So. Rep. 360), 233, 238.
Louisville &c. R. Co. v. Milton (14 B. Mon. 75; 58 Am. Dec. 647), 324, 333, 337.
Louisville &c. R. Co. v. Mahoney (7 Bush, 235), 138, 458.
Louisville &c. R. Co. v. Moore (83 Ky. 675), 460, 475.
Louisville &c. R. Co. v. Oden (80 Ala. 38), 248.
Louisville &c. R. Co. v. Orr (84 Ind. 50), 602.
Louisville &c. R. Co. v. Pedigo (108 Ind. 481), 206.
Louisville &c. R. Co. v. Perry (87 Ala. 392; 6 So. Rep. 401), 531.
Louisville &c. R. Co. v. Petty (67 Miss. 255; 7 So. Rep. 361), 478.
Louisville &c. R. Co. v. Richardson (66 Ind. 43; 32 Am. Rep. 94), 357, 359.
Louisville &c. R. Co. v. Robinson (4 Bush, 507), 18, 101, 139, 458, 460, 475.
Louisville &c. R. Co. v. Rusk (116 Ind. 566), 443.
Louisville &c. R. Co. v. Sandford (117 Ind. 265; 19 N. E. Rep. 770), 97.
Louisville &c. R. Co. v. Schmidt (81 Ind. 264), 281.
Louisville &c. R. Co. v. Schuster (7 S. W. Rep. 874), 279.
Louisville &c. R. Co. v. Shanks (94 Ind. 598), 17, 201.
Louisville &c. R. Co. v. Sheets (13 S. W. Rep. 248), 475.
Louisville &c. R. Co. v. Sicklings (5 Bush, 1), 138, 139, 225, 458.
Louisville &c. R. Co. v. Simmons (85 Ky. 151; 3 S. W. Rep. 10), 345.
Louisville &c. R. Co. v. Smith (67 Miss. 15), 335.
Louisville &c. R. Co. v. Snyder (117 Ind. 435; 20 N. E. Rep. 284), 206, 224.
Louisville &c. R. Co. v. Spain (61 Ind. 460), 354.
Louisville &c. R. Co. v. Stacker (2 Pickle, 343; 6 S. W. Rep. 737), 461.
Louisville &c. R. Co. v. Sullivan (81 Ky. 624; 50 Am. Rep. 186), 570.
Louisville &c. R. Co. v. Sumner (106 Ind. 55), 349.
Louisville &c. R. Co. v. Thomas (106 Ind. 10), 344.
Louisville &c. R. Co. v. Thompson (107 Ind. 442), 206.
Louisville &c. R. Co. v. Upton (18 Ill. App. 605), 344.
Louisville &c. R. Co. v. Wainscott (3 Bush, 149), 324, 337.
Louisville &c. R. Co. v. Whitsell (68 Ind. 297), 341, 345.
Louisville &c. R. Co. v. Wolfe (80 Ky. 82), 32, 258.
Louisville &c. R. Co. v. Yniestra (21 Fla. 700), 12, 54.
Lovejoy v. Boston &c. R. Co. (125 Mass. 79; 28 Am. Rep. 206), 476, 502, 529.
Lovenguth v. City of Bloomington (71 Ill. 238), 405.
Lovett v. Salem &c. R. Co. (9 Allen, 557), 172, 203.
Low v. Grand Trunk Ry. Co. (72 Me. 313; 39 Am. Rep. 331), 71.
Lowell v. Watertown (58 Mich. 568), 57.
Lowery v. Manhattan Ry. Co. (99 N. Y. 158; 52 Am. Rep. 12), 43.
Loyd v. Hannibal &c. R. Co. (53 Mo. 509), 211.

[The references are to pages.]

Lucas v. Milwaukee &c. R. Co. (33 Wis. 41; 14 Am. Rep. 735), 223.
Lucas v. New Bedford &c. R. Co. (6 Gray, 64), 213, 599.
Lucas v. Pennsylvania Co. (120 Ind. 205; 21 N. E. Rep. 972), 231.
Lucas v. Taunton &c. R. Co. (6 Gray, 71), 175.
Luddington v. Miller (4 Jones & Sp. 1), 83.
Ludwig v. Pillsbury (35 Minn. 256), 628.
Luebke v. Berlin Machine Works (88 Wis. 442; 60 N. W. Rep. 711), 518.
Luebke v. Chicago &c. R. Co. (59 Wis. 127; 48 Am. Rep. 483), 454 483, 508.
Luebke v. Chicago &c. R. Co. (63 Wis. 91; 53 Am. Rep. 266), 499, 511.
Lumis v. Phila. Traction Co. (181 Penn. St. 268), 371.
Lumley v. Caswell (47 Iowa, 159), 541.
Lund v. Tyngsboro (11 Cush. 563; 59 Am. Dec. 159), 63.
Lunt v. London &c. Ry. Co. (L. R. 1 Q. B. 277), 282.
Lusk v. Belote (22 Minn. 468), 585.
Luther v. Worcester (97 Mass. 269), 403.
Luxford v. Large (5 Car. & P. 421), 49.
Lygo v. Newbold (24 L. & Eq. 507; 9 Exch. 302), 84, 88, 178, 222, 241.
Lyman v. Gipson (18 Pick. 422), 336.
Lynam v. Union R. Co. (114 Mass. 83), 424, 428.
Lynch v. Nurdin (1 Q. B. 29; 4 Per. & Dav. 672; 5 Jur. 797), 26, 122, 194, 196, 198, 199, 306.
Lynch v. Smith (104 Mass. 52; 6 Am. Rep. 188), 172, 174, 176, 194, 203.
Lynn v. Illinois Cent. R. Co. (63 Miss. 157), 526.
Lyon v. Detroit &c. R. Co. (31 Mich. 429), 545.
Lyon, The John B. (33 Fed. Rep. 184), 442.
Lyons v. Broadway &c. R. Co. (10 N. Y. Supl. 237), 421.
Lyons v. Brookline (119 Mass. 491), 200, 411.
Lyons v. Child (61 N. H. 72), 72.
Lyons v. Desotelle (124 Mass. 387), 394.
Lyons v. Merrick (105 Mass. 71), 323, 388.
Lyons v. New York &c. R. Co. (39 Hun, 385), 507.
Lyons v. Terre Haute &c. R. Co. (101 Ind. 419), 325.
Lyons v. Union Pac. Ry. Co. (35 Fed. Rep. 111), 207.

M.

McAlpine v. Powell (70 N. Y. 126; 26 Am. Rep. 555; 55 How. Pr. 163), 81, 200, 296, 309, 590.
McAndrews v. Burns (30 N. J. Law, 117), 454, 464, 485.
McAunich v. Mississippi &c. R. Co. (20 Iowa, 338), 35, 46, 216.
McBride v. Kansas City &c. R. Co. (20 Mo. App. 216), 339.
McBride v. Northern Pac. R. Co. (19 Or. 64; 23 Pac. Rep. 814), 270.
McBride v. Union Pac. Ry. Co. (21 Pac. Rep. 687), 462.
McCall v. Chamberlain (13 Wis. 637), 325, 340, 354.
McCall v. Railroad Co. (54 N. Y. 642), 264, 270.
McCandless v. Chicago &c. R. Co. (45 Wis. 365), 327.
McCandless v. McWha (22 Penn. St. 261; 25 Penn. St. 95), 583.
McCann v. Sixth Ave. R. Co. (117 N. Y. 505; 23 N. E. Rep. 164), 42.
McCarthy v. Cass Ave Ry. Co. (92 Mo. 536; 4 S. W. Rep. 516), 167.
McCarthy v. Portland (67 Me. 167; 24 Am. Rep. 23), 386.
McCasker v. Long Island &c. R. Co. (84 N. Y. 77), 466, 472.
McCawley v. Furness R. Co. (L. R. 8 Q. B. 57), 249.
McClain v. Brooklyn City R. Co. (116 N. Y. 459; 22 N. E. Rep. 1062), 427, 428, 429.
McClary v. Lowell (44 Vt. 116; 8 Am. Rep. 366), 78, 256, 396.
McClelland v. Louisville &c. R. Co. (94 Ind. 276), 567.
McCleneghan v. Omaha &c. R. Co. 25 Neb. 523; 41 N. W. Rep. 350), 109.
McCollin v. Reed (16 Week. Notes Cas. 287), 590.
McCool v. Galena &c. R. Co. (17 Iowa, 461), 331.
McCord v. Cammell (L. R. (1896) A. C. 57), 482.

[The references are to pages.]

McCorkle v. Chicago &c. R. Co. (61 Iowa, 555), 208, 223, 320.
McCormack v. Nassau Elec. R. Co. (18 App. Div. (N. Y.) 333), 454.
McCoy v. California &c. R. Co. (40 Cal. 532; 6 Am. Rep. 623), 333, 354.
McCoy v. Empire Warehouse Co. (10 N. Y. Supl. 99), 511.
McCoy v. Philadelphia &c. R. Co. (5 Houst. (Del.) 599), 17.
McCrane v. Flushing & C. P. Electric Ry. Co. (13 App. Div. (N. Y. 177), 633.
McCready v. South Carolina R. Co. (2 Strobh. (Law) 356), 357.
McCrory v. Chicago &c. Ry. Co. (31 Fed. Rep. 531), 54, 290.
McCue v. Klein (60 Tex. 168; 48 Am. Rep. 260), 570.
McCullough v. Shoneman (105 Penn. St. 169), 490.
McCullum v. Long Island R. Co. (38 Hun, 569), 156.
McCutcheon v. Homer (43 Mich. 483; 38 Am. Rep. 212), 368.
McDade v. Washington &c. R. Co. (5 Mackey (D. C.) 144), 501.
McDermott v. Hannibal &c. R. Co. (87 Mo. 285), 483, 540.
McDermott v. Third Ave. R. Co. (44 Hun, 107), 615.
McDonald v. Boston & Maine R. Co. (87 Me. 466; 32 Atl. Rep. 1010), 211, 212.
McDonald v. Chicago &c. R. Co. (26 Iowa, 124), 207, 231, 258.
McDonald v. Chicago &c. R. Co. (41 Minn. 439; 43 N. W. Rep. 380), 516.
McDonald v. Chicago &c. R. Co. (75 Wis. 121; 43 N. W. Rep. 744), 313.
McDonald v. Long Island R. Co. (116 N. Y. 546; 22 N. E. Rep. 1068), 234.
McDonald v. Rockhill Iron & Coal Co. (19 Atl. Rep. 797; 26 W. N. C. 101), 538.
McDonald v. Snelling (14 Allen, 290), 47.
McDonald v. Union Pac. Ry. Co. (35 Fed. Rep. 38), 79.
McDonnell v. Pittsfield &c. R. Co. (115 Mass. 564), 323, 336, 350, 354.
McDonough v. Metropolitan R. Co. (137 Mass. 210), 420, 431, 439.
McDowell v. Chesapeake &c. R. Co. (5 S. W. Rep. 413), 542.
McDowell v. New York &c. R. Co. (37 Barb. 195), 336, 342, 351.
McEachern v. Boston & Me. R. Co. (150 Mass. 515; 23 N. E. Rep. 231), 194.
McElroy v. Nashua &c. R. Co. (4 Cush. 400), 206.
McEnery v. Waterford & Kilkenny Ry. Co. (8 Ir. C. L. R. 312), 560.
McFadden v. Missouri Pac. Ry. Co. (92 Mo. 349; 4 S. W. Rep. 689), 247.
McFadden v. Santa Ann. &c. Ry. Co. (87 Cal. 464; 25 Pac. Rep. 681), 165.
McFee v. Vicksburg &c. R. Co. (42 La. Ann. 790; 7 So. Rep. 720), 498.
McGan v. O'Neil (5 Colo. 425), 330.
McGarragher v. Rogers (120 N. Y. 527), 29.
McGary v. Loomis (63 N. Y. 104; 20 Am. Rep. 510), 53, 168, 171, 174, 203, 410, 411.
McGatrick v. Wason (4 Ohio St. 566), 256.
McGeary v. East &c R. Co. (135 Mass. 363), 168, 172.
McGee v. Boston Cordage Co. (139 Mass. 445; 1 East. Rep. 126), 453, 465, 496, 511.
McGee v. Missouri Pac. Ry. Co. (92 Mo. 208; 4 S. W. Rep. 739), 107, 223.
McGhee v. Consolidated Street Ry. Co. (102 Mich. 107; 60 N. W. Rep. 293), 429.
McGinty v. City of Keokuk (66 Iowa, 725), 55, 372, 375, 377.
McGlynn v. Brodie (31 Cal. 376), 496.
McGorty v. Southern New England Telephone Co. (69 Conn. 635; 33 Atl. Rep. 359), 537.
McGovern v. New York &c. R. Co. (67 N. Y. 417), 289.
McGowan v. St. Louis &c. R. Co. (61 Mo. 528), 463, 481.
McGrath v. Detroit &c. R. Co. (57 Mich. 555), 344.
McGrath v. Hudson River R. Co. (32 Barb. 144; 19 How. Pr. 211; 59 N. Y. 468; 17 Am. Rep. 359), 101, 260, 278.
McGrath v. Merwin (112 Mass. 467; 17 Am. Rep. 119), 255, 395.
McGrath v. New York &c. R. Co. 14 R. I. 357), 523.
McGrath v. Village of Bloomer (73 Wis. 29), 523.
McGrell v. Buffalo Office Building Co. (153 N. Y. 215), 28.

[The references are to pages.]

McGrew v. Stone (53 Penn. St. 436), 44, 47.
McGuiness v. Butler (159 Mass. 233; 34 N. E. Rep. 259), 86, 176, 194.
McGuire v. Chicago &c. R. Co. (37 Fed. Rep. 54), 196.
McGuire v. Hudson &c. R. Co. (2 Daly, 761), 290.
McGuire v. Missouri Pac. Ry. Co. (23 Mo. App. 325), 339.
McGuire v. Spence (91 N. Y. 303; 43 Am. Rep. 668), 53, 378, 410, 411.
McIntire v. Roberts (149 Mass. 450; 22 N. E. Rep. 13), 385.
McIntosh v. Hannibal &c. R. Co. (26 Mo. App. 377), 338.
McIntyre v. New York &c. R. Co. (43 Barb. 532; 37 N. Y. 287), 216.
McKaig v. Northern Pac. R. Co. (42 Fed. Rep. 288), 478.
McKean v. Burlington &c. R. Co. (55 Iowa, 192), 17, 34.
McKee v. Nelson (4 Cowen, 355), 570.
McKee v. Tourtellotte (167 Mass. 69; 44 N. E. Rep. 1071), 514.
McKeever v. Market St. &c. R. Co. (59 Cal. 294), 626, 627, 634.
McKellar v. City of Detroit (57 Mich. 158), 404.
McKeller v. Township of Monitor (78 Mich. 485; 44 N. W. Rep. 412), 35, 46.
McKimble v. Boston &c. R. Co. (139 Mass. 542; 141 Mass. 463), 96, 238, 599.
McKinne v. California &c. R. Co. (5 Pac. Rep. 505), 443.
McKinney v. Neil (1 McLean, 540), 64.
McKone v. Michigan &c. R. Co. (51 Mich. 601; 47 Am. Rep. 596), 81, 258.
McKune v. Cal. Southern R. Co. (66 Cal. 302), 469, 476, 482.
McLain v. Van Zandt (7 Jones & Spencer, 347, 351), 168, 171.
McLane v. Sharpe (2 Harr. (Del.) 481), 416.
McLaughlin v. City of Corry (77 Penn. St. 109; 18 Am. Rep. 432), 402.
McLaury v. City of McGregor (54 Iowa, 717), 372, 379, 380, 626, 629.
McLean v. Blue Point &c. Co. (51 Cal. 255), 453, 463.
McLean v. Burbank (11 Minn. 277), 98.
McMahon v. Davidson (12 Minn. 357), 157, 508.
McMahon v. New York (33 N. Y. 642), 168.
McMahon v. Northern &c. R. Co. (39 Md. 439), 172, 173, 203, 319, 320.
McManamee v. Mo. Pac. Ry. Co. (135 Mo. 440; 37 S. W. Rep. 119), 70, 275.
McManus v. Lancashire &c. Ry. Co. (3 Hurl. & N. 328), 244.
McMarra v. Chicago &c. R. Co. (41 Wis. 69), 362.
McMaster v. Illinois Cent. R. Co. (4 So. Rep. 59), 477.
McMillan v. Burlington &c. R. Co. (46 Iowa, 231), 303.
McMurtrey v. Louisville &c. R. Co. (67 Miss. 601; 7 So. Rep. 401), 209, 623.
McNamara v. Clintonville (62 Wis. 207; 51 Am. Rep. 722), 49.
McNamara v. New York &c. R. Co. (136 N. Y. 650; 32 N. E. Rep. 765), 261.
McNarra v. Chicago &c. R. Co. (41 Wis. 69), 94.
McNaughton v. Caledonian R. Co. (22 Dunl. B. & M. 160; 31 Jur. 94; Hay's Dec. 206), 51.
McNeal v. Pittsburgh &c. R. Co. (131 Penn. St. 184; 18 Atl. Rep. 1026), 289.
McNulta v. Eusch (134 Ill. 46; 24 N. E. Rep. 621), 236.
McPheeters v. Hannibal &c. R. Co. (45 Mo. 23), 329.
McPherson v. City of Buffalo (13 App. Div. (N. Y.) 502), 375.
McPherson v. St. Louis &c. Ry. Co. (97 Mo. 253; 10 S. W. Rep. 846), 497.
McPhillips v. New York &c. R. Co. (12 Daly, 365), 169.
McQueen v. Chicago &c. R. Co. (30 Kan. 689), 222.
McQuilken v. Central &c. R. Co. (50 Cal. 7; 64 Cal. 463), 234, 605.
McRicard v. Flint (114 N. Y. 222; 21 N. E. Rep. 153; 13 Daly, 541), 83.
McSwyny v. Broadway &c. R. Co. (7 N. Y. Supl. 456), 420.
McWilliams v. Philadelphia &c. R. Co. (15 Atl. Rep. 654), 290.
MacKalley's Case (9 Coke, 66; Cro. Jac. 279), 391.
Mabley v. Kittleberger (37 Mich. 360), 23, 416.
Macdougall v. Central &c. R. Co. (63 Cal. 431), 605.

[The references are to pages.]

Mack v. Lombard &c. R. Co. (8 Pa. Co. Ct. Rep. 305; 18 Wash. Law Rep. 84), 42.
Mackay v. New York &c. R. Co. (35 N. Y. 75), 286.
Mackey v. City of Vicksburg (64 Miss. 777; 2 So. Rep. 178), 85 169, 199.
Mackin v. Boston &c. R. Co. (135 Mass. 201; 46 Am. Rep. 456), 477, 502.
Macklin v. New Jersey Steamboat Co. (7 Abb. Pr. (N. S.) 236), 251.
Maclennan v. Long Island R. Co. (52 N. Y. Super. Ct. 22), 233.
Macomb v. Smithers (6 Bradw. 470), 55.
Macomber v. Nichols (34 Mich. 212; 22 Am. Rep. 522), 389.
Macon v. California &c. R. Co. (40 Cal. 532), 334.
Macon &c. R. Co. v. Baber (42 Ga. 300), 330, 333, 334.
Macon &c. R. Co. v. Davis (27 Ga. 113; 18 Ga. 679; 13 Ga. 68), 39, 101, 111, 114, 125, 130, 131, 132, 279, 281, 328, 334, 351.
Macon &c. R. Co. v. Johnson (38 Ga. 409), 111, 134.
Macon &c. R. Co. v. Lester (30 Ga. 911), 330, 334.
Macon &c. R. Co. v. McConnell (27 Ga. 481), 357, 360.
Macon &c. R. Co. v. Vaughn (48 Ga. 464), 330, 337.
Macon &c. R. Co. v. Winn (19 Ga. 440; 26 Ga. 250), 19, 34, 131.
Macy v. St. Paul &c. R. Co. (35 Minn. 200), 479.
Mad River R. Co. v. Barber (5 Ohio St. 541), 496, 504, 517, 538.
Madan v. Sherard (73 N. Y. 329; 29 Am. Rep. 153), 252.
Madden v. Chesapeake &c. R. Co. (28 W. Va. 610; 57 Am. Rep. 695), 476.
Madden v. Minneapolis &c. R. Co. (32 Minn. 303), 500.
Maddox v. Cunningham (68 Ga. 431; 45 Am. Rep. 500), 410.
Maddox v. Railway Company (38 L. T. (N. S.) 458), 230.
Madison, City of, v. Ross (3 Ind. 236; 54 Am. Dec. 481), 26.
Magee v. North Pac. R. Co. (78 Cal. 430), 524.
Maginnis v. Canada Southern Bridge Co. (49 Mich. 171), 505.
Maginnis v. New York &c. R. Co. (52 N. Y. 215), 76, 260, 289.
Magnin v. Dinsmore (70 N. Y. 410; 26 Am. Rep. 608; 56 N. Y. 168), 247.
Magoric v. Little (23 Blatchf. 399; 25 Fed. Rep. 627), 107.
Maguire v. Middlesex R. Co. (115 Mass. 239), 433, 434, 435.
Maguire v. Russell (12 Ct. of Ses. Cas. 1071, Sc.), 489.
Mahar v. N. Y. C. & H. R. R. Co. (5 App. Div. (N. Y.) 22), 633.
Maher v. Atlantic &c. R. Co. (64 Mo. 267), 301, 314.
Mahlen v. Lake Shore &c. R. Co. (49 Mich. 585), 280, 291.
Mahogany v. Ward (16 R. I. 479; 17 Atl. Rep. 860), 42, 48.
Mahoney v. Dore (155 Mass. 513; 30 N. E. Rep. 366), 519.
Mahoney v. Metropolitan R. Co. (104 Mass. 73), 406.
Makepeace v. Worden (1 N. H. 16), 323.
Malcom v. Richmond &c. R. Co. (106 N. C. 63; 11 S. E. Rep. 187), 215.
Mallard v. Ninth Ave. R. Co. (7 N. Y. Supl. 666), 174.
Mallory v. Griffey (85 Penn. St. 275), 606.
Malm v. Thelin (47 Neb. 686; 66 N. W. Rep. 650), 520.
Malone v. Boston &c. R. Co. (4 N. Y. Supl. 599; 51 Hun, 532), 304.
Malone v. Hathaway (64 N. Y. 5; 21 Am. Rep. 573), 463, 466, 516.
Malone v. Morton (84 Mo. 436), 500.
Maloy v. New York &c. R. Co. (58 Barb. 182), 372, 376.
Maloy v. Wabash &c. Ry. Co. (84 Mo. 270), 58, 301.
Maltby v. Chicago &c. R. Co. (52 Mich. 108), 285.
Manchester &c. Ry. Co. v. Wallis (14 C. B. 213; 23 L. J. (C. P.) 185), 354.
Manderschid v. City of Dubuque (29 Iowa, 73; 4 Am. Rep. 196), 381.
Mangam v. Brooklyn &c. R. Co. (36 Barb. 239; 38 N. Y. 456), 168, 169, 171, 203, 423.
Mangam v. Atterton (4 Hurl. & Colt. 388; L. R. 1 Exch. 239), 179, 197. 198, 200, 306.
Mangerton, The (1 Swab. 120), 60.
Manley v. New York &c. R. Co. (18 App. Div. (N. Y.) 420), 271.
Manly v. Wilmington &c. R. Co. (74 N. C. 655), 24, 34, 46, 196, 293, 301, 567, 600.

[The references are to pages.]

Mann v. Birchard (40 Vt. 326), 246.
Mann v. Central &c. R. Co. (55 Vt. 484; 45 Am. Rep. 628), 285.
Mann v. Oriental Print Works (11 R. I. 152), 465, 470.
Mann v. Phila. Traction Co. (175 Penn. St. 122; 34 Atl. Rep. 572), 435.
Mann v. Williamson (70 Mo. 661), 337.
Mansfield &c. Co. v. McEnery (91 Penn. St. 185; 36 Am. Rep. 662), 56, 538.
Mantel v. Chicago &c. R. Co. (33 Minn. 62), 280.
Manufacturing Co. v. Morrissey (40 Ohio St. 148; 48 Am. Rep. 669), 496, 543.
Manville v. Cleveland &c. R. Co. (11 Ohio St. 417), 464, 481.
Manz. v. St. Louis &c. Ry. Co. (87 Mo. 278), 338.
Manzoni v. Douglas (6 L. R. Q. B. Div. 145), 627.
Marble v. Ross (124 Mass. 44), 23, 58, 77, 87, 117.
Marble v. Worcester (4 Gray, 404), 374.
Marean v. New York &c. Ry. Co. (167 Penn. St. 220), 17.
Mareau v. Vanatta (88 Ill. 132), 594.
Marfell v. South Wales &c. Ry. Co. (8 C. B. (N. S.) 525; 7 Ins. (N. S.) 240; 29 L. J. (C. P.) 315; 8 Week. Rep. 765; 2 L. T. (N. S.) 629), 343.
Marietta &c. R. Co. v. Picksley (24 Ohio St. 654), 270.
Marietta &c. R. Co. v. Stevenson (24 Ohio St. 48), 329.
Marini v. Graham (67 Cal. 130), 367.
Mark v. Hunson &c. B. Co. (56 How. Pr. 108), 33.
Mark v. St. Paul &c. R. Co. (30 Minn. 493), 63.
Markham v. Houston Direct Nav. Co. (73 Tex. 247; 11 S. W. Rep. 131), 155.
Markin v. Priddy (39 Kan. 462; 18 Pac. Rep. 514), 349.
Marks v. Borum (1 Baxt. 87; 25 Am. Rep. 764), 593.
Marquette &c. R. Co. v. Spear (44 Mich. 169; 38 Am. Rep. 142), 56, 358, 362.
Marriott v. Stanley (1 Scott's N. R. 392), 22.
Mars v. Delaware &c. Canal Co. (8 N. Y. Supl. 107; 54 Hun, 625), 43.
Marsh v. Benton County (75 Iowa, 469; 39 N. W. Rep. 713), 27.
Marsh v. Chickering (101 N. Y. 396), 543.
Marsh v. New York &c. R. Co. (14 Barb. 364), 324, 332, 345, 352.
Marsh v. South Carolina R. Co. (56 Ga. 274), 530.
Marshall v. Ipswich (110 Mass. 522), 380.
Marshall v. Schricker (63 Mo. 208), 464.
Marshall v. Stewart (2 Macq. H. L. Cas. 30; 1 Pat. Sc. App. 447; 33 Eng. Law & Eq. 1; 39 Am. & Eng. R. Cas. 332, n.), 98, 451, 497, 545.
Marshall v. Widdicomb Furniture Co. (67 Mich. 167; 34 N. W. Rep. 541), 500.
Marsland v. Murray (148 Mass. 91; 18 N. E. Rep. 680), 203.
Martensen v. Chicago &c. R. Co. (60 Iowa, 705), 25.
Martin v. Baltimore &c. R. Co. (14 W. Va. 180; 35 Am. Rep. 748), 208.
Martin v. Bishop (59 Wis. 417), 18, 30.
Martin v. Cahill (39 Hun, 445), 199.
Martin v. Great Northern &c. Ry. Co. (16 C. B. 179; 81 Eng. Com. Law, 179), 231, 607.
Martin v. Little Rock &c. R. Co. (62 Ark. 156; 34 S. W. Rep. 545), 262, 265.
Martin v. Stewart (73 Wis. 558; 41 N. W. Rep. 538), 332, 340.
Martin v. Wallace (40 Ga. 52), 75.
Martin v. Ward (14 C. of S. Cas. (N. S.) 814), 152.
Martin v. Western &c. R. Co. (23 Wis. 437), 358, 359.
Martin v. Wood (5 N. Y. Supl. 274), 103.
Marty v. Chicago &c. R. Co. (38 Minn. 108; 35 N. W. Rep. 670), 287.
Marvin v. Wilber (52 N. Y. 270, 273), 241.
Maryland v. Pittsburgh &c. R. Co. (123 Penn. St. 487; 23 W. N. C. 95; 16 Atl. Rep. 623, 624), 269.
Maryland Central R. Co. v. Neubeur (62 Md. 391), 76.
Mascheck v. St. Louis &c. R. Co. (3 Mo. App. 600), 168.
Maslin v. Baltimore &c. R. Co. (14 W. Va. 180; 35 Am. Rep. 748), 247, 250.
Mason v. Edison Machine Works (28 Fed. Rep. 228), 465

[The references are to pages.]

Mason v. Missouri Pac. Ry. Co. (27 Kan. 83; 41 Am. Rep. 405), 78, 128, 296, 299, 314.
Mason v. Railroad Co. (111 N. C. 482; 16 S. E. Rep. 698; 114 N. C. 718; 19 S. E. Rep. 362), 469, 480, 545.
Mason v. Thompson (9 Pick. 280; 20 Am. Dec. 471), 586.
Masser v. Chicago &c. R. Co. (68 Iowa, 602), 77.
Massie v. Peel Splint Coal Co. (41 W. Va. 620; 24 S. E. Rep. 644), 536.
Masterton v. New York &c. R. Co. (84 N. Y. 247; 38 Am. Rep. 510), 145, 157.
Mathews v. Case (61 Wis. 491; 50 Am. Rep. 151), 483.
Mathews v. London Street Tramway Co. (58 L. J. Q. B. 12), 152.
Matson v. Maupin (75 Ala. 312), 27.
Matta v. Chicago &c. R. Co. (69 Mich. 109; 32 Am. & Eng. R. Cas. 71), 117.
Matthews v. Bonsee (51 N. J. Law, 30; 16 Atl. Rep. 195), 80, 84.
Matthews v. Missouri Pac. Ry. Co. (26 Mo. App. 75), 629.
Matthews v. St. Paul &c. R. Co. (18 Minn. 434), 351.
Matthews v. Warner (29 Gratt. 570; 26 Am. Rep. 396), 110.
Matti v. Chicago &c. Ry. Co. (69 Mich. 109; 37 N. W. Rep. 54), 276.
Mauch Chunk, Borough of, v. Kline (100 Penn. St. 119; 45 Am. Rep. 364), 404.
Maultby v. City of Leavenworth (28 Kan. 745), 372, 375.
Maumus v. Champion (40 Cal. 121), 103.
Mauritz v. New York &c. R. Co. (23 Fed. Rep. 765), 252.
Max Morris, The (28 Fed. Rep. 881), 577, 581.
Maxim v. Town of Champion (4 N. Y. Supl. 515; 50 Hun, 88), 381.
Maxwell v. Hannibal &c. R. Co. (85 Mo. 95), 507.
May v. Central R. &c. Co. (80 Ga. 363; 4 S. E. Rep. 330), 299.
May v. Hanson (5 Cal. 360; 63 Am. Dec. 135), 417, 605.
Mayberry v. Concord &c. R. Co. (47 N. H. 391), 323, 349, 354.
Maybey, The R. L. (4 Blatchf. 88), 581.
Mayes v. Chicago &c. R. Co. (63 Iowa, 562), 538.
Mayhew v. Burns (103 Ind. 328), 190.
Mayhew v. Sullivan Mining Co. (76 Me. 100; 19 Am. Law Rev. 328), 471, 486, 511.
Maynard v. Boston &c. R. Co. (115 Mass. 458; 15 Am. Rep. 119), 323, 340.
Mayo v. Boston &c. R. Co. (104 Mass. 137), 611.
Mayor &c. of Birmingham v. Starr (112 Ala. 98; 20 So. Rep. 424), 373.
Mayor v. Marriott (9 Md. 160), 403, 406.
Mayor &c. of New York v. Bailey (2 Denio, 433), 26.
Mayor of Colchester v. Brooke (7 Q. B. 377), 180, 183, 592.
Mayton v. Texas &c. Ry. Co. (63 Tex. 77; 51 Am. Rep. 637), 490.
Mead v. Burlington &c. R. Co. (52 Vt. 278), 333, 354.
Meara's Adm'x v. Holbrook (20 Ohio St. 137; 5 Am. Rep. 633), 492.
Meek v. Pennsylvania R. Co. (38 Ohio St. 632), 299.
Meeks v. Southern &c. R. Co. (52 Cal. 602; 56 Cal. 513; 38 Am. Rep. 67), 32, 76, 78, 168, 172, 178, 302, 309, 314.
Meesel v. Lynn &c. R. Co. (8 Allen, 234), 427, 433, 434, 435, 635.
Mehan v. Syracuse &c. R. Co. (73 N. Y. 585), 56, 539.
Meibus v. Dodge (38 Wis. 300; 20 Am. Rep. 6), 196, 199, 303.
Mellor v. Merchants' Manfg. Co. (150 Mass. 362; 23 N. E. Rep. 100), 490.
Memphis & Charleston R. Co. v. Hembree (84 Ala. 182; 4 So. Rep. 392), 49.
Memphis & Charleston R. Co. v. Whitfield (44 Miss. 466; 7 Am. Rep. 699), 237.
Memphis &c. R. Co. v. Askew (90 Ala. 5; 7 So. Rep. 823), 500, 531.
Memphis &c. R. Co. v. Blakeney (43 Miss. 218), 330, 334.
Memphis &c. R. Co. v. Jones (2 Head, 517), 19, 557.
Memphis &c. R. Co. v. Orr (43 Miss. 279), 337.
Memphis &c. R. Co. v. Salinger (46 Ark. 528), 215.
Memphis &c. R. Co. v. Shoecraft (13 S. W. Rep. 422), 335.

[The references are to pages.]

Memphis &c. R. Co. v. Stringfellow (44 Ark. 322; 51 Am. Rep. 598), 235, 236.
Memphis &c. R. Co. v. Thomas (51 Miss. 637), 454, 545.
Memphis &c. R. Co. v. Womack (84 Ala. 149; 4 So. Rep. 618), 275, 316, 320.
Menger v. Laur (55 N. J. Law, 205), 117.
Mentges v. New York &c. R. Co. (1 Hilt. 425), 326, 352.
Mentz v. Second Ave. R. Co. (2 Robt. 356; 3 Abb. App. Dec. 274), 424, 428.
Merchants' &c. Co. v. Cornforth (3 Colo. 280; 25 Am. Rep. 757), 248.
Mercier v. New Orleans &c. R. Co. (23 La. Ann. 264), 22.
Merkle v. New York &c. R. Co. (49 N. J. Law, 473; 9 Atl. Rep. 680), 290.
Merriam v. Hartford &c. R. Co. (20 Conn. 354; 52 Am. Dec. 344), 251.
Merrill v. Eastern R. Co. (139 Mass. 238; 31 Alb. Law Jour. 503), 96, 241, 438.
Merrill v. Hampden (26 Me. 234), 599.
Merrill v. North Yarmouth (78 Me. 200; 57 Am. Rep. 794), 374.
Merritt v. New York &c. R. Co. (162 Mass. 326; 38 N. E. Rep. 447), 211.
Merwin v. Manhattan Ry. Co. (1 N. Y. Supl. 267), 143.
Messenger v. Dennie (137 Mass. 197; 20 Am. Rep. 295; 141 Mass. 335), 169.
Metallic Compression Casting Co. v. Fitchburg R. Co. (109 Mass. 277; 12 Am. Rep. 689), 41.
Metcalfe v. Baker (11 Abb. Pr. (N. S.) 431), 154, 156.
Metcalfe v. Rochester Ry. Co. (12 App. Div. (N. Y.) 147, 176, 187.
Metropolitan &c. Ry. Co. v. Jackson (3 L. R. App. Cas. 193), 627.
Metropolitan St. R. Co. v. Moore (83 Ga. 453; 10 S. E. Rep. 730), 438.
Mettlestadt v. Ninth Ave. R. Co. (4 Robt. 377), 431.
Meuhlhausen v. St. Louis &c. R. Co. (91 Mo. 832; 2 S. W. Rep. 315), 195.
Meyer v. Midland &c. R. Co. (2 Neb. 319), 303.
Meyer v. North Missouri &c. R. Co. (35 Mo. 352), 343.
Meyers v. Chicago &c. R. Co. (59 Mo. 223), 279.
Meyers v. Union Trust Co. (82 Mo. 237), 338.
Michael v. Allestree (2 Levintz, 172), 448.
Michigan &c. R. Co. v. Dolan (32 Mich. 510), 509, 512.
Michigan &c. R. Co. v. Fisher (27 Ind. 97), 325, 332.
Michigan &c. R. Co. v. Lantz (29 Ind. 528), 601.
Michigan &c. R. Co. v. Smithson (45 Mich. 212), 477, 497, 502, 536.
Midland &c. R. Co. v. Daykin (17 C. B. 126; 25 L. J. (C. P.) 73), 332, 350.
Mikleson v. Truesdale (63 Minn. 137; 65 N. W. Rep. 260), 482.
Milarkey v. Foster (6 Or. 378; 25 Am. Rep. 531), 367, 378.
Milburn v. Kansas City &c. R. Co. (86 Mo. 104), 59.
Miles v. Atlantic &c. R. Co. (4 Hughes, 172), 221, 304.
Miles v. Hannibal &c. R. Co. (31 Mo. 407), 338.
Millcreek Township v. Perry (12 Atl. Rep. 149), 57.
Miller v. Chicago &c. R. Co. (59 Iowa, 707), 329, 332, 349.
Miller v. Ohio &c. Ry. Co. (24 Ill. App. 326), 463.
Miller v. Pendleton (8 Gray, 547), 417.
Miller v. Pennsylvania R. Co. (8 Atl. Rep. 209), 372.
Miller v. St. Louis &c. R. Co. (5 Mo. App. 471), 607.
Miller v. St. Paul &c. R. Co. (42 Minn. 554), 428.
Miller v. Terre Haute &c. Ry. Co. (144 Ind. 323; 43 N. E. Rep. 257), 275, 276.
Miller v. Union Pac. Ry. Co. (2 McCrary, 87; 4 McCrary, 115), 56, 314, 460.
Milliman v. New York &c. R. Co. (66 N. Y. 642), 236.
Mills v. Alexandria &c. R. Co. (2 McArthur, 314), 489.
Mills v. Chicago &c. R. Co. (76 Wisc. 422; 45 N. W. Rep. 225), 25, 94.
Mills v. Stark (4 N. H. 512; 17 Am. Dec. 444), 336.
Milton v. Hudson River Steamboat Co. (37 N. Y. 212), 16.

[The references are to pages.]

Milwaukee &c. R. Co. v. Hunter (11 Wis. 160), 285, 289, 607.
Milwaukee &c. R. Co. v. Kellogg (94 U. S. 469), 44, 364.
Minerly v. Union Ferry Co. (9 N. Y. Supl. 104; 56 Hun, 113), 72.
Mississippi &c. R. Co. v. Mason (51 Miss. 234), 91.
Mississippi &c. R. Co. v. Miller (40 Miss. 45), 330, 333.
Missouri &c. R. Co. v. Cornell (30 Kan. 35), 357.
Missouri &c. R. Co. v. Leggett (27 Kan. 323), 342, 343, 349.
Missouri Furnace Co. v. Abend (107 Ill. 44; 47 Am. Rep. 425), 497, 539, 543, 601, 607.
Missouri Pac. Ry. Co. v. Baxter (42 Neb. 793), 60 N. W. Rep. 1044), 520.
Missouri Pac. Ry. Co. v. Brown (75 Tex. 267; 12 S. W. Rep. 1117), 21, 97.
Missouri Pac. Ry. Co. v. Calbreath (66 Tex. 526), 532.
Missouri Pac. Ry. Co. v. Cassidy (24 Pac. Rep. 88), 96.
Missouri Pac. Ry. Co. v. Cornwall (70 Tex. 611; 8 S. W. Rep. 312), 248.
Missouri Pac. Ry. Co. v. Crenshaw (71 Tex. 340; 9 S. W. Rep. 262), 502.
Missouri Pac. Ry. Co. v. Dunham (4 S. W. Rep. 472), 342, 343.
Missouri Pac. Ry. Co. v. Dwyer (36 Kan. 58; 12 Pac. Rep. 352), 478.
Missouri Pac. Ry. Co. v. Gedney (24 Pac. Rep. 464), 335.
Missouri Pac. Ry. Co. v. Haley (25 Kan. 35), 534.
Missouri Pac. Ry. Co. v. Harris (67 Tex. 166; 2 S. W. Rep. 574), 247.
Missouri Pac. Ry. Co. v. Henry (75 Tex. 220; 12 S. W. Rep. 828), 499.
Missouri Pac. Ry. Co. v. Hill (9 S. W. Rep. 351), 281.
Missouri Pac. Ry. Co. v. Holcomb (44 Kan. 332; 24 Pac. Rep. 467), 224.
Missouri Pac. Ry. Co. v. Holley (30 Kan. 465), 530, 539.
Missouri Pac. Ry. Co. v. Johnston (35 Kan. 58), 350.
Missouri Pac. Ry. Co. v. Jones (75 Tex. 151; 12 S. W. Rep. 972), 489, 498.
Missouri Pac. Ry. Co. v. Lee (70 Tex. 496; 7 S. W. Rep. 857), 97, 260, 277.
Missouri Pac. Ry. Co. v. McCally (41 Kan. 639; 21 Pac. Rep. 574), 442, 605.
Missouri Pac. Ry. Co. v. McElyea (71 Tex. 386; 9 S. W. Rep. 313), 510.
Missouri Pac. Ry. Co. v. Mosely (12 U. S. App. 601; 57 Fed. Rep. 921), 27, 259, 628.
Missouri Pac. Ry. Co. v. Peregoy (36 Kan. 427; 17 Pac. Rep. 7), 510.
Missouri Pac. Ry. Co. v. Pierce (5 Pac. Rep. 378), 278.
Missouri Pac. Ry. Co. v. Platzer (73 Tex. 117; 11 S. W. Rep. 160), 362.
Missouri Pac. Ry. Co. v. Somers (71 Tex. 700; 9 S. W. Rep. 741), 523.
Missouri Pac. Ry. Co. v. Stevens (35 Kan. 622; 12 Pac. Rep. 25), 59.
Missouri Pac. Ry. Co. v. Texas &c. Ry. Co. (31 Fed. Rep. 527; 33 Fed. Rep. 359; 34 Fed. Rep. 99; 36 Fed. Rep. 879), 209, 232, 475.
Missouri Pac. Ry. Co. v. Vandeventer (26 Neb. 222; 41 N. W. Rep. 998), 247.
Missouri Pac. Ry. Co. v. Watts (64 Tex. 568; 63 Tex. 549), 517, 537.
Missouri Pac. Ry. Co. v. Weisen (65 Tex. 443), 297.
Missouri Pac. Ry. Co. v. White (76 Tex. 102; 13 S. W. Rep. 65), 532.
Missouri Pac. Ry. Co. v. Williams (75 Tex. 4; 12 S. W. Rep. 835), 465.
Missouri Pac. Ry. Co. v. Wilson (28 Kan. 637), 325.
Mitchell v. Alestree (3 Keb. 650), 448.
Mitchell v. Allestry (1 Vent. 295), 448.
Mitchell v. Chicago &c. R. Co. (51 Mich. 236; 47 Am. Rep. 566), 213, 232, 235, 237, 601.
Mitchell v. City of Clinton (99 Mo. 153; 12 S. W. Rep. 793), 605.
Mitchell v. Pennsylvania R. Co. (1 Am. Law Rep. 717), 19.
Mitchell v. Robinson (80 Ind. 281; 41 Am. Rep. 812), 448, 466, 483, 512.
Mitchell v. Tacoma Ry. & Motor Co. (9 Wash. 120; 37 Pac. Rep. 341), 426.
Mitchell v. Woods (16 L. T. (N. S.) 676), 588.

[The references are to pages.]

Moakler v. Williamette Valley R. Co. (18 Or. 189; 22 Pac. Rep. 948), 226.
Moberly v. Kansas City &c. R. Co. (17 Mo. App. 518), 285.
Mobile &c. R. Co. v. Ashcraft (48 Ala. 15), 66.
Mobile &c. R. Co. v. Caldwell (83 Ala. 196; 3 So. Rep. 445), 335.
Mobile &c. R. Co. v. Crenshaw (65 Ala. 566), 196, 605.
Mobile &c. R. Co. v. Holborn (4 So. Rep. 146), 539.
Mobile &c. R. Co. v. Hopkins (41 Ala. 486), 249.
Mobile &c. R. Co. v. Hudson (50 Miss. 572), 330.
Mobile &c. R. Co. v. Smith (59 Ala. 245), 464, 477.
Mobile &c. R. Co. v. Stroud (64 Miss. 784; 2 So. Rep. 171), 291, 320.
Mobile &c. R. Co. v. Thomas (42 Ala. 672), 534.
Mobile &c. R. Co. v. Williams (53 Ala. 595), 330.
Mochler v. Town of Shaftsbury (46 Vt. 580; 14 Am. Rep. 634), 415.
Moebus v. Becker (46 N. J. Law, 41), 591, 626, 629, 633.
Moebus v. Herman (38 Hun, 370) 168.
Mohney v. Cook (26 Penn. St. 342), 77, 255, 397, 398.
Mohoney v. Libbey (123 Mass. 20; 25 Am. Rep. 6), 408.
Moline Plow Co. v. Anderson (19 Ill. App. 417), 501.
Moltly v. Leavenworth (28 Kan. 745), 377.
Monaghan v. New York &c. R. Co. 45 Hun, 113), 476, 522, 537.
Monongahela Bridge Co. v. Bevard (11 Atl. Rep. 575), 57.
Monongahela City v. Fisher (111 Penn. St. 9; 56 Am. Rep. 241), 49.
Monroe v. Leach (7 Metc. 274), 416.
Montgomery, City of, v. Wright (72 Ala. 411; 47 Am. Rep. 422), 371, 626.
Montgomery &c. R. Co. v. Boring (51 Ga. 182), 235.
Montgomery &c. R. Co. v. Chambers (79 Ala. 338), 605.
Montgomery &c. R. Co. v. Thompson (77 Ala. 448; 54 Am. Rep. 72), 56.
Montgomery Gas Light Co. v. Montgomery & E. Ry. Co. (86 Ala. 372; 5 So. Rep. 735), 35, 605.
Moody v. Minneapolis &c. R. Co. (77 Iowa, 29; 41 N. W. Rep. 477), 339.
Moody v. Osgood (54 N. Y. 488), 416.
Moomey v. Peak (57 Mich. 259), 53.
Mooney v. Hudson River R. Co. (5 Robt. 548), 157.
Mooney v. Maynard (1 Vt. 470; 18 Am. Dec. 699), 337.
Moon's Admr. v. Richmond &c. R. Co. (78 Va. 745; 49 Am. Rep. 401), 465, 478, 481.
Moore v. Abbott (32 Me. 46), 390.
Moore v. Central R. Co. (24 N. J. Law, 268), 26, 50, 276, 606.
Moore v. Chicago &c. Ry. Co. (102 Iowa, 595; 71 N. W. Rep. 569), 264.
Moore v. City of Shreveport (3 La. Ann. 645), 599.
Moore v. Gadsden (87 N. Y. 84; 41 Am. Rep. 352), 406.
Moore v. Kenockee Township (75 Mich. 332; 42 N. W. Rep. 944), 368.
Moore v. Levert (24 Ala. 310), 336.
Moore v. Pennsylvania R. Co. (99 Penn. St. 301; 44 Am. Rep. 106), 299, 304, 313.
Moore v. Phila. R. Co. (108 Penn. St. 349; 32 Alb. Law Jour. 98), 278, 279, 301, 319.
Moore v. Wabash &c. Ry. Co. (85 Mo. 588), 499, 511.
Moran v. Harris (63 Iowa, 390), 537.
Moran v. Nashville &c. R. Co. (58 Tenn. 379), 271.
Moran v. New York &c. R. Co. (3 N. Y. 770), 479.
Morch v. Toledo &c. Ry. Co. (Mich.) (71 N. W. Rep. 464), 479.
Moreland v. Murray (148 Mass. 91; 18 N. E. Rep. 680), 202.
Morey v. Fitzgerald (56 Vt. 487; 48 Am. Rep. 811), 383.
Morgan v. Bridge Co. (5 Dill. 96), 168, 203, 605.
Morgan v. Camden &c. R. Co. (16 Atl. Rep. 353; 23 W. N. C. 189), 234.
Morgan v. City of Hallowell (57 Me. 377), 79.
Morgan v. Cox (22 Mo. 373), 26, 591.
Morgan v. Thompson (82 Ky. 383), 458.

[The references are to pages.]

Morgan v. Vale of Neath Ry. Co. (5 Best & S. 736; C. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 12 Week. Rep. 144; 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Week. Rep. 1031), 479.
Morgan, The, v. The Zebra (2 Hughes, 64), 581.
Moriarty v. Central Iowa Ry. Co. (64 Iowa, 696), 350.
Morison v. Broadway &c. R. Co. (8 N. Y. Supl. 436), 432.
Morning Light, The (2 Wall. 550), 581.
Morris v. Chicago &c. R. Co. (45 Iowa, 29), 89, 91.
Morris v. Lake Shore &c. Ry. Co. (148 N. Y. 182), 70.
Morris v. Phelps (2 Hilt. 38), 387.
Morris v. St. Louis &c. R. Co. (58 Mo. 78), 338.
Morris v. Third Ave. R. Co. (23 How. Pr. 345), 251.
Morris &c. R. Co. v. State (36 N. J. Law, 553), 356.
Morris &c. R. Co. v. Haslan (38 N. J. Law, 147), 291, 571.
Morrison v. Broadway &c. R. Co. (130 N. Y. 166; 29 N. E. Rep. 105), 432.
Morrison v. Construction Co. (44 Wis. 405), 506.
Morrison v. Cornelius (63 N. C. 346, 349), 17.
Morrison v. Erie Ry. Co. (56 N. Y. 302), 171, 180, 213.
Morrison v. General Steam Nav. Co. (8 Exch. 733), 35, 77.
Morrison v. Kansas City &c. R. Co. (27 Mo. App. 418), 347.
Morrison v. Lawrence, 98 Mass. 219), 591.
Morrison v. New York &c. R. Co. (32 Barb. 568), 351.
Morrison v. Shelby County (116 Ind. 431; 19 N. E. Rep. 316), 54.
Morrissey v. Eastern &c. R. Co. (126 Mass. 377; 30 Am. Rep. 686), 103, 296, 304, 314.
Morrissey v. Ferry Co. (43 Mo. 383), 34.
Morse v. Erie Ry. Co. (65 Barb. 490), 270.
Morse v. Inhabitants of Belfast (77 Me. 44; 1 East. Rep. 67), 368.
Morse v. Rutland &c. R. Co. (27 Vt. 49), 323.
Morse v. Sweenie (15 Ill. App. 486), 390, 414.
Morton v. Detroit &c. R. Co. (81 Mich. 423; 46 N. W. Rep. 111; 20 N. E. Rep. 287), 478, 510.
Morton v. Gloster (46 Me. 520), 72 255, 396.
Moser v. St. Paul &c. R. Co. (42 Minn. 480; 44 N. W. Rep. 530), 344, 349.
Moses v. Louisville &c. R. Co. (39 La. Ann. 649; 2 So. Rep. 567), 233.
Moses v. Southern Pac. R. Co. (18 Or. 385; 23 Pac. Rep. 498), 330, 343.
Mosey v. Troy (61 Barb. 580), 403, 406.
Moss v. Johnson (22 Ill. 633), 241.
Moss v. Pacific &c. R. Co. (49 Mo. 167), 508, 510.
Motey v. Granite Co. (36 U. S. App. 682; 74 Fed. Rep. 156), 46.
Mott v. Hudson River R. Co. (8 Bosw. 345; 1 Robert, 585; 24 N. Y. Super. Ct. 585), 42, 143.
Moulton v. Aldrich (28 Kan. 300), 60, 416.
Moulton v. Gage (138 Mass. 390), 520.
Moulton v. Inhabitants of Sanford (51 Me. 127), 370.
Mt. Adams &c. R. Co. v. Reul (4 Ohio Cir. Ct. 363), 143.
Mt. Vernon v. Dusouchett (2 Ind. 586; 54 Am. Dec. 467), 601, 602.
Mt. Washington Road Co., Petition of (35 N. H. 134), 411.
Mower v. Inhabitants of Leicester (9 Mass. 247; 6 Am. Dec. 63), 367.
Mowrey v. Central &c. R. Co. (66 Barb. 43), 171.
Moye v. Wrightsville &c. R. Co. (83 Ga. 669), 335.
Moynihan v. Hills Co. (146 Mass. 586; 16 N. E. Rep. 574), 510.
Moynihan v. Whidden (143 Mass. 287), 168, 382.
Muehlhausen v. St. Louis R. Co. (91 Mo. 332; 2 S. W. Rep. 315), 32, 438.
Muhr v. City of New York (2 N. Y. Supl. 59), 56.
Muirhead v. Hannibal &c. Ry. Co. (19 Mo. App. 634), 500.
Mulcairns v. Janesville (67 Wis. 24), 485, 497.
Muldowney v. Illinois &c. R. Co. (39 Iowa, 615; 36 Iowa, 462; 32 Iowa, 176), 35, 46, 496, 531, 601.
Mulherrin v. Delaware &c. R. Co. (81 Penn. St. 366), 78, 105, 293, 313, 317, 566.
Mullan v. Phila. Steamship Co. (78 Penn. St. 25; 21 Am. Rep. 2), 465.

[The references are to pages.]

Mullaney v. Spence (15 Abb. Pr. (N. S.) 319), 199, 302, 306.
Mullen v. City of Owosso (100 Mich. 103; 58 N. W. Rep. 663), 164.
Mullen v. Rainear (45 N. J. Law, 520), 17.
Mullen v. St. John (57 N. Y. 567; 15 Am. Rep. 530), 408.
Mulligan v. Curtis (100 Mass. 512), 172, 195, 203.
Mulligan v. Montana Union Ry. Co. (19 Mont. 135; 47 Pac. Rep. 795), 475.
Mulvey v. Rhode Island Locomotive Works (14 R. I. 204), 497, 511.
Mumpower v. Hannibal &c. R. Co. (59 Mo. 245), 331.
Munch v. New York &c. R. Co. (29 Barb. 647), 351.
Munger v. Marshalltown (56 Iowa, 216; 59 Iowa, 763), 372.
Munger v. Tonawanda R. Co. (4 N. Y. 349; 53 Am. Dec. 384; 49 Am. Dec. 239), 16, 49, 88, 332, 333, 336, 345, 351, 352.
Munn v. Reed (4 Allen, 431), 174, 195, 203, 303.
Munson v. Town of Derby (37 Conn. 298; 9 Am. Rep. 332), 381.
Murch v. The Concord R. Co. (29 N. H. 9), 223.
Murchison v. Sergent (69 Ga. 206; 47 Am. Rep. 754), 586, 587.
Murdock v. Boston &c. R. Co. (133 Mass. 15), 45.
Murphy v. Armstrong Transfer Co. (167 Mass. 199; 45 N. E. Rep. 93), 400.
Murphy v. Boston &c. R. Co. (88 N. Y. 146; 42 Am. Rep. 240), 454, 478, 495, 516.
Murphy v. Caralli (3 Hurl. & C. 462; 10 Jur. (N. S.) 1207; 34 L. J. (Exch.) 14; 13 Week. Rep. 165), 487.
Murphy v. Chicago &c. R. Co. (38 Iowa, 539; 45 Iowa, 661), 299, 315, 321, 601.
Murphy v. Chicago &c. R. Co. (45 Wis. 222; 30 Am. Rep. 721), 358, 359, 360.
Murphy v. City of Brooklyn (98 N. Y. 642), 591.
Murphy v. Dean (101 Mass. 455; 3 Am. Rep. 390), 17, 49, 50, 599.
Murphy v. Gloucester (105 Mass. 470), 382.
Murphy v. New York &c. R. Co. (118 N. Y. 527; 23 N. E. Rep. 812; 11 Daly (N. Y.) 122), 441, 499.
Murphy v. Rome &c. R. Co. (10 N. Y. Supl. 354), 234.
Murphy v. Smith (19 C. B. (N. S.) 361; 12 L. T. (N. S.) 605), 464.
Murphy v. Union Ry. Co. (118 Mass. 228), 422.
Murray v. Currie (6 L. R. (C. P.) 24; 40 L. J. (C. P.) 26; 23 L. T. (N. S.) 557; 19 Week. Rep. 104), 488.
Murray v. Gulf &c. Ry. Co. (73 Tex. 2; 11 S. W. Rep. 125), 514.
Murray v. McShane (52 Md. 217; 36 Am. Rep. 367), 53, 383, 408.
Murray v. Missouri Pac. Ry. Co. (101 Mo. 236; 13 S. W. Rep. 817), 281.
Murray v. Pontchartrain R. Co. (31 La. Ann. 490), 16.
Murray v. St. Louis &c. Ry. Co. (98 Mo. 573; 12 S. W. Rep. 252), 484.
Murray v. South Carolina R. Co. (1 McMil. 385; 36 Am. Dec. 268; 10 Rich. 227), 330, 451, 452, 454, 455, 456, 461, 475, 548.
Murray v. Usher (117 N. Y. 542; 23 N. E. Rep. 564), 497.
Murtaugh v. New York &c. R. Co. (3 N. Y. Supl. 483; 49 Hun, 456), 525, 541.
Muster v. Chicago &c. R. Co. (61 Wis. 325; 49 Am. Rep. 41), 239.
Myers v. Dixon (3 Jones & S. 390), 399.
Myers v. Indianapolis &c. R. Co. (113 Ill. 386), 626.
Myers v. Meinrath (101 Mass. 366; 3 Am. Rep. 368; 3 Allen, 165), 392, 395.
Mynard v. Syracuse &c. R. Co. (71 N. Y. 183; 27 Am. Rep. 28), 247.
Mynning v. Detroit &c. R. Co. (64 Mich. 93; 31 N. W. Rep. 147; 59 Mich. 257; 67 Mich. 677), 276, 288, 600.

N.

Nadau v. White River Lumber Co. (76 Wis. 120; 43 N. W. Rep. 1135), 528.
Nagel v. Missouri &c. R. Co. (75 Mo. 653; 42 Am. Rep. 418), 198, 303, 308.
Nagle v. Alleghany &c. R. Co. (88 Penn. St. 35; 32 Am. Rep. 413), 169.
Nance v. Carolina &c. R. Co. (94 N. C. 619), 233.
Nanticoke v. Warne (106 Penn. St. 373), 165.

[The references are to pages.]

Nary v. New York &c. R. Co. (9 N. Y. Supl. 153), 489.
Nash v. New York &c. R. Co. (4 N. Y. Supl. 525; 51 Hun, 594), 275, 277.
Nashville &c. R. Co. v. Carroll (6 Heisk. 347), 23, 34, 111, 135, 460, 478.
Nashville &c. R. Co. v. Elliott (1 Caldw. 611), 496, 513.
Nashville &c. R. Co. v. Handman (13 Lea (Tenn.) 423), 475.
Nashville &c. R. Co. v. Hembree (85 Ala. 481), 334.
Nashville &c. R. Co. v. Jones (9 Heisk. 27), 465, 496.
Nashville &c. R. Co. v. Prince (2 Heisk. 580), 318.
Nashville &c. R. Co. v. Smith (6 Heisk. 174), 34, 98, 111.
Nashville &c. R. Co. v. Wheless (10 Lea, 741; 43 Am. Rep. 317), 134, 454, 475.
Nason v. Boston (14 Allen, 508), 403.
Nason v. West (78 Me. 253), 533.
Navasota, City of, v. Pearce (46 Tex. 525; 26 Am. Rep. 279), 368.
Nave v. Flack (90 Ind. 205; 46 Am. Rep. 168), 33, 83, 374, 375, 378.
Naylor v. New York &c. R. Co. (33 Fed. Rep. 801), 475.
Neanow v. Ullech (46 Wis. 587), 8, 46, 72.
Needham v. Louisville &c. R. Co. (85 Ky. 423; 3 S. W. Rep. 797; 11 S. W. Rep. 306), 27, 540, 633.
Needham v. San Francisco &c. R. Co. (37 Cal. 409), 13, 32, 34, 49, 78, 91, 92.
Neff v. Town of Wellesley (148 Mass. 487; 20 N. E. Rep. 111), 400.
Nehrbas v. Central &c. R. Co. (62 Cal. 320), 17, 605.
Neier v. Missouri Pac. Ry. Co. (1 S. W. Rep. 387), 281, 624.
Neilling v. Industrial Manfg. Co. (78 Ga. 260), 540.
Neilon v. Marinette Paper Co. (75 Wis. 579; 44 N. W. Rep. 772), 528.
Neilson v. Kansas City &c. R. Co. (85 Mo. 599), 509.
Neimann v. Michigan Cent. R. Co. (80 Mich. 197; 44 N. W. Rep. 1049), 343.
Nelson v. Allen Paper Car-Wheel Co. (29 Fed. Rep. 840), 500.
Nelson v. Atlantic &c. R. Co. (68 Mo. 593), 89.
Nelson v. Chicago &c. R. Co. (38 Iowa, 564), 601.
Nelson v. Chicago &c. R. Co. (60 Wis. 324), 634.
Nelson v. Dubois (11 Daly (N. Y.) 127), 500.
Nelson v. Johnson (18 Neb. 180; 53 Am. Rep. 806), 526.
Nelson v. Suffolk Ins. Co. (8 Cush. 497), 573.
Nelson v. Vermont &c. R. Co. (26 Vt. 717), 340.
Nelson v. Village of Canisteo (100 N. Y. 89), 367.
Neptune, The (30 Fed. Rep. 925), 501.
Neslio v. Second &c. Passenger Co. (113 Penn. St. 300), 432.
Nevin v. Pullman &c. Car. Co. (106 Ill. 222; 46 Am. Rep. 688), 420.
New Albany &c. R. Co. v. Maiden (12 Ind. 10), 348.
New Albany &c. R. Co. v. Tilton (12 Ind. 3), 325.
New Haven Steamboat Co. v. Vanderbilt (16 Conn. 420), 36.
New Jersey &c. R. Co. v. Kennard (21 Penn. St. 203), 225, 226.
New Jersey Exp. Co. v. Nichols (32 N. J. Law, 166; 33 N. J. Law, 434), 23, 48, 103, 606, 607.
New Jersey Traction Co. v. Gardner (N. J.) (38 Atl. Rep. 669), 432, 633.
New Jersey Trans. Co. v. West (32 N. J. Law, 91), 286, 292, 571.
New Orleans &c. Ins. Co. v. Railroad Co. (20 La. Ann. 302), 248.
New Orleans &c. R. Co. v. Bourgeois (66 Miss. 3; 5 So. Rep. 529), 335.
New Orleans &c. R. Co. v. Burke (53 Miss. 200; 24 Am. Rep. 689), 419, 422.
New Orleans &c. R. Co. v. Field (46 Miss. 573), 330, 333, 334, 337.
New Orleans &c. R. Co. v. Harrison (48 Miss. 112; 12 Am. Rep. 356), 241, 490, 491.
New Orleans &c. R. Co. v. Mitchell (52 Miss. 808), 270.
New Orleans &c. R. Co. v. Norwood (62 Miss. 287; 52 Am. Rep. 191), 487.
New Orleans &c. R. Co. v. Thornton (65 Miss. 256; 3 So. Rep. 654), 344.
New World v. King (16 How. (U. S.) 474), 99.
New York, City of, v. Starin (12 N. E. Rep. 631), 417.

[The references are to pages.]

New York &c. R. Co. v. Atlantic Refining Co. (129 N. Y. 597), 25.
New York &c. R. Co. v. Bell (112 Penn. St. 400), 480.
New York &c. R. Co. v. Blessing (35 U. S. App. 208; 67 Fed. Rep. 277), 262.
New York &c. R. Co. v. Cooper (85 Va. 939; 9 S. E. Rep. 321), 155.
New York &c. R. Co. v. Coulbourn (69 Md. 360; 16 Atl. Rep. 208), 441.
New York &c. R. Co. v. Doane (115 Ind. 435; 17 N. E. Rep. 913), 107.
New York &c. R. Co. v. Euches (127 Penn. St. 316; 24 W. N. C. 261; 17 Atl. Rep. 991), 210, 234.
New York &c. R. Co. v. Grand Rapids &c. R. Co. (116 Ind. 60; 18 N. E. Rep. 182), 59.
New York &c. R. Co. v. Kellam's Adm'r (83 Va. 851; 3 S. E. Rep. 703), 276.
New York &c. R. Co. v. Lyons (119 Penn. St. 324; 13 Atl. Rep. 205), 540.
New York &c. R. Co. v. Steinbrenner (47 N. J. Law, 161; 54 Am. Rep. 126), 155.
New York Harbor Towboat Co. v. New York &c. R. Co. (148 N. Y. 574; 42 N. E. Rep. 1086), 629.
Newark Passenger Ry. Co. v. Block (55 N. J. Law, 605; 27 Atl. Rep. 1067), 399.
Newcomb v. Boston Protective Department (146 Mass. 596; 16 N. E. Rep. 555), 73.
Newdoerffer v. Brooklyn Heights R. Co. (9 App. Div. (N. Y.) 66), 269.
Newell v. Ryan (40 Hun, 286), 507.
Newhouse v. Miller (35 Ind. 463), 34.
Newkirk v. Sabler (9 Wend. 652), 383.
Newman v. Chicago &c. R. Co. (80 Iowa, 672; 45 N. W. Rep. 1054), 442.
Newman v. Ernst (10 N. Y. Supl. 310), 414.
Newman v. Phillipsburgh &c. R. Co. (52 N. J. Law, 446; 19 Atl. Rep. 1102), 185, 186.
Newson v. New York &c. R. Co. (29 N. Y. 383), 59, 106.
Niantic Coal & Min. Co. v. Leonard (25 Ill. App. 95), 514.
Niblett v. Nashville (12 Heisk. 684; 27 Am. Rep. 755), 381.
Nichols v. Chicago &c. Ry. Co. (69 Iowa, 154), 59.
Nichols v. Minneapolis (33 Minn. 430; 53 Am. Rep. 56), 57. 378.
Nichols' Adm'r v. Louisville &c. R. Co. (6 S. W. Rep. 339), 301.
Nichols' Adm'r v. Washington &c. R. Co. (83 Va. 99; 5 S. E. Rep. 171), 275, 316.
Nicholson v. Erie Ry. Co. (41 N. Y. 525), 276, 296, 315.
Nicholson v. Hannibal &c. R. Co. (82 Mo. 73), 338.
Nicholson v. Lancashire &c. Ry. Co. (34 L. J. (Exch.) 84; 3 Hurl. & C. 534), 81, 231.
Nickerson v. Harriman (38 Me. 277), 98.
Nisbet v. Garner (75 Iowa, 314; 39 N. W. Rep. 516), 154, 155, 165.
Nitro Phosphate Co. v. Docks Co. (9 L. R. Ch. Div. 503), 109.
Noble v. City of Richmond (31 Gratt. 271; 31 Am. Rep. 726), 369.
Noblesville Gas & Imp. Co. v. Loehr (124 Ind. 79; 24 N. E. Rep. 579), 374.
Nodine v. Doherty (46 Barb. 59), 394, 396.
Nolan v. Brooklyn City &c. R. Co. (87 N. Y. 63; 41 Am. Rep. 345), 433, 435.
Nolan v. Chicago &c. R. Co. (23 Mo. App. 353), 329.
Nolan v. King (97 N. Y. 565; 49 Am. Rep. 551), 377.
Nolan v. New York &c. R. Co. (53 Conn. 461), 58, 59.
Nolton v. Western R. Co. (15 N. Y. 444), 240.
Nordyke & Marmon Co. v. Van Sant (99 Ind. 188), 500.
Norfolk &c. R. Co. v. Ampey (93 Va. 108; 25 S. E. Rep. 226), 515.
Norfolk &c. R. Co. v. Burge (84 Va. 63; 4 S. E. Rep. 21), 290.
Norfolk &c. R. Co. v. Emmert (83 Va. 640; 3 S. E. Rep. 145), 532.
Norfolk &c. R. Co. v. Ferguson (79 Va. 241), 223.
Norfolk &c. R. Co. v. Groseclove (88 Va. 267; 13 S. E. Rep. 454), 186, 188.
Norfolk &c. R. Co. v. Harman (83 Va. 553; 8 S. E. Rep. 251), 292.
Norfolk &c. R. Co. v. Ormsby (27 Gratt. 455), 185.
Norfolk &c. R. Co. v. Prinnell (3 S. E. Rep. 95), 233.

[The references are to pages.]

Norris v. Androscoggin &c. R. Co. (39 Me. 273; 63 Am. Dec. 621), 323, 336, 340.
Norris v. Kohler (41 N. Y. 42), 387.
Norris v. Litchfield (35 N. H. 271), 35, 50, 77, 78, 255, 626.
North Baltimore Pass. Ry. Co. v. Arnreich (78 Md. 589; 28 Atl. Rep. 809), 423.
North Birmingham St. R. Co. v. Calderwood (89 Ala. 247; 7 So. Rep. 360), 35, 46.
North Chicago &c. Ry. Co. v. Gastka (128 Ill. 613; 21 N. E. Rep. 522), 421.
North Chicago Rolling Mill Co. v. Benson (18 Ill. App. 194), 513.
North Chicago Rolling Mill Co. v. Johnson (114 Ill. 57), 499.
North Chicago Street R. Co. v. Eldridge (151 Ill. 542), 25, 60.
North Chicago &c. Mills v. Monka (4 Ill. 664), 121.
North Eastern &c. R. Co. v. Sineath (8 Rich. (Law) 185), 336.
North Manheim, Township of, v. Arnold (13 Atl. Rep. 444), 378.
North Penn. R. Co. v. Heileman (49 Penn. St. 60), 264, 270, 276, 317, 633, 635.
North Penn. R. Co. v. Mahoney (57 Penn. St. 187; 6 Phila. 242), 168, 178, 184, 186.
North Penn. R. Co. v. Rehman (49 Penn. St. 106), 324, 328, 350.
Northeastern R. Co. v. Martin (78 Ga. 603; 3 S. E. Rep. 701), 335.
Northeastern R. Co. v. Wanless (43 L. J. (Q. B.) 185; L. R. 7 H. L. 12; 30 L. T. (N. S.) 275), 282.
Northern Central R. Co. v. Geis (31 Md. 357), 36, 92.
Northern Central R. Co. v. Price (29 Md. 420), 26, 32, 89, 92.
Northern &c. R. Co. v. Husson (101 Penn. St. 1; 47 Am. Rep. 690), 533, 536.
Northern &c. R. Co. v. Lems (7 U. S. App. 254; 51 Fed. Rep. 658), 360.
Northern &c. R. Co. v. State (29 Md. 420; 31 Md. 357), 313, 319, 605.
Northern Pac. Ry. Co. v. Craft's Administratrix (29 U. S. App. 687; 69 Fed. Rep. 124), 565.
Northern Pac. Ry. Co. v. Herbert (116 U. S. 642), 512.
Northern Pac. Ry. Co. v. Holmes (18 Pac. Rep. 76), 290.
Northern Pac. Ry. Co. v. Mares (123 U. S. 710), 540.
Northern Pac. Ry. Co. v. O'Brien (1 Wash. 599; 21 Pac. Rep. 32), 497, 606.
Norton v. Volzke (158 Ill. 402; 41 N. E. Rep. 1085), 526.
Norwood v. Raleigh &c. R. Co. (111 N. C. 236; 16 S. E. Rep. 4), 46, 298.
Nosler v. Chicago &c. R. Co. (73 Iowa, 268; 34 N. W. Rep. 850), 262, 276, 289.
Nowell v. New York (52 N. Y. Super. Ct. 382), 381.
Noyes v. Shepherd (30 Me. 173; 50 Am. Dec. 625), 23.
Noyes v. Smith (29 Vt. 59; 28 Vt. 63), 496, 508.
Noyes v. Town of Boscawen (64 N. H. 361; 10 Atl. Rep. 690), 155.
Nugent v. Boston &c. R. Corp. (19 Atl. Rep. 797), 534.
Nuss v. Rofsnyder (178 Penn. St. 397; 35 Am. Rep. 958), 518.
Nuzum v. Pittsburgh &c. R. Co. (30 W. Va. 228; 4 S. E. Rep. 242), 275, 316.

O.

Oakes v. Mase (165 U. S. 363), 481.
O'Bannon v. Louisville &c. R. Co. (8 Bush, 352), 324, 337.
Ober v. Crescent City R. Co. (44 La. Ann. 1059; 11 So. Rep. 818), 427, 432.
O'Brien v. Boston &c. R. Co. (138 Mass. 387; 52 Am. Rep. 279), 463.
O'Brien v. Commercial Ins. Co. (6 Jones & S. 526), 573.
O'Brien v. McGlinchy (68 Me. 552), 8, 25, 34, 172, 174, 202.
O'Brien v. Phila. &c. R. Co. (3 Phila. 76), 23, 49.
O'Brien v. Tatum (84 Ala. 186; 4 So. Rep. 158), 83.
O'Byrne v. Burns (16 Ct. of Ses. Cas. 1025), 560.
O'Callaghan v. Bode (84 Cal. 489; 24 Pac. Rep. 269), 83.
Ochsenbein v. Shapley (85 N. Y. 214), 58, 627, 633.
O'Connell v. Baltimore &c. R. Co. (20 Md. 212), 481.
O'Connell v. City of Lewistown (65 Me. 34; 20 Am. Rep. 673), 395.
O'Conner v. Adams (120 Mass. 427), 513, 517.
O'Connor v. Missouri Pac. Ry. Co. (94 Mo. 150; 7 S. W. Rep. 106), 59, 288.
O'Connor v. North Truckee Ditch Co. (17 Nev. 246), 32.

[The references are to pages.]

O'Connor v. Roberts (120 Mass. 227), 463.
Odell v. New York &c. R. Co. (120 N. Y. 323; 24 N. E. Rep. 478), 538.
O'Donnell v. Allegheny &c. R. Co. (50 Penn. St. 490; 59 Penn. St. 239), 219, 479, 496.
O'Donnell v. Baum (38 Mo. App. 245), 516.
O'Donnell v. Providence &c. R. Co. (6 R. I. 211), 314.
Oehme v. Cook (7 N. Y. Supl. 764), 534.
O'Flaherty v. Union R. Co. (45 Mo. 70), 168, 187, 191, 203, 413.
Ogden v. Rummens (3 Fost. & Fin. 751), 541.
Oglesby v. Smith (38 Mo. App. 67), 42.
Ogley v. Miles (8 N. Y. Supl. 270), 528.
Ogley v. Miles (139 N. Y. 458; 34 N. E. Rep. 1059), 527.
O'Hagan v. Dillon (10 Jones & S. 456), 563.
Ohio & M. Ry. Co. v. Hecht (115 Ind. 443; 17 N. E. Rep. 297), 35.
Ohio & M. Ry. Co. v. Walker (113 Ind. 196; 15 N. E. Rep. 234), 58.
Ohio &c. Ry. Co. v. Brubaker (47 Ill. 462), 344.
Ohio &c. Ry. Co. v. Clutter (82 Ill. 123), 285.
Ohio &c. Ry. Co. v. Collarn (73 Ind. 261; 38 Am. Rep. 134), 476, 478, 509, 545, 626.
Ohio &c. Ry. Co. v. Eaves (42 Ill. 288), 119, 277, 326.
Ohio &c. Ry. Co. v. Fowler (85 Ill. 21), 328.
Ohio &c. Ry. Co. v. Hammersley (28 Ind. 371), 464, 513.
Ohio &c. Ry. Co. v. Maisch (29 Ill. App. 640), 286.
Ohio &c. Ry. Co. v. Muhling (30 Ill. 9), 223.
Ohio &c. Ry. Co. v. Nichols (71 Ind. 271), 249, 250.
Ohio &c. Ry. Co. v. O'Donnell (26 Ill. App. 348), 335.
Ohio &c. Ry. Co. v. Porter (92 Ill. 437), 101, 120.
Ohio &c. Ry. Co. v. Selby (47 Ind. 471; 17 Am. Rep. 719), 208, 249, 250.
Ohio &c. Ry. Co. v. Shanefelt (47 Ill. 497), 120, 358, 361.
Ohio &c. Ry. Co. v. Stratton (78 Ill. 88), 91, 172, 180, 210.
Ohio &c. Ry. Co. v. Tinnall (13 Ind. 366), 476.
Ohio South R. Co. v. Morey (24 N. E. Rep. 269), 378.
Oil City Fuel Supply Co. v. Boundy (122 Penn. St. 449; 15 Atl. Rep. 865), 49.
Oil City Gas Co. v. Robinson (99 Penn. St. 1), 32.
O'Keefe v. Chicago &c. R. Co. (32 Iowa, 467), 89, 116, 129, 569.
O'Keefe v. Thorn (24 W. N. C. 379; 16 Atl. Rep. 737), 527.
Oldenburg v. New York &c. R. Co. (9 N. Y. Supl. 419), 287, 289.
Oldfield v. New York &c. R. Co. (14 N. Y. 310; 3 E. D. Smith, 103), 203, 424, 613, 635.
Olds v. N. Y. &c. R. Co. (Mass.) (51 N. E. Rep. 450), 224.
Oliver v. Ohio River R. Co. (42 W. Va. 703; 26 S. E. Rep. 444), 539.
O'Leary v. Brooklyn Elevator Co. (N. D.) (75 N. W. Rep. 919), 85.
Oleson v. Lake Shore &c. R. Co. (143 Ind. 405; 42 N. E. Rep. 736), 271.
Oliver v. Worcester (102 Mass. 489; 3 Am. Rep. 485), 381.
Olson v. Chicago &c. R. Co. (38 Minn. 412; 38 N. W. Rep. 352), 544.
Olson v. Crossman (31 Minn. 222), 585, 586.
Olson v. McMullen (34 Minn. 94), 521.
Olson v. St. Paul &c. R. Co. (34 Minn. 477), 445.
Olson v. St. Paul &c. R. Co. (38 Minn. 117; 35 N. W. Rep. 866), 483, 522.
Omaha &c. R. Co. v. O'Donnell (22 Neb. 475; 35 N. W. Rep. 235), 265, 276.
Omaha Street Ry. Co. v. Craig (58 N. W. Rep. 209), 432.
Omaha Street Ry. Co. v. Martin (48 Neb. 65; 64 N. W. Rep. 1007), 27, 298, 432, 607.
Omaha & R. V. R. Co. v. Cholette (33 Neb. 143), 103.
Omaha & R. V. R. Co. v. Cook (42 Neb. 906), 302.
Omaha & R. V. R. Co. v. Krayenbuhl (48 Neb. 553; 67 N. W. Rep. 447), 477.
Omaha & R. V. R. Co. v. Talbot (48 Neb. 627; 67 N. W. Rep. 599), 164, 260.
O'Malley v. Dorn (7 Wis. 236), 415.

[The references are to pages.]

O'Malley v. St. Paul &c. R. Co. (43 Minn. 589; 45 N. W. Rep. 440), 308.
O'Mora v. Hudson River R. Co. (38 N. Y. 445), 175, 571.
Omslaer v. Philadelphia Co. (31 Fed. Rep. 354), 43.
Omslaer v. Traction Co. (168 Penn. St. 519; 32 Atl. Rep. 50), 268.
O'Neil v. St. Louis & Iron Mountain &c. Ry. Co. (9 Fed. Rep. 337), 478, 503.
O'Neil v. Town of East Windsor (63 Conn. 150; 27 Atl. Rep. 237), 414.
O'Neill v. New Orleans (30 La. Ann. 220 31 Am. Rep. 221), 369.
O'Neill v. New York &c. R. Co. (115 N. Y. 579; 22 N. E. Rep. 217), 363.
Oppenheim v. White Lion Hotel Co. (L. R. 6 C. P. 515), 586, 588.
Orange &c. R. Co. v. Ward (47 N. J. Law, 560), 634.
Orleans, Village of, v. Perry (24 Neb. 831; 40 N. W. Rep. 417), 36, 50.
Ormond v. Central &c. R. Co. 58 Iowa, 742), 358.
Ormond v. Hayes (60 Tex. 180), 253, 492.
Ormond v. Holland (El., Bl. & El. 102), 445, 505, 510.
Ormsbee v. Boston &c. R. Co. (14 R. I. 102; 51 Am. Rep. 354), 269.
Orndorff v. Adams Express Co. (3 Bush, 194), 248.
O'Rourke v. Chicago &c. R. Co. (44 Iowa, 526), 91.
O'Rorke v. Union Pac. Ry. Co. (22 Fed. Rep. 189), 538, 540.
Orr v. Garabold (11 S. E. Rep. 778), 400.
Ortmayer v. Johnson (45 Ill. 469), 119.
Ortt v. Minneapolis &c. R. Co. (36 Minn. 396; 31 N. W. Rep. 519), 247.
Osage City v. Brown (27 Kan. 74), 58, 372, 373, 405, 633.
Osborn v. Morgan (130 Mass. 102; 39 Am. Rep. 467; 137 Mass. 1), 546.
Osborne v. Knox &c. R. Co. (68 Me. 49; 28 Am. Rep. 16), 490.
Osborne v. Union Ferry Co. (53 Barb. 629), 231.
Ostertag v. Pacific &c. R. Co. (64 Mo. 421), 178, 319.
Oszkoscil v. Eagle Pencil Co. (6 N. Y. Supl. 501), 527.
Otis v. Janesville (47 Wis. 422), 18, 24, 30, 49, 154.
Otis v. Thorn (23 Ala. 469), 156.
Otten v. Cohen (1 N. Y. Supl. 430), 43.
Owen v. New York &c. R. Co. (1 Lans. 108), 529.
Owen v. Railroad Co. (87 Ky. 626), 97.
Owens v. Baltimore &c. R. Co. (35 Fed. Rep. 715), 109.
Owens v. Hannibal &c. R. Co. (58 Mo. 387), 331.
Owens v. Pennsylvania R. Co. (41 Fed. Rep. 187), 258, 288.
Owens v. Richmond &c. R. Co. (88 N. C. 502), 600.
Owners of the Steamboat Farmer v. McCraw (26 Ala. 189; 62 Am. Dec. 718), 581.
Oyshterbank v. Gardner (49 N. Y. Super. Ct. 263), 571.
Ozier v. Hinesburgh (44 Vt. 220), 380.

P.

Pacific Mutual Life Insurance Co. v. Snowden (12 U. S. App. 704; 58 Fed. Rep. 342), 222.
Pacific R. Co. v. Brown (14 Kan. 469), 325, 328.
Pacific R. Co. v. Houts (12 Kan. 328), 34, 114, 128, 326.
Pacific R. Co. v. Lee (70 Tex. 496; 7 S. W. Rep. 857), 275.
Packet Co. v. McCue (17 Wall. 508), 98.
Packett v. Atlas Steamship Co. (12 Daly (N. Y.), 441), 483.
Paddock v. Northeastern Ry. Co. (18 L. T. (N. S.) 60), 81.
Paducah &c. R. Co. v. Hoehl (12 Bush, 41), 18, 50, 605.
Page v. Bucksport (64 Me. 51; 18 Am. Rep. 239), 44, 63, 381.
Page v. Hodge (63 N. H. 610), 147.
Page v. Hollingsworth (7 Ind. 317), 325.
Page v. Wells (37 Mich. 415), 548.
Pallez v. Brooklyn City R. Co. (4 N. Y. Supl. 384), 27.
Palmer v. Andover (2 Cush. 605), 371, 390.
Palmer v. Barker (3 Fairf. (Me.) 338), 414.
Palmer v. Chicago &c. R. Co. (112 Ind. 250; 14 N. E. Rep. 70), 103.
Palmer v. Dearing (93 N. Y. 7; 17 Week. Dig. (N. Y.) 145), 54, 627, 633.
Palmer v. Detroit &c. R. Co. (56 Mich. 1), 288.

[The references are to pages.]

Palmer v. Harrison (57 Mich. 182), 527.
Palmer v. Missouri Pac. R. Co. (76 Mo. 217), 357.
Palmer v. Northern Pac. Ry. Co. (37 Minn. 223; 33 N. W. Rep. 707), 349.
Palys v. Erie Ry. Co. (30 N. J. Eq. 604), 16, 32, 280.
Pantzar v. Tilly Foster Mining Co. (99 N. Y. 368), 466, 498.
Pardington v. South Wales Ry. Co. (1 Hurl. & N. 392), 244.
Parish v. Eden (62 Wis. 272), 203, 372.
Park v. O'Brien (23 Conn. 339), 601, 608, 620, 635.
Parker v. Adams (12 Metc. 415; 46 Am. Dec. 694), 414, 416, 599.
Parker v. Boston &c. R. Co. (3 Cush. 107; 50 Am. Dec. 709), 367.
Parker v. Latner (60 Me. 528; 11 Am. Rep. 210), 396.
Parker v. Nassau (59 N. H. 402), 73, 77.
Parker v. Portland Publishing Co. (69 Me. 173; 31 Am. Rep. 262), 79, 316.
Parker v. Rensselaer &c. R. Co. (16 Barb. 315), 343.
Parker v. South Carolina &c. R. Co. (48 S. C. 364; 26 S. E. Rep. 669), 541.
Parkhill v. Brighton (61 Iowa, 103), 372, 374, 375, 377.
Parkhurst v. Johnson (50 Mich. 70; 45 Am. Rep. 28), 517.
Parkinson v. Nashua &c. R. Co. (61 N. H. 416), 27.
Parks v. Hannibal &c. R. Co. (20 Mo. App. 440), 338.
Parmelee v. Farro (22 Ill. App. 467), 126.
Parrott v. Barney (2 Abb. C. C. 197; 1 Deady, 405; 1 Sawyer, 423), 26.
Parrott v. Wells, Fargo & Co. (15 Wall. 524), 26.
Parshall v. Minneapolis &c. R. Co. (35 Fed. Rep. 649), 156.
Parsons v. New York &c. R. Co. (113 N. Y. 355; 21 N. E. Rep. 145; 37 Hun, 128), 235, 289.
Parvis v. Philadelphia &c. R. Co. (17 Atl. Rep. 702), 27.
Passenger Railroad Co. v. Young (21 Ohio St. 518; 8 Am. Rep. 78), 420.
Pastene v. Adams (49 Cal. 87), 83.
Patec v. Adams (37 Kan. 133; 14 Pac. Rep. 505), 77.
Patten v. Chicago &c. R. Co. (32 Wis. 533), 231.
Patten v. Rea (2 C. B. (N. S.) 606), 448.
Patterson v. Burlington &c. R. Co. (38 Iowa, 279), 601.
Patterson v. Hemenway (148 Mass. 94; 19 N. E. Rep. 15), 83.
Patterson v. Pittsburgh &c. R. Co. (76 Penn. St. 389; 18 Am. Rep. 412), 465, 472, 496, 541, 544.
Patterson v. Wallace (1 Macq. 784), 497, 533.
Patton v. Central Iowa Ry. Co. (7 Iowa, 306; 35 N. W. Rep. 149), 523, 539.
Patton v. Chicago &c. R. Co. (75 Iowa, 459; 39 N. W. Rep. 708), 339.
Patton v. St. Louis &c. R. Co. (87 Mo. 117; 56 Am. Rep. 446), 356.
Patton v. Western North Carolina R. Co. (96 N. C. 455; 1 S. E. Rep. 863), 469, 471, 483.
Paulmier v. Erie Ry. Co. (34 N. J. Law, 151), 98, 446, 496, 517.
Payne v. Chicago & Alton R. Co. (136 Mo. 562; 38 S. W. Rep. 308), 29, 275.
Payne v. Chicago &c. Ry. Co. (39 Iowa, 523), 154.
Payne v. Humestown &c. R. Co. (70 Iowa, 584; 31 N. W. Rep. 886), 302.
Payne v. Kansas City &c. R. Co. (72 Iowa, 214; 33 N. W. Rep. 633), 339.
Payne v. Troy &c. R. Co. (9 Hun, 526), 285.
Peach v. Utica (10 Hun, 477), 401. 571.
Pearce v. Atwood (13 Mass. 324, 350), 395.
Pearsall v. Post (20 Wend. 111), 419.
Pearsall v. Western Union Tel. Co. (44 Hun, 532), 576.
Pearson v. Chicago &c. R. Co. (33 Mo. App. 543), 338, 339.
Pearson v. Duane (4 Wall. 605), 422.
Pearson v. Milwaukee &c. R. Co. (45 Iowa, 497), 328, 332, 334, 339.
Pease v. Chicago &c. R. Co. (61 Wis. 163), 447, 480.
Peck v. Michigan Cent. R. Co. (57 Mich. 3), 283.
Peck v. Neil (3 McLean, 26), 157.
Peck v. New York &c. R. Co. (50 Conn. 379), 165.

[The references are to pages.]

Peddicord v. Missouri Pac. Ry. Co. (85 Mo. 160), 346.
Pederson v. City of Rushford (41 Minn. 289), 521.
Peek v. North Staffordshire &c. Ry. Co. (10 H. L. Cas. 473, 494), 243, 244.
Peixotti v. McLaughlin (1 Strobh. 468; 47 Am. Dec. 563), 250.
Pekin, City of, v. McMahon (154 Ill. 141; 39 N. E. Rep. 484), 29, 85, 188.
Pence v. Chicago &c. R. Co. (63 Iowa, 746), 262.
Pendleton St. R. Co. v. Shires (18 Ohio St. 255), 423.
Pendleton St. R. Co. v. Stallman (22 Ohio St. 255), 423.
Pendrill v. Second Ave. R. Co. (2 Jones & S. 481; 43 How. Pr. 399), 424.
Penfold v. Universal Life Ins. Co. (85 N. Y. 317; 39 Am. Rep. 660), 574.
Penn v. Lewis (Addison, 279), 593.
Pennsylvania Canal Co. v. Bentley (66 Penn. St. 30), 264, 267, 606.
Pennsylvania Co. v. Backes (133 Ill. 255; 24 N. E. Rep. 563), 258, 524.
Pennsylvania Co. v. Dean (92 Ind. 459), 213, 626, 633.
Pennsylvania Co. v. Dunlap (13 N. E. Rep. 403), 341, 344.
Pennsylvania Co. v. Frana (112 Ill 398), 266, 626.
Pennsylvania Co. v. Gallagher (40 Ohio St. 637; 48 Am. Rep. 689), 489, 490.
Pennsylvania Co. v. Gallentine (77 Ind. 322), 602.
Pennsylvania Co. v. Long (94 Ind. 250), 530, 539.
Pennsylvania Co. v. McCarty (112 Ind. 322; 13 N. E. Rep. 409), 341, 344.
Pennsylvania Co. v. Marion (123 Ind. 415; 23 N. E. Rep. 973; 104 Ind. 239), 57, 231.
Pennsylvania Co. v. Myers (136 Ind. 242), 16, 102.
Pennsylvania Co. v. Smith (98 Ind. 42), 13.
Pennsylvania Co. v. Stegmeier (118 Ind. 305; 20 N. E. Rep. 843), 283.
Pennsylvania Co. v. Stoelke (104 Ill. 201), 626.
Pennsylvania Co. v. Whitcomb (111 Ind. 212; 12 N. E. Rep. 380), 511.
Pennsylvania &c. R. Co. v. Huff (8 Atl. Rep. 789), 268.
Pennsylvania &c. R. Co. v. Mason (109 Penn. St. 296; 58 Am. Rep. 722), 511.
Pennsylvania &c. R. Co. v. Rathgeb (32 Ohio St. 66), 263.
Pennsylvania &c. Co. v. State (61 Md. 108), 297.
Pennsylvania R. Co. v. Aiken (18 Atl. Rep. 619; 25 W. N. C. 13), 262, 281.
Pennsylvania R. Co. v. Aspell (23 Penn. St. 147; 62 Am. Dec. 323), 15, 92, 107, 212, 215, 231.
Pennsylvania R. Co. v. Atha (22 Fed. Rep. 920), 80.
Pennsylvania R. Co. v. Beale (73 Penn. St. 504; 13 Am. Rep. 753), 264, 270, 271.
Pennsylvania R. Co. v. Bell (15 Atl. Rep. 561), 235.
Pennsylvania R. Co. v. Bock (93 Penn. St. 427), 186, 203.
Pennsylvania R. Co. v. Butler (57 Penn. St. 335), 249.
Pennsylvania R. Co. v. Goodenough (55 N. J. Law, 577, 587, 588; 28 Atl. Rep. 3), 19, 166.
Pennsylvania R. Co. v. Goodman (62 Penn. St. 329), 16.
Pennsylvania R. Co. v. Henderson (51 Penn. St. 315), 208, 248, 249, 250.
Pennsylvania R. Co. v. Hope (80 Penn. St. 373; 21 Am. Rep. 100), 45, 356, 363.
Pennsylvania R. Co. v. Horst (110 Penn. St. 226; 1 Atl. Rep. 217), 632.
Pennsylvania R. Co. v. James (81 Penn. St. 194), 186.
Pennsylvania R. Co. v. Kelly (31 Penn. St. 372), 184.
Pennsylvania R. Co. v. Kerr (62 Penn. St. 353; 1 Am. Rep. 431), 45, 356, 364.
Pennsylvania R. Co. v. Kilgore (32 Penn. St. 292), 211.
Pennsylvania R. Co. v. Langdon (92 Penn. St. 21; 37 Am. Rep. 651), 50, 217, 219, 221.
Pennsylvania R. Co. v. Lewis (79 Penn. St. 33), 189, 303, 315, 316.
Pennsylvania R. Co. v. Lyons (129 Penn. St. 113; 18 Atl. Rep. 759), 211, 213, 233.
Pennsylvania R. Co. v. McTighe (46 Penn. St. 316), 606.
Pennsylvania R. Co. v. Matthews (36 N. J. Law, 531), 285, 286.

[The references are to pages.]

Pennsylvania R. Co. v. Mooney (126 Penn. St. 244; 17 Atl. Rep. 590; 24 W. N. C. 40), 262.
Pennsylvania R. Co. v. Morgan (82 Penn. St. 134), 25, 175, 303.
Pennsylvania R. Co. v. Ogier (35 Penn. St. 60), 106.
Pennsylvania R. Co. v. O'Shaughnessy (122 Ind. 588; 23 N. E. Rep. 675), 441.
Pennsylvania R. Co. v. Peters (116 Penn. St. 206; 9 Atl. Rep. 317), 211, 263.
Pennsylvania R. Co. v. Price (96 Penn. St. 256), 207.
Pennsylvania R. Co. v. Ray (102 U. S. 451), 206.
Pennsylvania R. Co. v. Riblet (66 Penn. St. 166), 324.
Pennsylvania R. Co. v. Righter (42 N. J. Law, 180), 16, 45, 117.
Pennsylvania R. Co. v. Riordon (119 Penn. St. 577; 13 Atl. Rep. 324), 248.
Pennsylvania R. Co. v. Roney (89 Ind. 453; 46 Am. Rep. 173), 64, 67, 68, 116, 546.
Pennsylvania R. Co. v. Rudel (100 Ill. 603), 263.
Pennsylvania R. Co. v. Schultz (93 Penn. St. 341), 360.
Pennsylvania R. Co. v. Sinclair (62 Ind. 301; 30 Am. Rep. 185), 17, 34, 103.
Pennsylvania R. Co. v. Wachter (60 Md. 395), 534.
Pennsylvania R. Co. v. Weber (76 Penn. St. 157; 18 Am. Rep. 407; 72 Penn. St. 27), 267, 270, 606.
Pennsylvania R. Co. v. Werner (8 Rep. 59), 63.
Pennsylvania R. Co. v. Wilson (132 Penn. St. 27; 18 Atl. Rep. 1087), 167.
Pennsylvania R. Co. v. Zebe (33 Penn. St. 318; 37 Penn. St. 420), 92, 98, 187.
Pennsylvania R. Co. v. Zink (126 Penn. St. 288; 17 Atl. Rep. 614), 442.
Pennsylvania Telegraph Co. v. Vernau (15 Atl. Rep. 624), 53, 62.
Penny v. Rochester R. Co. (7 App. Div. (N. Y.) 595, 598), 29.
People v. Eastwood (14 N. Y. 562), 565, 570.
People v. New York Hospital (3 Abb. N. C. 229), 583.
People's Passenger Ry. Co. v. Green (56 Md. 84), 34, 431, 435.
People's Passenger Ry. Co. v. Lauderbach (19 Am. Law Rev. 163), 437.
Peoria v. Simpson (110 Ill. 294; 51 Am. Rep. 683), 384.
Peoria Bridge Ass'n v. Loomis (20 Ill. 235), 390.
Peoria &c. R. Co. v. Babbs (23 Ill. App. 454), 347.
Peoria &c. R. Co. v. Barton (80 Ill. 72), 342.
Peoria &c. R. Co. v. Champ (75 Ill. 578), 326.
Peoria &c. R. Co. v. Clayberg (107 Ill. 644), 263, 274.
Peplow v. Richardson (4 L. R. (C. P.) 168), 396.
Pepper v. Southern Pacific R. Co. (105 Cal. 389; 38 Pac. Rep. 974), 262, 271, 275.
Perez v. The New Orleans &c. R. Co. (47 La. Ann. 1391; 17 So. Rep. 869), 159.
Perigo v. Chicago &c. R. Co. (55 Iowa, 326), 530, 538, 541.
Perkins v. Buffalo &c. R. Co. (10 N. Y. Supl. 356), 286.
Perkins v. Eastern &c. R. Co. (29 Me. 307; 50 Am. Dec. 589), 323, 326, 336, 340, 599.
Perkins v. Inhabitants of Fayette (68 Me. 152; 28 Am. Rep. 84), 368, 370, 390.
Perkins v. New York &c. R. Co. (24 N. Y. 196), 99, 240, 245.
Perley v. Eastern R. Co. (98 Mass. 414), 357, 363.
Perrin v. Devendorf (22 Ill. App. 284), 399.
Perry v. Lansing (17 Hun, 34), 156.
Peschel v. Chicago &c. R. Co. (62 Wis. 338; 21 N. W. Rep. 269; 20 Cent. L. J. 203), 464, 471, 500.
Peters v. Rylands (20 Penn. St. 497; 59 Am. Dec. 746), 205.
Petersen v. Hubbell (12 App. Div. (N. Y.) 372, 377), 401.
Peterson v. Chicago &c. R. Co. (64 Mich. 621; 34 N. W. Rep. 260), 465.
Peterson v. Sherry Lumber Co. (90 Wis. 83; 62 N. W. Rep. 948), 518.
Peterson v. Whitebreast C. & M. Co. (50 Iowa, 673; 32 Am. Rep. 143), 453, 463.
Petition of Mt. Washington Road Co. (35 N. H. 134), 411.
Pettengill v. The City of Yonkers (116 N. Y. 558; 22 N. E. Rep. 1095), 373.
Petty v. Hannibal &c. R. Co. (88 Mo. 306), 276.

[The references are to pages.]

Peverly v. Boston (136 Mass. 366; 49 Am. Rep. 37), 17, 23, 417, 626.
Peyton v. Texas &c. Ry. Co. (41 La. Ann. 861; 6 So. Rep. 690), 67, 316.
Pfister v. Central Pac. R. Co. (70 Cal. 169), 250.
Phalen v. Clark (19 Conn. 421; 50 Am. Dec. 253), 73.
Phelps v. Winona &c. R. Co. (37 Minn. 485; 32 N. W. Rep. 273), 285.
Philadelphia &c. R. Co. v. Anderson (20 Atl. Rep. 2), 236.
Philadelphia &c. R. Co. v. Boyer (97 Penn. St. 91), 23, 48, 107, 152, 206, 606.
Philadelphia &c. R. Co. v. Carr (99 Penn. St. 505), 280, 287, 290.
Philadelphia &c. R. Co. v. Derby (14 How. (U. S.) 468), 206, 240, 319.
Philadelphia &c. R. Co. v. Edelstein (16 Atl. Rep. 847; 23 W. N. C. 342), 107.
Philadelphia &c. R. Co. v. Frank (67 Md. 339; 10 Atl. Rep. 204), 275.
Philadelphia &c. R. Co. v. Hassard (75 Penn. St. 367), 439.
Philadelphia &c. R. Co. v. Hendrickson (80 Penn. St. 183; 21 Am. Rep. 97), 355, 360.
Philadelphia &c. R. Co. v. Hogan (47 Penn. St. 244), 106.
Philadelphia &c. R. Co. v. Hogeland (66 Md. 149; 7 Atl. Rep. 105), 155.
Philadelphia &c. R. Co. v. Hummel (44 Penn. St. 375), 105, 178, 293, 295, 316, 324.
Philadelphia &c. R. Co. v. Layer (112 Penn. St. 414), 291.
Philadelphia &c. R. Co. v. Lehman (56 Md. 209; 40 Am. Rep. 415), 256, 397.
Philadelphia &c. R. Co. v. Long (75 Penn. St. 257), 184, 186, 190, 191, 410, 413.
Philadelphia &c. R. Co. v. McCormick (124 Penn. St. 427; 23 W. N. C. 344; 16 Atl. Rep. 848), 236.
Philadelphia &c. R. Co. v. Schultz (93 Penn. St. 341), 356.
Philadelphia &c. R. Co. v. Spearen (47 Penn. St. 300), 105, 175, 178, 184, 271, 279, 303, 314, 324, 568.
Philadelphia &c. R. Co. v. Stebbing (62 Md. 504), 76, 260.
Philadelphia &c. R. Co. v. Towboat Co. (23 How. (U. S.) 309), 77, 253, 255, 397.
Philadelphia Traction Co. v. Orbann (119 Penn. St. 37; 12 Atl. Rep. 816), 438.
Philbrick v. Miles (25 Fed. Rep. 265), 627.
Phillips v. Chicago &c. R. Co. (64 Wis. 475), 489.
Phillips v. Clark (5 C. B. (N. S.) 884), 22.
Phillips v. De Wald (79 Ga. 732; 7 S. E. Rep. 151), 42.
Phillips v. Dickerson (85 Ill. 11), 571.
Phillips v. Library Co. (55 N. J. Law, 307; 27 Atl. Rep. 478), 311.
Phillips v. New York &c. R. Co. (6 N. Y. Supl. 621), 390.
Phillips v. Rensselaer &c. R. Co. (49 N. Y. 177), 209.
Phillips v. Ritchie County (31 W. Va. 477; 7 S. E. Rep. 427), 55.
Picard v. Smith (10 C. B. (N. S.) 470), 590.
Pickett v. Wilmington & Weldon R. Co. (117 N. C. 616; 22 S. E. Rep. 264), 298.
Piedmont Electric Illuminating Co. v. Patteson's Adm'x (84 Va. 747; 6 S. E. Rep. 4), 442.
Pierce v. Atlanta Cotton Mills (79 Ga. 782; 4 S. E. Rep. 381), 36.
Pierce v. Bane (53 U. S. App. 297), 532.
Pierce v. Cannon (20 Colo. 178), 29.
Pierce v. Central Iowa Ry. Co. (73 Iowa, 140; 34 N. W. Rep. 783), 499.
Pierce v. New Bedford (129 Mass. 534; 37 Am. Rep. 387), 401.
Pierce v. Van Dusen (78 Fed. Rep. 693), 482.
Pierce v. Whitcomb (48 Vt. 127; 21 Am. Rep. 120), 79, 82, 83, 316, 377.
Piggot v. The Eastern Counties Ry. Co. (3 Man., G. & S. 230; 54 Eng. Com. Law, 229), 355, 363.
Pigott v. Lilly (55 Mich. 150), 415.
Pike v. Chicago &c. R. Co. (39 Fed. Rep. 754), 278.
Pike v. Grand Trunk Ry. Co. (39 Fed. Rep. 255), 70, 629.
Pillings v. Narragansett M. Co. (19 R. I. 666; 36 Am. Rep. 130), 519.

[The references are to pages.]

Pingree v. Leyland (135 Mass. 398), 538.
Piper v. Chicago &c. R. Co. (77 Wis. 247; 46 N. W. Rep. 165), 279.
Piper v. New York &c. R. Co. (156 N. Y. 224), 271.
Pitcher v. Lake Shore &c. R. Co. (8 N. Y. Supl. 389), 634.
Pittsburgh v. Grier (22 Penn. St. 54; 60 Am. Dec. 65), 63, 258.
Pittsburgh &c. R. Co. v. Andrews (39 Md. 329; 17 Am. Rep. 568), 225.
Pittsburgh &c. R. Co. v. Bingham (29 Ohio St. 365; 23 Am. Rep. 751), 258.
Pittsburgh &c. R. Co. v. Bumstead (48 Ill. 221), 175.
Pittsburgh &c. R. Co. v. Caldwell (74 Penn. St. 421), 168, 175, 178.
Pittsburgh &c. R. Co. v. Collins (87 Penn. St. 405; 30 Am. Rep. 371), 54, 296, 314.
Pittsburgh &c. R. Co. v. Conn. (104 Ind. 64), 45.
Pittsburgh &c. R. Co. v. Devinney (17 Ohio St. 197), 475, 481.
Pittsburgh &c. R. Co. v. Dunn (56 Penn. St. 280), 285.
Pittsburgh &c. R. Co. v. Hinds (53 Penn. St. 512), 419, 422.
Pittsburgh &c. R. Co. v. Hixon (77 Ind. 111), 357.
Pittsburgh &c. R. Co. v. Jones (86 Ind. 496; 44 Am. Rep. 334), 357, 360.
Pittsburgh &c. R. Co. v. Kuntson (69 Ill. 103), 120, 320.
Pittsburgh &c. R. Co. v. McClurg (56 Penn. St. 294; 2 Am. Ry. Cases, 552), 225, 227, 626.
Pittsburgh &c. R. Co. v. McCombs (18 Atl. Rep. 613), 500.
Pittsburgh &c. R. Co. v. Martin (82 Ind. 476), 263.
Pittsburgh &c. R. Co. v. Methven (21 Ohio St. 586), 345.
Pittsburgh &c. R. Co. v. Noel (77 Ind. 110), 357, 602.
Pittsburgh &c. R. Co. v. Pearson (72 Penn. St. 169), 187, 190, 192, 410, 413.
Pittsburgh &c. R. Co. v. Pillow (76 Penn. St. 510; 18 Am. Rep. 424), 422.
Pittsburgh &c. R. Co. v. Rohrman (13 Week. Notes Cas. 258; 29 Alb. Law Jour. 97), 66.
Pittsburgh &c. R. Co. v. Sentmeyer (92 Penn. St. 276; 37 Am. Rep. 684), 529.
Pittsburgh &c. R. Co. v. Smith (26 Ohio St. 124), 103, 348.
Pittsburgh &c. R. Co. v. Stuart (71 Ind. 505), 325, 326, 328, 349.
Pittsburgh &c. R. Co. v. Taylor (104 Penn. St. 306; 49 Am. Rep. 580), 56, 58, 63, 281, 390.
Pittsburgh &c. R. Co. v. Vining (27 Ind. 513), 168, 172, 188, 276, 601.
Pittsburgh &c. R. Co. v. Yundt (78 Ind. 373), 274.
Pitzner v. Shinnick (39 Wis. 129), 354.
Plaster v. Ill. &c. R. Co. (35 Iowa, 449), 601.
Platt v. Forty-second St. R. Co. (2 Hun, 124), 438.
Platt v. Richmond &c. R. Co. (108 N. Y. 358), 248.
Platz v. City of Cohoes (89 N. Y. 219; 42 Am. Rep. 286), 255, 397.
Pleasants v. Raleigh &c. R. Co. (95 N. C. 195), 540.
Pluckwell v. Wilson (5 Car. & P. 375), 416.
Plumley v. Birge (124 Mass. 57; 26 Am. Rep. 645), 168, 196, 303.
Plummer v. Eastern R. Co. (73 Me. 591), 263, 265.
Plymouth, Township of, v. Graver (125 Penn. St. 24; 24 W. N. C. 220; 17 Atl. Rep. 249), 42.
Poeppers v. Missouri &c. R. Co. (67 Mo. 715; 29 Am. Rep. 518), 361, 363.
Poler v. New York &c. R. Co. (16 N. Y. 476), 346, 349.
Pollich v. Sellers (7 So. Rep. 786), 540.
Pomfrey v. Saratoga Springs (34 Hun (N. Y.) 607), 374.
Ponfret v. Ricroft (1 Saund. 323, n. 3), 383.
Pool v. Chicago &c. R. Co. (53 Wis. 659; 56 Wis. 227), 107, 219, 222.
Poole v. Alger (11 Gray, 489), 336.
Poole v. North Carolina R. Co. (8 Jones (Law) 340), 299, 301.
Popp v. New York &c. R. Co. (7 N. Y. Supl. 249), 634.
Porter v. Anheuser-Busch Brewing Ass'n (24 Mo. App. 1), 200.
Porter v. Hannibal &c. R. Co. (60 Mo. 160), 497.
Post v. Buffalo &c. R. Co. (108 Penn. St. 585), 360.
Post v. Stockwell (44 Hun (N. Y.) 28), 58.
Postman v. City of Decorah (89 Iowa, 336), 17.

[The references are to pages.]

Potter v. Chicago &c. R. Co. (21 Wis. 372; 22 Wis. 615), 117, 607.
Potter v. Faulkner (1 Best & S. 800; 8 Jur. (N. S.) 259; 31 L. J. (Q. B.) 30; 10 Week. Rep. 93; 5 L. T. (N. S.) 455), 492.
Potter v. Moran (61 Mich. 60; 27 N. W. Rep. 854), 416.
Potter v. Warner (91 Penn. St. 362; 36 Am. Rep. 668), 117, 583.
Poucher v. New York &c. R. Co. (49 N. Y. 263; 10 Am. Rep. 364), 208, 245, 246.
Powell v. Missouri Pac. Ry. Co. (76 Mo. 80), 263, 280.
Powell v. New York &c. R. Co. (109 N. Y. 613; 15 N. E. Rep. 891), 269.
Powell v. Penn. R. Co. (32 Penn. St. 416), 324.
Power v. Harlow (57 Mich. 107; 53 Mich. 507; 19 N. W. Rep. 237), 86, 185.
Powers v. New York &c. R. Co. (98 N. Y. 274), 442, 538.
Powhattan &c. Co. v. Appomattox R. Co. (24 How. 247), 78.
Praeger v. The Bristol &c. Ry. Co. (24 L. T. Rep. (N. S.) 105), 237.
Prather v. Richmond &c. R. Co. (80 Ga. 427; 9 S. E. Rep. 530), 544, 599.
Pratt Coal & Iron Co. v. Browly (83 Ala. 371; 3 So. Rep. 555), 185, 202.
Pray v. Mayor &c. (32 N. J. Law, 394), 368.
Pray v. Omaha Street Ry. Co. (44 Neb. 167), 433.
Prentiss v. Boston (112 Mass. 43), 599.
Presscott v. Eastern &c. R. Co. (113 Mass. 370, n.), 286.
President &c. of Mt. Vernon v. Dusouchett (2 Ind. 586; 54 Am. Dec. 467), 375, 385, 602.
Price v. Central &c. R. Co. (31 Am. Dec. 229; 32 Am. Dec. 19), 324.
Price v. Houston &c. Ry. Co. (46 Tex. 535), 454.
Price v. Philadelphia &c. R. Co. (84 Md. 506; 36 Atl. Rep. 263), 562, 566.
Price v. St. Louis &c. R. Co. (72 Mo. 414), 208, 211.
Prideaux v. Mineral Point (43 Wis. 513; 28 Am. Rep. 558), 154, 607, 621.
Priest v. Nicholls (116 Mass. 401), 22.
Priestley v. Fowler (3 M. & W. 1), 450, 451, 452, 455, 456, 461, 473, 548, 549, 558, 559, 560.
Prince v. International &c. R. Co. (64 Tex. 144; 20 Cent. L. J. 479), 222, 241.
Prinsor's Case (Cro. Car. 602), 392.
Probert v. Phipps (149 Mass. 258; 21 N. E. Rep. 370), 527.
Probst v. Delamater (100 N. Y. 266), 507.
Probst v. Georgia Pac. Ry. Co. (3 So. Rep. 764), 531.
Providence v. Clapp (17 How. 161), 367, 402, 403, 404.
Providence &c. Steamship Co. v. Clare (127 U. S. 45), 97.
Pucket v. St. Louis &c. Ry. Co. (25 Mo. App. 650), 339.
Puffer v. Orange (122 Mass. 389; 23 Am. Rep. 368), 382.
Puget Sound Iron Co. v. Lawrence (3 Wash. T. 226; 14 Pac. Rep. 869), 500.
Pullman Palace Car Co. v. Bluhm (109 Ill. 20; 50 Am. Rep. 601), 109, 585.
Pullman Palace Car Co. v. Gardner (14 Week. Notes Cas. 17), 590.
Pullman Palace Car Co. v. Laack (143 Ill. 242; 32 N. E. Rep. 285), 127.
Pullman Palace Car Co. v. Lowe (28 Neb. 239; 44 N. W. Rep. 226), 251.
Pullman Palace Car Co. v. Pollock (69 Tex. 120; 5 S. W. Rep. 814), 251.
Pullman Palace Car Co. v. Smith (73 Ill. 365), 251.
Pullutro v. Delaware &c. R. Co. (7 N. Y. Supl. 510), 441, 446, 501.
Purcell v. Southern Ry. Co. (119 N. C. 728; 26 S. E. Rep. 161), 480.
Purinton v. Maine Cent. R. Co. (78 Me. 569; 7 Atl. Rep. 707), 279.
Purl v. St. Louis &c. R. Co. (72 Mo. 168), 292.
Purple v. Greenfield (138 Mass. 1), 386.
Purtell v. Jordan (156 Mass. 573, 31 N. E. Rep. 652), 399.
Purvis v. Coleman (21 N. Y. 111), 589.
Puterbaugh v. Reasor (9 Ohio St. 484), 146, 147, 166.
Putnam v. Broadway &c. R. Co. (55 N. Y. 108; 14 Am. Rep. 190), 419, 421.

[The references are to pages.]

Putnam v. New York &c. R. Co. (47 Hun, 439), 42.
Pyle v. Clark (49 U. S. App. 260; 79 Fed. Rep. 744), 46, 163, 259, 260, 262, 264, 628.
Pyne v. Chicago &c. R. Co. (54 Iowa, 223), 477.
Pzolla v. Mich. Cent. R. Co. (54 Mich. 273), 320.

Q.

Quackenbush v. Chicago &c. R. Co. (73 Iowa, 458; 35 N. W. Rep. 523), 223.
Quackenbush v. Wisconsin &c. R. Co. (62 Wis. 411), 340.
Quaid v. Cornwall (13 Bush, 601), 496.
Quarman v. Burnett (6 M. & W. 499), 149, 448.
Quebec Steamship Co. v. Merchant (133 U. S. 375), 483.
Quick v. Indianapolis &c. R. Co. (130 Ill. 334; 22 N. E. Rep. 709), 499, 545.
Quimby v. Boston &c. R. Co. (150 Mass. 365), 249.
Quimby v. Vermont &c. R. Co. (23 Vt. 393), 336.
Quincy, City of, v. Barker (81 Ill. 300; 25 Am. Rep. 278), 405.
Quincy &c. R. Co. v. Gruse (26 Ill. App. 397), 126.
Quinn v. Donovan (85 Ill. 194), 121.
Quinn v. Illinois &c. R. Co. (51 Ill. 495), 216.
Quinn v. New Jersey Lighterage Co. (23 Fed. Rep. 363; 32 Alb. Law Jour. 86), 453, 470, 472.
Quinn v. Power (24 N. Y. Super. Ct. 102), 241.
Quinn v. South Carolina Ry. Co. (29 S. C. 381), 226.

R.

R. v. Arundel (5 Mau. & Sel. 257), 513.
R. v. Chillesford (4 Barn. & C. 94), 513.
R. v. St. Petroix (4 T. R. 196), 513.
Raben v. Central Iowa Ry. Co. (74 Iowa, 732; 39 N. W. Rep. 621; 73 Iowa. 579; 35 N. W. Rep. 645), 211, 215, 234.
Radcliffe v. St. Louis &c. Ry. Co. (90 Mo. 127; 2 S. W. Rep. 277), 339.
Radley v. London &c. Ry. Co. (L. R. 9 Exch. 91; 43 L. J. (Exch.) 73; 1 App. Cas. 754), 34, 36, 46, 91.
Radman v. Haberstro (1 N. Y. Supl. 561), 109.
Rafferty v. Missouri Pac. Ry. Co. (91 Mo. 33), 315.
Ragsdale v. Memphis &c. R. Co. (59 Tenn. 426), 480.
Ragsdale v. Northern Pac. Ry. Co. (42 Fed. Rep. 383), 475.
Raiford v. Mississippi &c. R. Co. (43 Miss. 233), 330, 334.
Railroad Co. v. Barrett (36 Ohio St. 452), 251.
Railroad Co. v. Bowler (9 Heisk. 866), 483.
Railroad Co. v. Drew (59 Tex. 10; 46 Am. Rep. 261), 542.
Railroad Co. v. Fitzpatrick (8 Ohio Law Jour, 203; 19 Am. Law Rev. 163), 477.
Railroad Co. v. Fort (17 Wall. 553; 2 Dill. 259), 465, 471.
Railroad Co. v. Gladmon (15 Wall. 401), 196, 270, 423, 605, 612, 613, 620.
Railroad Co. v. Henning (15 Wall. 659), 230.
Railroad Co. v. Herbeck (60 Tex. 612), 185.
Railroad Co. v. Houston (95 U. S. 697), 46, 264, 270, 296, 314, 317.
Railroad Co. v. Jones (95 U. S. 439), 16, 22, 50.
Railroad Co. v. Lockwood (17 Wall. 357, 364; 10 Am. Rep. 366), 244, 246, 250.
Railroad Co. v. Lowrey (61 Tex. 149), 274.
Railroad Co. v. Miller (25 Mich. 274), 164.
Railroad Co. v. Morris (31 Gratt. 200), 22.
Railroad Co. v. Newman (94 Ga. 560; 21 S. E. Rep. 219), 132.
Railroad Co. v. Norton (24 Penn. St. 465; 64 Am. Dec. 672), 12, 92, 105, 109, 113, 115, 117, 293, 294, 316, 426.
Railroad Co. v. Pollard (22 Wall. 341), 26.
Railroad Co. v. Reagan (96 Tenn. 128; 33 S. W. Rep. 1050), 546.
Railroad Co. v. Skinner (19 Penn. St. 298; 57 Am. Dec. 654), 294, 324, 325, 326, 336.
Railroad Co. v. Snyder (18 Ohio St. 399), 47.
Railroad Co. v. State (36 Md. 366), 279.
Railroad Co. v. Stevens (95 U. S. 655), 249, 250.

[The references are to pages.]

Railroad Co. v. Stout (17 Wall. 657; 2 Dill. 294), 85, 194, 198, 307, 309, 630.
Railroad Co. v. Wagner (33 Kan. 660; 7 Pac. Rep. 201), 503.
Railroad Co. v. Walker (11 Heisk. 383), 134, 318.
Railroad Co. v. Whitton (13 Wall. 270), 279.
Railway Co. v. Davis (10 U. S. App. 422; 53 Fed. Rep. 61), 46.
Railway Co. v. Lewis (33 Ohio St. 196), 464.
Railway Co. v. Moseley (12 U. S. App. 601; 57 Fed. Rep. 921), 46.
Railway Co. v. Spangler (44 Ohio St. 471), 456, 470, 557.
Railway Co. v. Sullivan (5 Tex. Law Rev. 183), 466, 471.
Rains v. St. Louis &c. R. Co. (71 Mo. 164; 36 Am. Rep. 459), 529.
Raisin v. Mitchell (9 Car. & P. 613), 122.
Rammell v. Schambacher (120 Penn. St. 579; 11 Atl. Rep. 779), 569.
Ramsay v. Quinn (4 Cent. Law Jour. 478), 471.
Ramsden v. Boston &c. R. Co. (104 Mass. 117; 6 Am. Rep. 200), 420.
Ramsey v. Louisville &c. R. Co. (Ct. of App. Ky. 1885), 137.
Ramsey v. Rushville (81 Ind. 394), 380, 634.
Randall v. Baltimore &c. R. Co. (109 U. S. 478), 475.
Randall v. Conn. &c. R. Co. (132 Mass. 499), 263, 633.
Randall v. Frankford &c. R. Co. (8 Pa. Co. Ct. Rep. 277), 143.
Randall v. Richmond &c. R. Co. (104 N. C. 410), 335.
Ransier v. Minneapolis &c. R. Co. (32 Minn. 331), 447.
Ransom v. Chicago &c. R. Co. (62 Wis. 178; 51 Am. Rep. 718), 106, 278.
Rasmussen v. Chicago &c. R. Co. (65 Iowa, 236; 42 N. W. Rep. 1063), 521.
Rathbone v. Union R. Co. (13 R. I. 709), 431.
Rathbun v. Payne (19 Wend. 399), 101, 616.
Rauch v. Lloyd (31 Penn. St. 358), 184, 320.
Rawson v. Pennsylvania R. Co. (48 N. Y. 212; 8 Am. Rep. 543), 252.
Ray v. Manchester (46 N. H. 59), 401.
Raymond v. Burlington &c. R. Co. (65 Iowa, 152), 601.
Raymond v. City of Lowell (6 Cush. 524; 53 Am. Dec. 57), 367, 368, 371, 379, 399, 626.
Read v. Boston & Albany R. Co. (140 Mass. 199), 443.
Read v. Great Eastern Ry. Co. (L. R. 3 Q. B. 555), 556.
Read v. Nichols (118 N. Y. 224; 23 N. E. Rep. 468), 44.
Read v. Patterson (11 Lea (Tenn.) 430), 582.
Readhead v. Midland Ry. Co. (L. R. 2 Q. B. 412; L. R. 4 Q. B. 379), 206, 516.
Reading &c. R. Co. v. Ritchie (102 Penn. St. 425), 263.
Reading Iron Works v. Devine (109 Penn. St. 246), 97, 484.
Reading Township v. Telfair (57 Kan. 708; 48 Pac. Rep. 134; 57 Am. St. Rep. 355), 166.
Ream v. Pittsburgh &c. R. Co. (49 Ind. 93), 279, 296.
Reardon v. City (66 Cal. 492; 19 Am. Law Rev. 492), 369.
Reardon v. Thompson (149 Mass. 267; 21 N. E. Rep. 369), 84.
Reary v. Louisville &c. R. Co. (40 La. Ann. 32; 3 So. Rep. 390), 61.
Rebelsky v. Chicago &c. R. Co. (79 Iowa, 55; 44 N. W. Rep. 536), 531.
Reber v. Bond (38 Fed. Rep. 822), 224.
Reber v. Pittsburgh & Birmingham Traction Co. (179 Penn. St. 339; 36 Atl. Rep. 245), 437.
Rector v. Pierce (3 Thomp. & C. 416), 377.
Rector of the Church of the Ascension v. Buckhardt (3 Hill. 193), 408.
Reddington v. Phila. Traction Co. (132 Penn. St. 154; 19 Atl. Rep. 28), 432.
Reddon v. Union Pac. Ry. Co. (15 Pac. Rep. 262), 465, 471.
Redmond v. Rome &c. R. Co. (10 N. Y. Supl. 330), 441.
Redstone Coke Co. v. Roby (8 Atl. Rep. 593), 511.
Reed v. Axtell (84 Va. 231; 4 S. E. Rep. 587), 233.
Reed v. Belfast (20 Me. 246), 367.
Reed v. Chicago &c. R. Co. (74 Iowa, 188; 37 N. W. Rep. 149), 289.

[The references are to pages.]

Reed v. Northfield (13 Pick. 94; 23 Am. Dec. 662), 58, 371, 374.
Reed v. Stockmeyer (34 U. S. App. 727; 74 Fed. Rep. 186), 514.
Reedie v. London &c. Ry. Co. (4 Exch. 244), 149.
Reese v. Biddle (112 Penn. St. 72), 512.
Reeves v. Delaware &c. R. Co. (30 Penn. St. 454), 59, 295, 324, 325.
Regan v. Palo (N. J.), (41 Atl. Rep. 364), 518.
Regina v. Rymer (13 Cox's C. C. 378), 396.
Regina v. Watts (1 Salk. 357), 408.
Rehberg v. Mayor &c. of New York (91 N. Y. 137; 43 Am. Rep. 657), 378.
Reibel v. Cincinnati &c. R. Co. (114 Ind. 476; 17 N. E. Rep. 107), 212.
Reich v. Mayor &c. (17 N. Y. Week. Dig. 140), 406.
Reilly v. Hannibal &c. R. Co. (94 Mo. 600; 7 S. W. Rep. 407), 203.
Reinder's Adm'r v. Blick & Philips Coal Co. (13 S. W. Rep. 719), 96.
Reitman v. Stolte (120 Ind. 314; 22 N. E. Rep. 304), 516.
Renneker v. South Carolina R. Co. (20 S. C. 219), 17.
Renner v. Canfield (36 Minn. 90; 30 N. W. Rep. 435), 43.
Rensselaer &c. R. Co. In Re (4 Paige, 553), 336.
Renwick v. New York &c. R. Co. (36 N. Y. 133), 277, 573.
Rex v. Brotherton (Stra. 702), 392.
Rex v. Bubb (4 Cox's C. C. 455), 176.
Rex. v. Friend (R. & R. 20), 176.
Rex v. Pease (4 Barn. & Adol. 30), 336.
Rex v. Smith (L. & C. 607; 10 Cox's C. C. 82), 176.
Rex v. Squire (1 Russ., C. & M. 80, 678), 176.
Rexter v. Starin (73 N. Y. 601), 18, 64, 70.
Reynolds v. Barnard (168 Mass. 226; 46 N. E. Rep. 703). 553.
Reynolds v. Burlington (52 Vt. 300), 26, 372.
Reynolds v. Hindman (32 Iowa, 149), 92, 277, 601.
Reynolds v. New York &c. R. Co. (58 N. Y. 248; 2 N. Y. Super. Ct. 644), 270, 280, 615, 618.
Reynolds v. Railway Co. (32 U. S. App. 577; 69 Fed. Rep. 808), 46.
Reynolds v. Texas &c. Ry. Co. (37 La. Ann. 694), 232.
Rhines v. Chicago &c. R. Co. (75 Iowa, 597; 39 N. W. Rep. 912), 344.
Rhing v. Broadway &c. R. Co. (53 Hun, 321; 6 N. Y. Supl. 641), 429.
Rhoades v. Chicago &c. R. Co. (58 Mich. 263), 280.
Rhoades v. Utica &c. R. Co. (5 Hun, 344), 342.
Rice v. King Philip Mills (144 Mass. 229; 11 N. E. Rep. 101), 500, 501.
Rice v. Montpelier (19 Vt. 470), 380, 382.
Riceman v. Havemeyer (84 N. Y. 647), 615, 618.
Richards v. Enfield (13 Gray, 344), 367, 386.
Richards v. Fuqua's Adm'r (28 Miss. 792; 64 Am. Dec. 121), 417.
Richards v. Rough (53 Mich. 212), 537.
Richardson v. Milburn (11 Md. 340), 324.
Richardson v. New York &c. R. Co. (45 N. Y. 846), 285.
Richardson v. The Metropolitan Ry. Co. (L. R. 3 C. P. 374. n.), 230.
Richardson v. Wilmington &c. R. Co. (8 Rich. (Law) 120), 293, 567.
Richmond v. Railway Co. (87 Mich. 374; 49 N. W. Rep. 621), 277.
Richmond v. Sacramento R. Co. (18 Cal. 351), 327, 334.
Richmond &c. R. Co. v. Anderson (31 Gratt. 812; 31 Am. Rep. 750), 17, 33, 34, 50.
Richmond &c. R. Co. v. Farmer (97 Ala. 141), 64.
Richmond &c. R. Co. v. Howard (79 Ga. 44; 3 S. E. Rep. 426), 27, 36, 267.
Richmond &c. R. Co. v. Medley (75 Va. 499; 40 Am. Rep. 734), 357, 360.
Richmond &c. R. Co. v. Moore (78 Va. 93), 500.
Richmond &c. R. Co. v. Morris (31 Gratt. 200) 17, 22, 50, 212.
Richmond &c. R. Co. v. Normant (84 Va. 167; 4 S. E. Rep. 211), 499.
Richmond &c. R. Co. v. Pickleseimer (85 Va. 798; 10 S. E. Rep. 44), 209.

[The references are to pages.]

Richmond &c. R. Co. v. Williams (86 Va. 165; 9 S. E. Rep. 990), 480.
Richmond Granite Co. v. Bailey (92 Va. 554; 24 S. E. Rep. 232), 471.
Richmond Locomotive & Machine Works v. Ford (94 Va. 627; 27 S. E. Rep. 509), 472.
Richter v. Harper (95 Mich. 221; 54 N. W. Rep. 768), 362.
Ricker v. Freeman (50 N. H. 420), 157.
Rickert v. Stephens (19 Atl. Rep. 410), 538.
Ricketts v. Birmingham St. Ry. Co. (85 Ala. 600; 5 So. Rep. 353), 432.
Ricketts v. East & West India Docks &c. Ry. Co. (12 C. B. 160; 16 Jur. 1072; 21 L. J. (C. P.) 201; 12 Eng. Law. & Eq. 520; 7 Eng. Ry. Cases, 295), 322, 354.
Riddle v. Proprietors (7 Mass. 169; 5 Am. Dec. 35), 367.
Riest v. Goshen (42 Ind. 339), 601.
Riester v. New York &c. R. Co. (16 App. Div. (N. Y.) 216), 235.
Rigby v. Hewett (5 Exch. 240), 149.
Rigler v. Charlotte &c. R. Co. (94 N. C. 604), 280.
Riley v. Connecticut &c. R. Co. (135 Mass. 292), 531, 600.
Riley v. O'Brien (6 N. Y. Supl. 129; 53 Hun, 147), 462.
Riley v. Steamship Co. (29 La. Ann. 791; 29 Am. Rep. 342), 487, 496, 516.
Riley v. West Virginia &c. R. Co. (27 W. Va. 145), 499.
Rine v. Chicago &c. R. Co. (88 Mo. 392), 301.
Rinear v. Grand Rapids &c. R. Co. (70 Mich. 620; 38 N. W. Rep. 599), 344.
Ring v. City of Cohoes (77 N. Y. 83; 33 Am. Rep. 574), 92, 145, 370, 389.
Rippe v. Chicago &c. R. Co. (42 Minn. 34; 43 N. W. Rep. 652), 342.
Ritt's Adm'x v. Louisville &c. R. Co. (4 S. W. Rep. 796), 499.
Ritterhouse v. Washington Street Ry. Co. (120 N. C. 544; 26 S. E. Rep. 922), 480, 551.
Ritterman v. Ropes (51 N. Y. Super. Ct. 25), 83.
Rivers v. City Council of Augusta (65 Ga. 376), 389.
Roach v. Western &c. R. Co. (93 Ga. 785; 21 S. E. Rep. 67), 164.
Robbins v. Springfield Street Ry. Co. (165 Mass. 30; 42 N. E. Rep. 334), 400, 430.
Robel v. Chicago &c. R. Co. (45 Minn. 84), 528.
Roberts v. Chicago &c. R. Co. (33 Minn. 218), 480.
Roberts v. Delaware &c. Canal Co. (177 Penn. St. 183; 35 Atl. Rep. 723), 283.
Roberts v. Smith (2 Hurl. & N. 213), 444.
Robertson v. Cornelson (34 Fed. Rep. 716), 503, 526.
Robertson v. Erie Ry. Co. (22 Barb. 91), 221, 241.
Robertson v. Penn. R. Co. (180 Penn. St. 43; 36 Atl. Rep. 403), 273.
Robertson v. Terre Haute &c. R. Co. (78 Ind. 77; 41 Am. Rep. 552), 429, 453.
Robeson v. French (12 Metc. 24; 45 Am. Dec. 236), 393.
Robinson v. Chicago &c. R. Co. (79 Iowa, 495; 44 N. W. Rep. 718), 347.
Robinson v. City of Cedar Rapids (100 Iowa, 662; 69 N. W. Rep. 1064), 373.
Robinson v. Cone (22 Vt. 213; 54 Am. Dec. 67), 175, 183, 194.
Robinson v. Fitchburg R. Co. (7 Gray 92), 599.
Robinson v. Flint &c. R. Co. (79 Mich. 323; 44 N. W. Rep. 779), 324.
Robinson v. George F. Blake Mfg. Co. (143 Mass. 528; 10 N. E. Rep. 314), 500, 501.
Robinson v. Grand Trunk Ry. Co. (32 Mich. 322), 341.
Robinson v. Houston &c. Ry. Co. (46 Tex. 540), 540.
Robinson v. New York &c. R. Co. (66 N. Y. 13; 23 Am. Rep. 1; 65 Barb. 146), 145, 154, 156, 163, 614, 616.
Robinson v. Pioche (5 Cal. 460), 563, 569.
Robinson v. Western &c. R. Co. (48 Cal. 409), 34, 60, 425, 605.
Robostelli v. New York &c. R. Co. (32 Fed. Rep. 796), 234.
Rock v. Indian Orchard Mills (142 Mass. 522; 8 N. E. Rep. 401), 195, 527.
Rock Island v. Vanlandschoot (58 Ill. 485), 565, 571.

[The references are to pages.]

Rockford &c. R. Co. v. Byam (80 Ill. 528), 270.
Rockford &c. R. Co. v. Delaney (82 Ill. 198; 25 Am. Rep. 308), 115, 121, 126, 169, 303.
Rockford &c. R. Co. v. Heflin (65 Ill. 367), 344.
Rockford &c. R. Co. v. Hillmer (72 Ill. 235), 120, 286.
Rockford &c. R. Co. v. Irish (72 Ill. 404), 120, 326, 331, 334, 345.
Rockford &c. R. Co. v. Lewis (58 Ill. 49), 329.
Rockford &c. R. Co. v. Lynch (67 Ill. 149), 347.
Rockford &c. R. Co. v. Rafferty (73 Ill. 58), 120, 329, 331.
Roden v. Chicago &c. R. Co. (133 Ill. 72; 24 N. E. Rep. 425), 282, 296.
Rodman v. Michigan Cent. R. Co. (55 Mich. 57; 54 Am. Rep. 348; 31 Alb. Law Jour. 34), 475, 481.
Rodrian v. New York &c. R. Co. (7 N. Y. Supl. 811), 290.
Rodrian v. New York &c. R. Co. (125 N. Y. 526; 26 N. E. Rep. 741), 261, 262, 267, 275, 600.
Roesner v. Hermann (10 Biss. 486), 19, 556.
Rogen v. Enoch Morgan's Sons' Co. (1 N. Y. Supl. 273), 442.
Rogers v. Chicago &c. R. Co. (26 Iowa, 558), 343.
Rogers v. Galveston City Ry. Co. (76 Tex. 502; 13 S. W. Rep. 540), 540.
Rogers v. Ludlow Mfg. Co. (144 Mass. 198; 11 N. E. Rep. 77), 511.
Rogers v. Newburyport &c. R. Co. (1 Allen, 16), 324, 333, 340, 354.
Rogers v. Overton (87 Ind. 410), 545, 602.
Rogers &c. Works v. Hand (50 N. J. Law, 464; 14 Atl. Rep. 766), 511.
Roll v. Northern &c. R. Co. (15 Hun, 496), 64.
Rolland v. Chicago &c. R. Co. (5 McCrary, 549), 284.
Rolseth v. Smith (38 Minn. 14; 35 N. W. Rep. 565), 632.
Rome v. Dodd (58 Ga. 238), 133.
Romeo v. Boston &c. R. Co. (87 Me. 540; 33 Atl. Rep. 24), 262, 283.
Romney Marsh, The Lord's Bailiff-Jurats of, v. The Corporation of the Trinity House (L. R. 5 Exch. 204; L. R. 7 Exch. 247), 41.
Rompillon v. Abbott (1 N. Y. Supl. 662), 42.
Ronan v. Midland Ry. Co. (47 L. R. Ir. 157), 248.
Roof v. Railroad Co. (4 S. C. 61), 606.
Rooney v. Allan (10 C. of S. Cas. 1224, Sc.), 442.
Root v. New York Cent. Sleeping Car. Co. (28 Mo. App. 199), 251, 252.
Rose v. Des Moines &c. R. Co. (39 Iowa, 246), 249.
Rosenbaum v. Shoffner (98 Tenn. 624; 40 S. W. Rep. 1086), 589.
Ross v. Boston &c. R. Co. (6 Allen, 87), 357, 359, 360.
Ross v. Davenport (66 Iowa, 548), 57.
Rost v. Missouri Pac. Ry. Co. (76 Tex. 168; 12 S. W. Rep. 1131), 27.
Roth v. Union Depot Co. (13 Wash. 525), 29, 303.
Rothe v. Milwaukee &c. R. Co. (21 Wis. 256), 76, 279, 299.
Rothenberger v. N. W. C. M. Co. (57 Minn. 461; 59 N. W. Rep. 531), 544.
Rothstein v. Penn. R. Co. (171 Penn. St. 620; 33 Atl. Rep. 379), 212, 215.
Rothwell v. Hutchison (13 Ct. of Ses. Cas. 463), 541.
Roul v. East Tenn. &c. R. Co. (11 S. E. Rep. 558), 441.
Roulston v. Clark (3 E. D. Smith, 366), 79, 409.
Rowe v. Railroad Co. (7 S. C. 167), 331.
Rowell v. City of Lowell (7 Gray, 100), 409.
Rowell v. Railroad (57 N. H. 132; 24 Am. Rep. 59), 357, 359.
Rowen v. New York &c. R. Co. (59 Conn. 365), 16.
Rowland v. Cannon (35 Ga. 105), 189.
Rowland v. Missouri Pac. Ry. Co. (20 Mo. App. 463), 483.
Rozelle v. Rose (3 App. Div. (N. Y.) 132), 467.
Rubenstein v. Cruikshank (54 Mich. 199), 570, 589.
Rucker v. Missouri &c. Ry. Co. (61 Tex. 499), 219, 221.
Rudd v. Richmond &c. R. Co. (80 Va. 546), 303.
Rudolphy v. Fuchs (44 How. Pr. 155), 628.
Ruland v. South Newmarket (59 N. H. 291), 626, 633.

[The references are to pages.]

Rummell v. Dilworth, Porter & Co. (131 Penn. St. 509; 19 Atl. Rep. 345), 528.
Runyon v. Central R. Co. (25 N. J. Law, 556), 23, 48, 50, 276.
Rusch v. Davenport (6 Iowa, 443), 601.
Rush v. Missouri Pac. Ry. Co. (36 Kan. 129; 12 Pac. Rep. 582), 522, 540.
Rushville v. Poe (85 Ind. 83), 602.
Russell v. Carolina Central R. Co. (118 N. C. 1098; 24 S. E. Rep. 518), 277, 283.
Russell v. Men of Devon (2 T. R. 667), 367.
Russell v. Minneapolis &c. R. Co. (32 Minn. 230), 525, 536.
Russell v. Tillotson (140 Mass. 201), 517.
Russell v. Village of Canastota (98 N. Y. 496), 534.
Rust v. Low (6 Mass. 90), 323, 336.
Rutter v. Foy (46 Iowa, 132), 102, 104.
Rutter v. Missouri Pac. Ry. Co. (81 Mo. 169), 97.
Ryall v. Central Pac. R. Co. (76 Cal. 474; 18 Pac. Rep. 430), 443.
Ryan v. Bagley (50 Mich. 179; 45 Am. Rep. 35), 466, 479, 484, 512.
Ryan v. Cumberland &c. R. Co. (23 Penn. St. 384), 223, 477, 481.
Ryan v. Fowler (24 N. Y. 410), 444, 495.
Ryan v. Hudson River &c. R. Co. (1 Jones & Sp. 137), 614.
Ryan v. Long Island R. Co. (51 Hun, 607; 4 N. Y. Supl. 381), 529.
Ryan v. Miller (12 Daly, 77), 43, 511.
Ryan v. Missouri &c. Ry. Co. (65 Tex. 13; 57 Am. Rep. 589), 248.
Ryan v. New York &c. R. Co. (35 N. Y. 210; 37 Hun, 186), 168, 364.
Ryan v. Thompson (2 Jones & Sp. 133), 83.
Rylands v. Fletcher (L. R. 1 Exch. 265; L. R. 3 H. L. 330; 3 Hurl. & C. 774), 409.

S.

Saare v. Union Ry. Co. (20 Mo. App. 211), 424.
Sabine &c. Ry. Co. v. Dean (76 Tex. 73; 13 S. W. Rep. 45), 290.
Sabine &c. Ry. Co. v. Hanks (73 Tex. 323; 11 S. W. Rep. 377), 296.
Sadler v. Henlock (4 El. & Bl. 570; 24 L. J. (Q. B.) 138; 1 Jur. (N. S). 677), 448.
St. Claire Street Ry. Co. v. Eadie (43 Ohio St. 91; 54 Am. Rep. 144, n.), 154, 155, 186.
St. Johnsburg &c. R. Co. v. Hunt (59 Vt. 294), 340.
St. Joseph &c. R. Co. v. Chase (11 Kan. 47), 357, 361.
St. Joseph &c. R. Co. v. Glover (11 Kan. 302), 342.
St. Joseph &c. R. Co. v. Wheeler (35 Kan. 185), 223.
St. Louis &c. R. Co. v. Basham (47 Ark. 321), 335.
St. Louis &c. R. Co. v. Bell (81 Ill. 76; 25 Am. Rep. 269), 199, 304.
St. Louis &c. R. Co. v. Box (52 Ark. 368; 12 S. W. Rep. 757), 285.
St. Louis &c. R. Co. v. Britz (72 Ill. 256), 460, 464, 475, 476.
St. Louis &c. R. Co. v. Cantrell (37 Ark. 519; 40 Am. Rep. 105), 107, 214.
St. Louis &c. R. Co. v. Crosnoe (72 Tex. 79; 10 S. W. Rep. 342), 275, 316.
St. Louis &c. R. Co. v. Dingman 62 Ark. 245; 35 S. W. Rep. 219), 262.
St. Louis &c. R. Co. v. Fairbairn (48 Ark. 491; 4 S. W. Rep. 50), 232.
St. Louis &c. R. Co. v. Faitz (23 Ill. App. 498), 119.
St. Louis &c. R. Co. v. Gaines (46 Ark. 555), 477.
St. Louis &c. R. Co. v. Harper (44 Ark. 524), 485, 500.
St. Louis &c. R. Co. v. Higgins (44 Ark. 203), 532.
St. Louis &c. R. Co. v. Irwin (38 Kan. 701; 16 Pac. Rep. 146), 528.
St. Louis &c. R. Co. v. Leathers (62 Ark. 235), 275.
St. Louis &c. R. Co. v. Manly (58 Ill. 300), 78, 120, 264, 277.
St. Louis &c. R. Co. v. Marker (41 Ark. 542), 441.
St. Louis &c. R. Co. v. Mathias (50 Ind. 65), 276.
St. Louis &c. R. Co. v. Monday (49 Ark. 257; 4 S. W. Rep. 782), 300.
St. Louis &c. R. Co. v. Morgart (45 Ark. 318), 442.

[The references are to pages.]

St. Louis &c. R. Co. v. Person (49 Ark. 182; 4 S. W. Rep. 755), 107.
St. Louis &c. R. Co. v. Rice (51 Ark. 467; 11 S. W. Rep. 699), 531.
St. Louis &c. R. Co. v. Rosenberry (45 Ark. 256; 11 S. W. Rep. 212), 108, 211.
St. Louis &c. R. Co. v. Ross (61 Ark. 617; 33 S. W. Rep. 1054), 300.
St. Louis &c. R. Co. v. Shackelford (42 Ark. 417), 476.
St. Louis &c. R. Co. v. Taylor (64 Ark. 364; 42 S. W. Rep. 831), 262.
St. Louis &c. R. Co. v. Terhune (50 Ill. 151), 277.
St. Louis &c. R. Co. v. Todd (36 Ill. 409), 99, 119, 121, 125, 326, 328, 351.
St. Louis &c. R. Co. v. Valirius (56 Ind. 511), 496, 504.
St. Louis &c. R. R. Co. v. Vincent (36 Ark. 451), 333.
St. Louis &c. R. Co. v. Washburn (97 Ill. 293), 347.
St. Louis &c. R. Co. v. Weaver (35 Kan. 412; 11 Pac. Rep. 412), 475, 498, 505, 511, 605.
St. Louis &c. R. Co. v. White (48 Ark. 495; 4 S. W. Rep. 52), 211.
St. Louis &c. R. Co. v. Wilkerson (46 Ark. 513), 302.
St. Paul, City of, v. Kuby (8 Minn. 166), 172.
Sahlgaard v. St. Paul Street Ry. Co. (48 Minn. 275; 51 N. W. Rep. 111), 432.
Salem v. Goller (76 Ind. 291), 17, 103.
Salina, City of, v. Trosper (27 Kan. 545), 372, 373, 563, 565.
Salisbury v. Herchenroder (106 Mass. 458; 8 Am. Rep. 354), 41, 408.
Salmon v. Delaware &c. R. Co. (38 N. J. Law, 5; 20 Am. Rep. 356), 356, 360.
Salmon v. New York &c. R. Co. (5 N. Y. Supl. 225), 283.
Salter v. Utica &c. R. Co. (13 Hun, 197), 280.
Sammon v. New York &c. R. Co. (62 N. Y. 351), 464.
San Antonio &c. Ry. Co. v. Bennett (76 Tex. 151), 606.
San Antonio Street Ry. Co. v. Mechler (87 Tex. 628), 303.
Sanborn v. Atchison &c. R. Co. (35 Kan. 292), 527.
Sanborn v. Madera Flume & Trading Co. (70 Cal. 261; 11 Pac. Rep. 710), 511, 538.
Sanders v. Reister (1 Dakota, 151), 78, 382, 383.
Sanders v. Young (1 Head, 219), 417.
Sanderson v. Frazier (8 Colo. 79; 54 Am. Rep. 544; 19 Am. Law Rev. 312), 437, 605.
Sandusky &c. R. Co. v. Sloan (27 Ohio St. 341), 346, 347.
Sanford v. Eighth Ave. R. Co. (23 N. Y. 343), 103, 420.
Sanford v. Standard Oil Co. (118 N. Y. 571; 24 N. E. Rep. 313), 487.
Sangamon Coal Mining Co. v. Wiggerhaus (122 Ill. 279; 13 N. E. Rep. 648), 498, 511.
Sann v. Johns Mfg. Co. (16 App. Div. (N. Y.) 252), 67.
Sappho, The (9 Jur. 560; 1 Parsons' Mar. Law, 189), 579.
Saunders v. City & Suburban R. Co. (41 S. W. Rep. 1032), 430.
Sauter v. New York &c. R. Co. (66 N. Y. 50; 23 Am. Rep. 18), 33, 98.
Savage v. Bangor (40 Me. 176; 63 Am. Dec. 658), 368, 381.
Savage v. Corn Exchange Ins. Co. (36 N. Y. 655), 35.
Savannah &c. R. Co. v. Barber (71 Ga. 644), 531.
Savannah &c. R. Co. v. Geiger (21 Fla. 669; 58 Am. Rep. 697), 330.
Savannah &c. R. Co. v. Rice (23 Fla. 575; 3 So. Rep. 170), 335.
Savannah &c. R. Co. v. Stewart (71 Ga. 427), 298.
Savannah &c. R. Co. v. Watts (82 Ga. 229; 9 S. E. Rep. 129), 236.
Saverenz v. Chicago &c. R. Co. (56 Iowa, 689), 263.
Sawyer v. Rutland &c. R. Co. (27
Sanders v. Young (1 Head. 219),
Sawyer v. Sauer (10 Kan. 472), 22, 124, 128, 129.
Sawyer v. Vermont &c. R. Co. (105 Mass. 196), 350.
Sayer v. Portsmouth &c. R. Co. (31 Me. 228), 248.
Sayward v. Carlson (1 Wash. 29; 23 Pac. Rep. 830), 484, 498.
Scanlan v. Boston (140 Mass. 84), 285.
Schaab v. Wheel Co. (56 Mo. 173), 35.

[The references are to pages.]

Schacherl v. St. Paul City Ry. Co. (42 Minn. 42; 43 N. W. Rep. 837), 431.
Schaefler v. City of Sandusky (33 Ohio St. 246; 31 Am. Rep. 533), 58, 374.
Schafer v. The Mayor (154 N. Y. 466), 600.
Schaick v. Hudson River R. Co. (43 N. Y. 527), 290.
Schall v. Cole (107 Penn. St. 1), 442.
Scheffer v. Railroad Co. (105 U. S. 249), 44.
Scheffer v. Washington &c. R. Co. (105 U. S. 249), 98.
Scheffler v. Minneapolis &c. R. Co. (32 Minn. 125, 518), 96, 98.
Schepers v. Union Depot R. Co. (126 Mo. 675; 29 S. W. Rep. 712), 432.
Schierhold v. North &c. R. Co. (40 Cal. 447), 34, 172, 203, 302.
Schiffler v. Chicago &c. Ry. Co. (96 Wis. 71; 71 N. W. Rep. 97), 211, 212.
Schilling v. Chicago &c. R. Co. (71 Wis. 255; 37 N. W. Rep. 414), 262.
Schilling v. Winona & St. Peter R. Co. (66 Minn. 252; 68 N. W. Rep. 1083), 224.
Schlater v. Wilbert (41 La. Ann. 406; 6 So. Rep. 107), 425.
Schmid v. Humphrey (48 Iowa, 652; 30 Am. Rep. 414), 77, 254, 255, 395.
Schmidt v. Bauer (80 Cal. 565; 22 Pac. Rep. 256), 83.
Schmidt v. Burlington &c. R. Co. (75 Iowa, 606; 39 N. W. Rep. 916), 59.
Schmidt v. Chicago &c. R. Co. (83 Ill. 405), 98, 121.
Schmidt v. Kansas City Distilling Co. (90 Mo. 284), 199.
Schmidt v. Leisterkow (6 Dak. 386; 43 N. W. Rep. 820), 538.
Schneer v. Gas Light Co. of Syracuse (147 N. Y. 529), 29.
Schoenfeld v. Milwaukee City Ry. Co. (74 Wis. 433; 43 N. W. Rep. 162), 54.
Schofield v. Chicago &c. R. Co. (2 McCrary, 268), 263.
Schofield v. Chicago &c. R. Co. (114 U. S. 615), 46, 264, 276.
Schonhoff v. Jackson Branch R. Co. (97 Mo. 151; 10 S. W. Rep. 618), 372.
School District v. Boston &c. R. Co. (102 Mass. 552; 3 Am. Rep. 502), 248.
Schreiber v. Chicago &c. R. Co. (61 Minn. 499; 63 N. W. Rep. 1034), 217.
Schreiner v. New York &c. R. Co. (12 App. Div. (N. Y.) 555), 215.
Schroeder v. Michigan Car. Co. (56 Mich. 132; 32 Alb. Law Jour. 134), 504, 532.
Schron v. Staten Island Electric R. Co. (16 App. Div. (N. Y.) 111), 164.
Schultz v. Chicago &c. R. Co. (44 Wis. 638), 19, 64, 65.
Schultz v. Chicago &c. R. Co. (67 Wis. 616; 58 Am. Rep. 881; 31 N. W. Rep. 321), 478, 521, 540.
Schultz v. Griffith (103 Iowa, 150; 72 N. W. Rep. 445), 592.
Schultz v. Milwaukee (49 Wis. 254; 35 Am. Rep. 779), 386, 401.
Schultz v. Moon (33 Mo. App. 329), 45.
Schulz v. Pennsylvania R. Co. (5 Rep. 376), 267.
Schum v. Pennsylvania R. Co. (107 Penn. St. 8; 19 Am. Law Rev. 823; 52 Am. Rep. 468), 270, 289, 608.
Schwandner v. Birge (33 Hun, 186), 528.
Schwarz v. Hannibal &c. R. Co. (58 Mo. 207), 326, 331.
Scott v. Dublin &c. Ry. Co. (11 Ir. Com. Law (N. S.) 377), 36, 91.
Scott v. Hogan (72 Iowa, 614; 34 N. W. Rep. 444), 27.
Scott v. London Docks Co. (3 Hurl. & C. 596; 11 Jur. (N. S.) 204; 34 L. J. (Exch.) 17, 220; 11 Week. Rep. 410; 11 L. T. (N. S. 148; 10 Jur. (N. S.) 1107), 410.
Scott v. Pennsylvania R. Co. (9 N. Y. Supl. 189), 27.
Scott v. Pennsylvania R. Co. (130 N. Y. 679; 29 N. E. Rep. 289), 262.
Scott v. Oregon Ry. & Nav. Co. (4 Or. 211; 13 Pac. Rep. 98), 530, 532.
Scott v. Shephard (2 Black. 892), 43, 363.
Scott v. Shepherd (1 Smith's Leading Cases (H. & W. notes), 549), 47.
Scott v. Sweeney (34 Hun (N. Y.) 292), 462.

[The references are to pages.]

Scoville v. Hannibal &c. R. Co. (81 Mo. 434), 297.
Scranton and the Emerald Isle, The (2 Ben. 25), 581.
Scranton, City of, v. Hill (102 Penn. St. 378; 48 Am. Rep. 211), 380.
Seaboard & Roanoke R. Co. v. Joyner (92 Va. 354; 23 S. E. Rep. 773), 300.
Searle v. Lindsay (11 C. B. (N. S.) 429), 483.
Searles v. Milwaukee &c. R. Co. (35 Iowa, 490), 326, 329.
Sears v. Central &c. R. Co. (53 Ga. 630), 531.
Sears v. Dennis (105 Mass. 312), 63.
Seaver v. Boston &c. R. Co. (14 Gray, 466), 479.
Seawell v. Raleigh &c. R. Co. (106 N. C. 272), 335.
Secord v. St. Paul &c. R. Co. (5 McCrary, 515), 49, 94, 95, 110, 605.
Sedgwick v. Illinois &c. R. Co. (73 Iowa, 158; 34 N. W. Rep. 790), 531.
Sedgwick v. Illinois &c. R. Co. (76 Iowa, 340; 41 N. W. Rep. 35), 531.
Seefeld v. Chicago &c. R. Co. (70 Wis. 216; 35 N. W. Rep. 278), 290, 633.
Seeley v. Peters (10 Ill. 130), 329.
Seeley v. Town of Litchfield (49 Conn. 134; 44 Am. Rep. 213), 403.
Seese v. Northern Pac. R. Co. (39 Fed. Rep. 487), 531.
Sehroth v. City of Prescott (63 Wis. 652), 368.
Seley v. Southern Pac. R. Co. (23 Pac. Rep. 751), 525.
Self v. Dunn (42 Ga. 528), 417.
Selinas v. Vermont State Agr. Soc. (60 Vt. 249; 15 Atl. Rep. 117), 83.
Sellars v. Richmond &c. R. Co. (94 N. C. 654), 282.
Selleck v. Lake Shore &c. R. Co. (58 Mich. 195), 42.
Serandat v. Saisse (L. R. 1 P. C. 152), 560.
Sever v. Boston &c. R. Co. (14 Gray, 466), 464.
Severy v. Nickerson (120 Mass. 306; 21 Am. Rep. 514), 79, 258, 383.
Sevier v. Vicksburg &c. R. Co. (61 Miss. 8; 48 Am. Rep. 74), 232, 238.
Sewell v. City of Cohoes (75 N. Y. 45; 31 Am. Rep. 418), 529.
Sewell v. New York &c. R. Co. (Mass.) (50 N. E. Rep. 541), 274.
Seybolt v. New York &c. R. Co. (95 N. Y. 562; 47 Am. Rep. 75), 207.
Seymer v. Lake (66 Wis. 651), 292, 563.
Seymour v. Maddox (16 Q. B. 326; 20 L. J. (Q. B.) 327), 316, 451.
Shaber v. St. Paul R. Co. (28 Minn. 103), 265.
Shackelford's Adm'r v. Louisville &c. R. Co. (84 Ky. 43), 314, 320.
Shadd v. Railroad Co. (116 N. C. 968; 21 S. E. Rep. 554), 469.
Shaefler v. City of Sandusky (33 Ohio St. 246; 31 Am. Rep. 533), 405.
Shaffer v. Railroad Co. (105 U. S. 249), 32.
Shanahan v. New York &c. R. Co. (10 Abb. Pr. 398), 352.
Shannon v. Boston &c. R. Co. (78 Me. 52), 62, 64.
Shanny v. Androscoggin Mills (66 Me. 420), 496, 502, 509, 538, 545.
Shapleigh v. Wyman (134 Mass. 118), 399, 400, 633.
Sharp v. Pathhead Spinning Co. (12 Ct. of Ses. Cas. 574), 526.
Sharrod v. London &c. Ry. Co. (4 Exch. 580; 14 Jur. 23; 20 Law Jour. Exch. 185; 7 Dow. & L. 213; 6 Eng. Ry. Cases, 239), 323.
Shaw v. Boston &c. R. Co. (8 Gray, 45), 285.
Shaw v. Craft (37 Fed. Rep. 317), 165.
Shaw v. Deal (7 Penn. Co. Ct. Rep. 378), 525.
Shaw v. Roberds (6 Ad. & El. 75), 355, 573.
Shaw v. York &c. Ry. Co. (13 Q. B. 347), 244.
Shea v. Potrero &c. R. Co. (44 Cal. 414), 59, 425.
Shea v. Reems (36 La. Ann. 966), 59, 400, 449.
Sheehan v. Edgar (58 N. Y. 631), 399.
Sheeler v. Chesapeake &c. R. Co. (81 Va. 188), 529.
Sheerman v. Toronto &c. Ry. Co. (34 Up. Can. (Q. B.) 451), 223.
Sheff v. City of Huntington (16 W. Va. 307), 18, 606.

[The references are to pages.]

Sheffield v. Western Union Telegraph Co. (36 Fed. Rep. 164), 165.
Shehan v. Philadelphia &c. R. Co. (166 Penn. St. 354; 31 Atl. Rep. 120), 268, 284.
Shelby's Adm'r v. Cincinnati &c. Ry. Co. (85 Ky. 224; 3 S. W. Rep. 157), 258, 288.
Sheldon v. Flint &c. R. Co. (59 Mich. 172), 633.
Sheldon v. Western Union Telegraph Co. (4 N. Y. Supl. 526; 51 Hun, 591), 415.
Shellabarger v. Chicago &c. R. Co. (66 Iowa, 18), 339.
Shepard v. Buffalo &c. R. Co. (35 N. Y. 641), 333, 352, 354.
Shephard v. Midland Ry. Co. (20 W. R. 705), 207.
Sheridan v. Brooklyn R. Co. (36 N. Y. 39), 143, 154, 156, 434.
Sherley v. Billings (8 Bush, 147; 8 Am. Rep. 451), 420, 448.
Sherman v. Anderson (27 Kan. 333; 41 Am. Rep. 414), 325, 337, 342.
Sherman v. Chicago &c. R. Co. (34 Minn. 259), 537.
Sherman v. Fall River Iron Co. (2 Allen, 524), 109.
Sherman v. Hannibal &c. R. Co. 72 Mo. 62; 37 Am. Rep. 423), 222, 241.
Sherman v. Menomonee River Lumber Co. (72 Wis. 122; 39 N. W. Rep. 365), 446, 501.
Sherman v. Rochester &c. R. Co. (17 N. Y. 153), 462, 475.
Sherman v. Stage Co. (24 Iowa, 515), 33, 97.
Sherman v. Syracuse &c. R. Co. (17 N. Y. 153), 411, 454.
Sherry v. New York &c. R. Co. (104 N. Y. 652; 10 N. E. Rep. 128), 287.
Sherwood v. City of Hamilton (37 Up. Can. (Q. B.) 410), 370.
Sherwood v. General Ins. Co. (1 Blatchf. 255), 573.
Shields v. Younge (13 Ga. 349; 60 Am. Dec. 698), 453.
Shipley v. Fifty Associates (101 Mass. 251), 409.
Shippy v. Village of Au Sable (85 Mich. 280; 48 N. W. Rep. 584), 185.
Short v. Baltimore City Passenger Ry. Co. (50 Md. 73; 33 Am. Rep. 298), 407.
Show v. Boston &c. R. Co. (8 Gray, 45, 66), 288.
Shriver v. Sioux City &c. R. Co. (24 Minn. 506; 31 Am. Rep. 353), 248.
Shultz v. Wall (134 Penn. St. 262; 19 Atl. Rep. 742), 570, 585.
Shumacher v. St. Louis &c. R. Co. (39 Fed. Rep. 174), 444.
Sias v. Rochester R. Co. (18 App. Div. (N. Y.) 506), 438.
Sickles v. New Jersey Ice Co. (153 N. Y. 83; 46 N. E. Rep. 1042), 373.
Siegrist v. Arnot (10 Mo. App. 197), 66.
Siela v. Hannibal &c. R. Co. (82 Mo. 430), 500.
Sika v. Chicago &c. R. Co. (21 Wis. 370), 340.
Silberstein v. Houston &c. Ry. Co. (4 N. Y. Supl. 843), 167, 424.
Silliman v. Lewis (49 N. Y. 379, 383), 35.
Sills v. Brown (9 Car. & P. 601), 49, 95, 109.
Silver v. Kansas City &c. R. Co. (78 Mo. 528; 47 Am. Rep. 118), 330, 338.
Silver Cord Mining Co. v. McDonald (78 Mo. 528; 47 Am. Rep. 118), 63.
Simkins v. Columbia &c. R. Co. (20 S. C. 258), 331.
Simmons v. Chicago &c. R. Co. (110 Ill. 340), 538.
Simmons v. New Bedford &c. R. Co. (97 Mass. 368), 206.
Simmonson v. Stellenmerf (1 Edm. Sel. Cas. 194), 78, 414.
Simms v. South Carolina R. Co. (27 S. C. 268; 3 S. E. Rep. 301; 2 S. E. Rep. 486), 234, 401, 628.
Simons v. Gaynor (89 Ind. 165), 379, 399.
Simpson v. Bloss (7 Taunt. 246), 73.
Simpson v. Hand (6 Whart. 311; 36 Am. Dec. 231), 17, 92, 147, 152, 153, 160.
Sinclair v. Berndt (87 Ill. 174), 461.
Siner v. Great Western Ry. Co. (L. R. 3 Exch. 150), 238.
Siner v. Great Western Ry. Co. (L. R. 4 Exch. 117), 230.
Singleton v. Eastern Counties Ry. Co. (7 C. B. (N. S.) 287), 175, 179.
Singleton v. Southwestern R. Co. (70 Ga. 464; 48 Am. Rep. 574), 490.
Sioux City v. Weare (59 Iowa, 95), 378.

[The references are to pages.]

Sioux City &c. R. Co. v. Finlayson (16 Neb. 578), 542.
Sioux City &c. R. Co. v. Smith (22 Neb. 775; 36 N. W. Rep. 285), 497.
Sir Garnet Wolsely, The (41 Fed. Rep. 896), 538.
Sisk v. Crump (112 Ind. 504; 14 N. E. Rep. 381), 382.
Six Carpenters' Case, The (8 Rep. 146; 1 Smith's Leading Cases (8th Am. ed. of 1885), 257), 183.
Skelton v. London &c. Ry. Co. (L. R. 2 C. P. 631), 287.
Skerritt v. Scallan (11 Ir. C. L. R. 389), 505.
Skipp v. Eastern Counties Ry. Co. (9 Exch. 223; 23 L. J. (Exch.) 23; 24 Eng. L. & E. 396), 451, 541.
Skjeggerud v. Minneapolis &c. R. Co. (38 Minn. 56; 35 N. W. Rep. 572), 57.
Slater v. Burlington &c. R. Co. (71 Iowa, 209), 154.
Slater v. Chapman (67 Mich. 523; 35 N. W. Rep. 106), 465, 507.
Slater v. Jewett (85 N. Y. 61; 39 Am. Rep. 627), 454, 476, 480, 492.
Slatterly v. New York &c. R. Co. (4 N. Y. Supl. 910), 480.
Slattery v. Toledo &c. R. Co. (23 Ind. 81), 478.
Sleeper v. Sandown (52 N. H. 244), 401, 571.
Slim v. Great Northern &c. Ry. Co. (14 C. B. 647), 244.
Slimmer v. Merry (23 Iowa, 94), 417.
Sloan v. Hubbard (34 Ohio St. 585), 329, 341.
Sloop v. St. Louis &c. R. Co. (22 Mo. App. 593), 335.
Slosson v. Burlington &c. R. Co. (55 Iowa, 294; 60 Iowa, 215), 358, 601, 626, 633.
Small v. Chicago &c. R. Co. (55 Iowa, 582), 358, 363.
Smallman v. Whilter (87 Ill. 545; 29 Am. Rep. 76), 242.
Smethurst v. Barton Square Church (148 Mass. 261; 19 N. E. Rep. 387), 409.
Smith v. Atchison &c. R. Co. (25 Kan. 738), 173, 304.
Smith v. Bailey (14 App. Div. (N Y.) 283), 401.
Smith v. Boston &c. R. Co. (120 Mass. 490; 21 Am. Rep. 538), 73, 256, 393.
Smith v. Boston Gaslight Co. (129 Mass. 318), 612.
Smith v. Central R. &c. Co. (5 S. E. Rep. 772), 107.
Smith v. Chicago &c. R. Co. (42 Fed. Rep. 520), 478, 506, 508.
Smith v. Chicago &c. R. Co. (55 Iowa, 33; 34 Iowa, 506), 319, 326, 329.
Smith v. Chicago &c. Ry. Co. (91 Wis. 503; 65 N. W. Rep. 183), 479, 482.
Smith v. Conway (121 Iowa, 216), 77.
Smith v. County Court (33 W. Va. 713; 11 S. E. Rep. 7), 370.
Smith v. Dygert (12 Barb. 613), 414.
Smith v. Eastern &c. R. Co. (35 N. H. 356), 340, 606.
Smith v. Flint &c. R. Co. (46 Mich. 258; 41 Am. Rep. 161), 454, 477, 502, 533.
Smith v. Gardiner (11 Gray, 418), 414.
Smith v. Georgia Pac. Ry. Co. (88 Ala. 538; 7 So. Rep. 119), 236.
Smith v. Hannibal &c. R. Co. (37 Mo. 287), 357, 360.
Smith v. Hestonville &c. R. Co. (92 Penn. St. 450; 37 Am. Rep. 705), 186, 203, 410, 539.
Smith v. Irwin (51 N. J. Law, 507; 18 Atl. Rep. 852), 526, 527.
Smith v. Kansas &c. R. Co. (58 Iowa, 622), 350.
Smith v. London & St. Katherine's Dock Co. (L. R. 3 C. P. 326), 81.
Smith v. London &c. Ry. Co. (L. R. 5 C. P. 102), 29, 363.
Smith v. Lowell Manfg. Co. (124 Mass. 114), 454.
Smith v. Maine Central R. Co. (87 Me. 339; 32 Atl. Rep. 967), 163, 262, 269, 271, 272.
Smith v. Minnesota &c. R. Co. (26 Minn. 419), 299.
Smith v. Nashville &c. R. Co. (6 Coldw. 589; 6 Heisk. 174), 135, 318.
Smith v. New York &c. R. Co. (29 Barb. 132; 24 N. Y. 222), 99, 245.
Smith v. New York &c. R. Co. (38 Hun, 33), 162.
Smith v. New York &c. R. Co. (46 N. J. Law, 7), 255.
Smith v. New York &c. R. Co. (19 N. Y. 132), 485, 486, 489, 504.

[The references are to pages.]

Smith v. New York &c. R. Co. (4 App. Div. (N. Y.) 493), 163, 272.
Smith v. Norfolk & Southern R. Co. (114 N. C. 728; 19 S. E. Rep. 863), 262, 302, 566.
Smith v. O'Connor (48 Penn. St. 218, 221), 175, 184.
Smith v. Oxford Iron Co. (42 N. J. Law, 467; 36 Am. Rep. 535), 496, 517.
Smith v. Peninsular Car Works (60 Mich. 501; 27 N. W. Rep. 662), 517, 525.
Smith v. Railroad (35 N. H. 366, 367), 184.
Smith v. Richmond &c. R. Co. (99 N. C. 241; 5 S. E. Rep. 896), 224.
Smith v. Rollins (11 R. I. 464; 23 Am. Rep. 509), 396.
Smith v. Ryan (8 N. Y. Supl. 853), 57.
Smith v. St. Lawrence &c. Co. (L. R. 5 P. C. 308), 56.
Smith v. St. Louis &c. R. Co. (91 Mo. 58; 3 S. W. Rep. 836), 338.
Smith v. St. Paul &c. R. Co. (32 Minn. 1; 50 Am. Rep. 550), 420.
Smith v. Savannah &c. R. Co. (84 Ga. 698; 11 S. E. Rep. 455), 291.
Smith v. Sibley Manfg. Co. (85 Ga. 333; 11 S. E. Rep. 616), 540.
Smith v. Simmons (103 Penn. St. 32), 377.
Smith v. Smith (2 Pick. 621; 13 Am. Dec. 464), 22, 77, 161, 166, 371.
Smith v. Steele (L. R. 10 Q. B. 125; 44 L. J. (Q. B.) 60), 98.
Smith v. Stokes (4 Best & S. 84), 389.
Smith v. Wabash &c. Ry. Co. (92 Mo. 359; 4 S. W. Rep. 129), 469, 476, 482, 545.
Smith v. Wildes (143 Mass. 556; 10 N. E. Rep. 446), 384.
Smith v. Wilson (36 Minn. 334; 31 N. W. Rep. 176), 589.
Smoot v. The Mayor (24 Ala. 112), 605.
Smotherman v. St. Louis &c. Ry. Co. (29 Mo. App. 265), 216.
Snider v. New Orleans &c. R. Co. (48 La. Ann. 1; 18 So. Rep. 695), 430.
Snow v. Adams (1 Cush. 447), 369.
Snow v. Fitchburg R. Co. (136 Mass. 552; 49 Am. Rep. 40), 207, 239.
Snow v. Housatonic R. Co. (8 Allen, 450; 8 Pick. 450), 58, 374, 496, 530, 543.
Snow v. Provincetown (120 Mass. 580), 391.
Snowden v. Boston &c. R. Co. (151 Mass. 220; 24 N. E. Rep. 40), 215.
Snowden v. Norfolk &c. R. Co. (95 N. C. 93), 335.
Snyder v. Hannibal &c. R. Co. (60 Mo. 413), 178, 241, 448.
Snyder v. Pittsburgh &c. R. Co. (11 W. Va. 15), 94, 357, 360, 362.
Sobieski v. St. Paul &c. R. Co. (41 Minn. 169; 42 N. W. Rep. 863), 441.
Soewer v. City of Sedalia (77 Mo. 431, 446), 372.
Solen v. Virginia &c. R. Co. (13 Nev. 106), 298, 315.
Solomon v. Central Park &c. R. Co. (1 Sweeney (N. Y. Super. Ct.), 298), 434, 436.
Solomon R. Co. v. Jones (30 Kan. 601), 502.
Somer v. Harrison (8 Atl. Rep. 799), 484.
Somerset & Cambria R. Co. v. Galbraith (109 Penn. St. 32), 545.
Somerville &c. R. Co. v. Lee (97 Ala. 325), 212.
Sorenson v. Northern Pac. R. Co. (36 Fed. Rep. 166), 97.
South & North Ala. R. Co. v. Donovan (84 Ala. 141; 4 So. Rep. 142), 203, 316.
South & North Ala. R. Co. v. Schaufler (75 Ala. 136), 213, 214.
South & North Ala. R. Co. v. Thompson (62 Ala. 494), 263.
South & North Ala. R. Co. v. Williams (65 Ala. 74), 326, 328, 330, 334, 348, 350.
South Covington &c. Ry. Co. v. Ware (84 Ky. 267; 1 S. W. Rep. 493), 63, 64, 66.
Southall v. Jones (5 Vict. L. R. 402), 388.
Southcote v. Stanley (1 Hurl. & N. 247; 25 L. J. (Exch.) 339), 81, 383, 590.
Southcote's Case (43 Eliz. A. D. 1601; 4 Rep. 83, b.; Cro. Eliz. 815), 2.
Southern Express Co. v. Crook (44 Ala. 468; 4 Am. Rep. 140), 249.
Southern Pac. Co. v. Johnson's Admx. (44 U. S. App. 1; 69 Fed. Rep. 559), 520.

[The references are to pages.]

Southern Ry. Co. v. Boston (99 Ga. 798; 27 S. E. Rep. 163), 443.
Southern Ry. Co. v. Bryant's Admr. (95 Va. 212; 28 S. E. Rep. 183), 261, 271, 607.
Southern Ry. Co. v. Smith (95 Va. 187; 28 S. E. Rep. 173), 215.
South Side Passenger Ry. Co. v. Trich (117 Penn. St. 290; 11 Atl. Rep. 627), 43.
Southwestern &c. R. Co. v. Haukerson (61 Ga. 114), 78, 292, 565, 567.
Southwestern &c. R. Co. v. Paulk (24 Ga. 356), 63.
Southwestern &c. R. Co. v. Singleton (66 Ga. 252; 67 Ga. 306), 213, 626, 634.
Southwestern Telegraph & Telephone Co. v. Beatty (63 Ark. 65; 37 S. W. Rep. 570), 429.
Southworth v. Old Colony &c. R. Co. (105 Mass. 342; 7 Am. Rep. 528), 332, 387, 388.
Soward v. Chicago &c. R. Co. (30 Iowa, 551), 343.
Sparhawk v. Salem (1 Allen, 30), 382.
Spaulding v. Town of Sherman (75 Wis. 77; 43 N. W. Rep. 558), 43.
Spearbracker v. Larrabee (64 Wis. 573), 57.
Spelman v. Fisher Iron Co. (56 Barb. 151), 517, 534.
Spence v. Chicago &c. R. Co. (25 Iowa, 139), 332.
Spencer v. Baltimore &c. R. Co. (4 Mackey, 138; 54 Am. Rep. 269), 291.
Spencer v. Brooks (97 Ga. 681; 25 S. E. Rep. 480), 480.
Spencer v. Illinois &c. R. Co. (29 Iowa, 55), 282.
Spencer v. Milwaukee &c. R. Co. (17 Wis. 487), 226, 227.
Spencer v. Utica &c. R. Co. (5 Barb. 337), 614, 615, 616, 617.
Spice v. Bacon (L. R. 2 Exch. Div. 463), 586, 588.
Spicer v. South Boston Iron Co. (138 Mass. 426), 500.
Spillane v. Missouri Pacific Ry. Co. (111 Mo. 555), 28, 29.
Spinner v. New York &c. R. Co. (67 N. Y. 153), 324, 328, 342, 349, 352.
Spiva v. Osage Coal and Mining Co. (88 Mo. 68), 96.
Splittorf v. State (108 N. Y. 205; 15 N. E. Rep. 322), 54.
Spofford v. Harlow (3 Allen, 176), 72, 414.
Spooner v. Brooklyn City &c. R. Co. (54 N. Y. 230; 13 Am. Rep. 570), 157, 433.
Spooner v. Delaware &c. R. Co. (115 N. Y. 22; 21 N. E. Rep. 696), 67, 285, 302.
Spring v. Hager (145 Mass. 186; 13 N. E. Rep. 479), 586.
Springer Transp. Co. v. Smith (16 Lea, 498; 1 S. W. Rep. 280), 420.
Springett v. Ball (4 Fost. & Fin. 472), 24, 97, 379, 390.
Springfield Consolidated Ry. Co. v. Welsch (155 Ill. 511), 29.
Spring's Adm'r v. Glenn (12 Bush, 172), 104, 458.
Squire v. Central Park R. Co. (4 Jones & Sp. 436), 614.
Staats v. Hudson River R. Co. (4 Abb. App. Dec. 287; 3 Keyes, 196; 33 How. Pr. 139), 342, 349.
Stacey v. Winona &c. R. Co. (42 Minn. 158; 43 N. W. Rep. 905), 349.
Stacke v. Milwaukee &c. R. Co. (9 Wis. 202), 101.
Stackpole v. Healey (16 Mass. 33; 8 Am. Dec. 121), 336.
Stackus v. New York &c. R. Co. (79 N. Y. 464), 264, 271.
Stacy v. Town of Phelps (47 Hun, 54), 370.
Stafford v. Chicago &c. R. Co. (6 Chi. Law Jour. 329; 114 Ill. 244), 453, 507.
Stafford v. City of Oskaloosa (57 Iowa, 748), 154.
Stafford v. Ingersoll (3 Hill, 38), 383.
Stafford v. Rubens (115 Ill. 196), 202.
Stager v. Ridge Ave. &c. Ry. Co. (119 Penn. St. 70; 12 Atl. Rep. 821), 431.
Standard Oil Co. v. Helmick (148 Ind. 457; 47 N. E. Rep. 14), 543.
Stanton v. Metropolitan R. Co. (14 Allen, 485), 254, 393, 439.
Stanton v. Springfield (12 Allen, 566), 404, 407.
Star v. Rookesby (1 Salk. 335), 322, 336.
Starne v. Schlothane (21 Ill. App. 97), 484.
Starry v. Dubuque &c. Ry. Co. (51 Iowa, 419), 607.

[The references are to pages.]

State v. Baltimore &c. R. Co. (69 Md. 339; 14 Atl. Rep. 685; 58 Md. 482; 36 Md. 366), 279, 291, 297, 299.
State v. Baltimore &c. R. Co. (15 W. Va. 362; 36 Am. Rep. 803), 255.
State v. Berdetta (73 Ind. 185; 38 Am. Rep. 117), 387.
State v. Boston &c. R. Co. (80 Me. 430; 15 Atl. Rep. 36), 155, 269, 282, 283.
State v. Burlington (36 N. H. 521), 367.
State v. Collins (16 R. I. 371; 17 Atl. Rep. 131), 414.
State v. Edens (85 N. C. 522), 387.
State v. Goff (20 Ark. 289), 256.
State v. Grand Trunk Ry. Co. (58 Me. 176; 4 Am. Rep. 258), 235.
State v. Hardister (38 Ark. 605; 42 Am. Rep. 5), 585.
State v. Larry (7 Baxt. 95; 32 Am. Rep. 555), 392.
State v. Maine Central R. Co. (76 Me. 357; 49 Am. Rep. 622), 260, 269, 270, 281.
State v. Maine Central R. Co. (81 Me. 84; 16 Atl. Rep. 368; 77 Me. 538), 215, 263.
State v. Manchester &c. R. Co. (52 N. H. 528), 16, 32, 34, 78, 98, 263.
State v. Maryland R. Co. (63 Md. 433), 463.
State v. Railroad Co. (24 W. Va. 783; 49 Am. Rep. 290), 255.
State v. Schulz (55 Iowa, 698; 39 Am. Rep. 187), 585.
Steamboat New World v. King (16 How. 469), 21, 181, 206, 240.
Stearns v. Old Colony &c. R. Co. (1 Allen, 493), 323.
Stebbins v. Central R. Co. (54 Vt. 464; 41 Am. Rep. 855), 49, 95, 110.
Stebbins v. Township of Keane (55 Mich. 552; 22 N. W. Rep. 37), 56.
Steele v. Burkhardt (104 Mass. 59; 6 Am. Rep. 191), 34, 45, 72, 73, 371, 387, 414.
Steele v. Central R. Co. of Iowa (43 Iowa, 109), 17, 22.
Steele v. City of Boston (128 Mass. 583), 401.
Steen v. St. Paul &c. R. Co. (37 Minn. 310; 34 N. W. Rep. 113), 500.
Steers v. Liverpool, New York &c. Steamship Co. (57 N. Y. 1; 15 Am. Rep. 453), 247.
Steffen v. Chicago &c. R. Co. (46 Wis. 259), 506.
Steiler v. Hart (65 Mich. 644; 32 N. W. Rep. 875), 500, 528.
Steinmetz v. Kelly (72 Ind. 442; 37 Am. Rep. 170), 102, 104.
Stell, Ex parte (4 Hughes, 157), 304.
Stephens v. Doe (73 Cal. 26; 14 Pac. Rep. 378), 483.
Stephens v. Duncan (73 Wis. 404; 41 N. E. Rep. 337), 542.
Stephens v. Hannibal &c. R. Co. (86 Mo. 221), 465, 471.
Stephens v. Martins (17 Atl. Rep. 242; 23 W. N. C. 475), 59.
Stepp v. Chicago &c. R. Co. (85 Mo. 229), 33.
Sterling Bridge Co. v. Pearl (80 Ill. 251), 120.
Stetler v. Chicago &c. R. Co. (46 Wis. 497; 29 Am. Rep. 102, n.), 446.
Stevens v. Boxford (10 Allen, 25), 63.
Stevens v. Whistler (11 East, 51), 322.
Stevenson v. Chicago &c. R. Co. (18 Fed. Rep. 493), 63.
Stevenson v. Duncan (73 Wis. 404; 41 N. W. Rep. 337), 520.
Steves v. Oswego &c. R. Co. (18 N. Y. 422), 38, 271, 277, 571.
Stewart v. Alcorn (2 Week. Notes Cas. (Penn. 1876) 401), 384.
Stewart v. Boston &c. R. Co. (146 Mass. 605; 16 N. E. Rep. 466), 108.
Stewart v. Brooklyn &c. R. Co. (90 N. Y. 588), 420.
Stewart v. Burlington &c. R. Co. (32 Iowa, 561), 339.
Stewart v. Chicago &c. R. Co. (27 Iowa, 282), 332.
Stewart v. Davis (31 Ark. 518; 25 Am. Rep. 576), 396.
Stewart v. International &c. R. Co. (53 Tex. 289; 37 Am. Rep. 753), 231.
Stewart v. Nashville (96 Tenn. 50), 28.
Stewart v. Philadelphia &c. R. Co. (17 Atl. Rep. 639), 498.
Stewart v. Ripon (38 Wis. 584), 571.
Stickney v. Maidstone (30 Vt. 738), 63.
Stickney v. Salem (3 Allen, 374), 386, 411.
Stiles v. Geesey (71 Penn. St. 439), 33, 49, 92, 117.

[The references are to pages.]

Stilson v. Hannibal &c. R. Co. (67 Mo. 671), 180, 185, 319.
Stinson v. Gardner (42 Me. 248), 386, 411.
Stirk v. Central R. &c. Co. (79 Ga. 495; 5 S. E. Rep. 105), 529.
Stock v. Wood (136 Mass. 353), 400, 411, 600.
Stoddard v. St. Louis &c. R. Co. (65 Mo. 514), 469, 497.
Stoker v. Minneapolis (32 Minn. 478), 634.
Stokes v. Saltonstall (13 Peters, 181), 26, 63, 206, 215.
Stoll v. Hoopes (14 Atl. Rep. 658), 442.
Stone v. Dry-Dock &c. Ry. Co. (115 N. Y. 104; 21 N. E. Rep. 712; 46 Hun, 184), 168, 424.
Stone v. Hunt (94 Mo. 475; 7 S. W. Rep. 431), 624.
Stone v. Jackson (16 C. B. 199; 32 Eng. Law & Eq. 349), 79, 409.
Stoner v. Pennsylvania &c. R. Co. (98 Ind. 384; 49 Am. Rep. 764), 233, 431.
Storey v. Dubuque St. Ry. Co. (51 Iowa, 419), 17.
Story v. Chicago &c. R. Co. (79 Iowa, 402; 44 N. W. Rep. 690), 350.
Story v. Elliot (8 Cowen, 27; 18 Am. Dec. 423), 391, 392.
Stout v. Indianapolis &c. R. Co. (1 Wils. (Ind'pls) 80), 281.
Stout v. Sioux City &c. R. Co. (2 Dill. 294), 306, 307.
Stover v. Bluehill (51 Me. 439), 585.
Stover v. Shugart (45 Ill. 76), 329.
Strahlendorf v. Rosenthal (30 Wis. 674), 534.
Strand v. Chicago &c. R. Co. (64 Mich. 479; 67 Mich. 380; 31 N. W. Rep. 184; 34 N. W. Rep. 712), 234.
Stratton v. Central Street Ry. Co. (95 Ill. 25), 121.
Straugh v. Detroit &c. R. Co. (65 Mich. 706; 36 N. W. Rep. 161), 270.
Straus v. Kansas &c. R. Co. (75 Mo. 185; 86 Mo. 421), 92, 234.
Strauss v. Newburgh Electric R. Co. (6 App. Div. (N. Y.) 264), 163.
Strawbridge v. Bradford (128 Penn. St. 200), 168.
Street v. Inhabitants of Holyoke (105 Mass. 82; 7 Am. Rep. 500), 368, 406.
Street Railways (24 Alb. Law Jour. 365), 433.
Strett v. Laumier (34 Mo. 469), 72, 388.
Stringer v. Frost (116 Ind. 477; 19 N. E. Rep. 331), 59.
Stringer v. Missouri Pac. Ry. Co. (96 Mo. 299; 9 S. W. Rep. 905), 221.
Stringham v. Stewart (100 N. Y. 516), 446, 501.
Stroble v. Chicago &c. Ry. Co. (70 Iowa, 555), 537.
Strong v. Canton &c. R. Co. (3 So. Rep. 465), 276.
Strong v. Placerville R. Co. (14 Rep. 110), 24, 26.
Strong v. Sacramento &c. R. Co. (61 Cal. 326), 17, 22, 289, 290.
Strother v. South Carolina &c. R. Co. (47 S. C. 375; 28 S. E. Rep. 272), 278.
Stuart v. Havens (17 Neb. 211), 378.
Stuart v. Machias Port (48 Me. 477), 391, 563, 565.
Stubley v. London Ry. Co. (L. R. 1 Exch. 13), 263, 288.
Stucke v. Milwaukee &c. R. Co. (9 Wis. 202), 92, 324.
Studwell v. Ritch (14 Conn. 292), 337.
Sturgis v. Detroit &c. R. Co. (72 Mich. 619; 40 N. W. Rep. 914), 232.
Sturgis v. Kountz (165 Penn. St. 358; 30 Atl. Rep. 976), 47.
Sturtevant v. Merrill (33 Me. 62), 323.
Sullivan v. India Mfg. Co. (113 Mass. 396), 504, 513, 517, 541.
Sullivan v. Louisville Bridge Co. (9 Bush. 81), 18, 23, 36, 458, 496, 534, 540.
Sullivan v. Missouri Pac. Ry. Co. (117 Mo. 214; 23 S. W. Rep. 149), 275.
Sullivan v. Missouri Pac. Ry. Co. (97 Mo. 113; 10 S. W. Rep. 852), 476.
Sullivan v. New York &c. R. Co. (175 Penn. St. 361; 34 Atl. Rep. 798). 268.
Sullivan v. Pennsylvania R. Co. (30 Penn. St. 240), 324.
Sullivan v. Philadelphia &c. R. Co. (30 Penn. St. 234), 145.
Sullivan v. Tioga R. Co. (112 N. Y. 643; 20 N. E. Rep. 569; 44 Hun, 304), 485, 489.
Sullivan v. Toledo &c. R. Co. (58 Ind. 26), 453.

[The references are to pages.]

Sullivan v. Waters (14 Ir. C. L. 460), 84, 316, 383.
Summerhays v. Kansas &c. R. Co. (2 Colo. 284), 453, 475.
Summers v. Crescent City R. Co. (34 La. Ann. 139; 44 Am. Rep. 419), 6, 438.
Summersell v. Fish (117 Mass. 312), 464.
Sutherland v. Troy &c. R. Co. (46 Hun, 372), 476.
Sutton v. New York Central &c. R. Co. (66 N. Y. 243), 315, 317, 321.
Sutton v. Wauwatosa (29 Wis. 21; 9 Am. Rep. 534), 8, 77, 254, 255, 397, 634.
Suydam v. Grand St. R. Co. (41 Barb. 375; 17 Abb. Pr. 304), 424, 614.
Suydam v. Moore (8 Barb. 358), 342.
Svenson v. Atlantic Steamship Co. (57 N. Y. 112), 485, 486.
Swainson v. Northeastern Ry. Co. (3 Exch. Div. 341), 486, 546.
Swan v. Broome (3 Burr. 1597; 2 Bl. 527; 1 Wm. Bl. 526), 391, 392.
Swann v. Smith (14 Daly, 114), 589.
Sweeney v. Berlin &c. Envelope Co. (101 N. Y. 520; 54 Am. Rep. 722), 504.
Sweeney v. Boston &c. R. Co. (128 Mass. 5), 314, 531.
Sweeney v. New York Steam Co. (6 N. Y. Supl. 528), 43.
Sweeney v. Old Colony &c. R. Co. (10 Allen, 368), 80, 230, 258, 282, 305, 311, 383.
Sweet v. Ohio Coal Co. (78 Wis. 127; 47 N. W. Rep. 182), 542.
Swift v. Madden (165 Ill. 41; 45 N. E. Rep. 979), 542.
Swift v. Rutkowski (167 Ill. 156; 47 N. E. Rep. 362), 539.
Swift v. Staten Island Rapid Transit Co. (123 N. Y. 645, 649), 28, 29.
Swigert v. Hannibal &c. R. Co. (75 Mo. 475), 79, 209.
Swindler v. Hilliard (2 Rich. (Law) 286; 45 Am. Dec. 732), 249.
Swoboda v. Ward (40 Mich. 420), 517.
Sword v. Cameron (1 Ct. of Ses. Cas. 493), 558, 560.
Sykes v. Town of Pawlet (43 Vt. 446; 5 Am. Rep. 295), 381, 386.

T.

Taber v. Delaware &c. R. Co. (71 N. Y. 489), 235.
Tabler v. Hannibal &c. R. Co. (5 S. W. Rep. 810), 504.
Tabor v. Missouri &c. R. Co. (46 Mo. 353; 2 Am. Rep. 517), 289.
Talbot v. Minneapolis &c. R. Co. (45 N. W. Rep. 1113), 341.
Talmadge v. Rensselaer &c. R. Co. (13 Barb. 493), 348.
Tanner v. Louisville &c. R. Co. (60 Ala. 621), 103.
Tarrant v. Webb (18 C. B. 797; 25 L. J. (N. S.) C. P. 263), 451, 510.
Tarwater v. Hannibal &c. R. Co. (42 Mo. 193), 329.
Tatham v. Lewis (65 Penn. St. 65), 582.
Taylor v. Baldwin (78 Cal. 517; 21 Pac. Rep. 124), 537.
Taylor v. Carew Mfg. Co. (143 Mass. 470; 10 N. E. Rep. 308; 140 Mass. 150), 56, 442, 537, 599.
Taylor v. Cranberry Iron & Coal Co. (94 N. C. 525), 97.
Taylor v. Delaware &c. Canal Co. (113 Penn. St. 162; 8 Atl. Rep. 43), 275, 316.
Taylor v. Evansville &c. R. Co. (121 Ind. 124; 22 N. E. Rep. 876), 465.
Taylor v. Felsing (164 Ill. 331; 45 N. E. Rep. 161), 542.
Taylor v. Grand Trunk Ry. Co. (48 N. H. 304; 2 Am. Rep. 229), 206.
Taylor v. Humphreys (10 C. B. (N. S.) 429), 396.
Taylor v. Missouri Pac. Ry. Co. (26 Mo. App. 336; 86 Mo. 457), 76, 211.
Taylor v. Peckham, City Treasurer, &c. (8 R. I. 349; 5 Am. Rep. 578), 367, 382, 408.
Taylor v. Town of Constable (10 N. Y. Supl. 607), 57.
Taylor v. Western Pacific R. Co. (45 Cal. 423), 489.
Taylor v. Whitehead (2 Dong. 645), 383.
Teipel v. Hilsendegen (44 Mich. 461), 601, 612, 621.
Telfer v. Northern R. Co. (30 N. J. Law, 188), 48, 50, 98, 263, 279, 302.
Templeton v. Montpelier (56 Vt. 328), 372, 375.
Terre Haute &c. R. Co. v. Augustus (21 Ill. 186), 342.
Terre Haute &c. R. Co. v. Buck (96 Ind. 346; 49 Am. Rep. 168), 33, 45, 235, 237, 238, 431.
Terre Haute &c. R. Co. v. Clark (73 Ind. 168), 263.

[The references are to pages.]

Terre Haute &c. R. Co. v. Graham (46 Ind. 239; 95 Ind. 286; 48 Am. Rep. 719), 17, 78, 292, 295, 296, 301, 314.
Terre Haute &c. R. Co. v. McMurray (98 Ind. 358; 49 Am. Rep. 752), 491.
Terre Haute &c. R. Co. v. Smith (16 Ind. 102), 348.
Terre Haute &c. R. Co. v. Voelker (129 Ill. 540; 22 N. E. Rep. 20), 76, 263, 266.
Terry v. New York &c. R. Co. (22 Barb. 575), 324, 336, 346.
Tetherow v. St. Joseph &c. R. Co. (98 Mo. 74; 11 S. W. Rep. 310), 285.
Texas &c. Ry. Co. v. Anderson (4 Texas L. Rev. 211), 43.
Texas &c. Ry. Co. v. Barfield (3 S. W. Rep. 665), 320.
Texas &c. Ry. Co. v. Berry (67 Tex. 238), 96.
Texas &c. Ry. Co. v. Best (66 Tex. 116), 231.
Texas &c. Ry. Co. v. Bradford (2 S. W. Rep. 595; 66 Tex. 732), 540.
Texas &c. Ry. Co. v. Carlton (60 Tex. 397), 534.
Texas &c. Ry. Co. v. Chapman (57 Tex. 75), 267.
Texas &c. Ry. Co. v. Cole (66 Tex. 562; 1 S. W. Rep. 629), 44.
Texas &c. Ry. Co. v. Frazier (90 Tex. 33; 36 S. W. Rep. 432), 482, 552.
Texas &c. Ry. Co. v. Harrington (62 Tex. 597), 477, 507.
Texas &c. Ry. Co. v. Herbeck (60 Tex. 602), 627, 633.
Texas &c. Ry. Co. v. Kirk (62 Tex. 227), 511.
Texas &c. Ry. Co. v. McAtee (61 Tex. 695), 530.
Texas &c. Ry. Co. v. Murphy (46 Tex. 356; 26 Am. Rep. 272), 432, 606.
Texas &c. Ry. Co. v. O'Donnell (58 Tex. 27), 168, 176, 185.
Texas &c. Ry. Co. v. Orr (46 Ark. 182), 97, 109, 231, 606.
Texas &c. Ry. Co. v. Phillips (Tex.) (42 S. W. Rep. 852), 28.
Texas &c. Ry. Co. v. Young (60 Tex. 201), 60, 61, 331, 348.
Thall v. Carnie (5 N. Y. Supl. 244), 446, 526.
Thatcher v. Central Traction Co. (166 Penn. St. 66; 40 Atl. Rep. 1048), 426.
Thayer v. Arnold (4 Metc. 589), 323.
Thayer v. St. Louis &c. R. Co. (22 Ind. 26), 463, 496.
Theleman v. Moeller (73 Iowa, 108; 34 N. W. Rep. 765), 463, 511.
Thetis, The (L. R. 2 A. & E. 365), 420.
Thirteenth St. &c. R. Co. v. Boudrou (92 Penn. St. 475; 37 Am. Rep. 707), 32, 53, 433, 434.
Thomas v. Delaware &c. R. Co. (19 Blatchf. 533), 290.
Thomas v. Kenyon (1 Daly, 132), 109.
Thomas v. Mayor &c. (28 Hun, 110; 15 Week. Dig. (N. Y.) 378), 58, 374.
Thomas v. New York (28 Hun, 110), 405.
Thomas v. Winchester (6 N. Y. 397; 57 Am. Dec. 455), 44, 448.
Thompkins v. Clay St. Ry. Co. (19 Am. Law Rev. 163, 318), 425.
Thompkins v. Kanawha Board (21 W. Va. 224), 32, 627, 633.
Thompson v. Bridgewater (7 Pick. 188), 371, 573.
Thompson v. Buffalo Ry. Co. (145 N. Y. 196; 39 N. E. Rep. 709), 28, 426.
Thompson v. Central &c. R. Co. (54 Ga. 509), 133, 550, 605.
Thompson v. Duncan (76 Ala. 334), 605.
Thompson v. Missouri Pac. Ry. Co. (51 Neb. 527; 71 N. W. Rep. 61), 539.
Thompson v. New Orleans &c. R. Co. (50 Miss. 315; 19 Am. Rep. 12), 238.
Thompson v. New York &c. R. Co. (33 Hun, 16), 289.
Thompson v. North Missouri R. Co. (51 Mo. 190), 605.
Thompson, The A. W. (39 Fed. Rep. 115), 97.
Thorn v. New York City Ice Co. (46 Hun, 497), 517, 538.
Thorogood v. Bryan (8 C. B. 115; 18 L. J. (C. P.) 336), 98, 147, 148, 149, 150, 151, 152, 153, 154, 155, 165, 189.
Thorp v. Brookfield (30 Conn. 321), 563.
Thorpe v. Missouri Pac. Ry. Co. (89 Mo. 650; 2 S. W. Rep. 3), 508, 544.
Thorpe v. New York &c. R. Co. (76 N. Y. 406), 448.

[The references are to pages.]

Thurber v. Harlem &c. R. Co. (60 N. Y. 333), 171.
Tibby v. Missouri Pac. Ry. Co. (82 Mo. 292), 223.
Tierney v. Minnesota &c. R. Co. (33 Minn. 311; 32 Alb. Law Jour. 133; 53 Am. Rep. 35), 454, 478.
Tift v. Jones (74 Ga. 469), 55.
Tighe v. Lowell (119 Mass. 472), 411.
Tillett v. Norfolk &c. R. Co. (118 N. C. 1031; 24 S. E. Rep. 111), 217.
Tillett v. Ward (L. R. 10 Q. B. D. 17; 22 Am. Law Reg. (N. S.) 245), 323.
Tilley v. St. Louis &c. R. Co. (49 Ark. 535; 6 S. W. Rep. 8), 362.
Tillock v. Webb (56 Me. 100), 395.
Tilton v. Hamilton Ins. Co. (1 Bosw. 392), 573.
Timins v. Chicago &c. R. Co. (72 Iowa, 94; 33 N. W. Rep. 379), 332.
Timm v. Northern Pac. R. Co. (3 Wash. Ter. 299; 13 Pac. Rep. 415), 334.
Timmons v. Ohio &c. R. Co. (6 Ohio St. 105), 92.
Tindley v. City of Salem (137 Mass. 171), 389, 591.
Tissue v. Baltimore &c. R. Co. (112 Penn. St. 91; 56 Am. Rep. 310), 497.
Titan, The (23 Fed. Rep. 413), 485.
Titcomb v. Fitchburg R. Co. (12 Allen, 254), 388.
Titus v. Inhabitants of Northbridge (97 Mass. 258), 370, 390.
Tobin v. Portland &c. R. Co. (59 Me. 183; 8 Am. Rep. 415), 258.
Todd v. City of Troy (61 N. Y. 506), 403.
Todd v. Old Colony &c. R. Co. (3 Allen, 18; 7 Allen, 207), 207, 225, 240.
Toledo, City of, v. Cone (19 Am. Law Rev. 330), 470.
Toledo &c. R. Co. v. Asbury (84 Ill. 429), 497, 531, 538.
Toledo &c. R. Co. v. Badeley (54 Ill. 19; 5 Am. Rep. 71), 238.
Toledo &c. R. Co. v. Barlow (71 Ill. 640), 329.
Toledo &c. R. Co. v. Beggs (85 Ill. 80; 28 Am. Rep. 613), 74.
Toledo &c. R. Co. v. Bevin (26 Ind. 443), 601.
Toledo &c. R. Co. v. Brannagan (75 Ind. 490), 601.
Toledo &c. R. Co. v. Bray (57 Ill. 514), 329.
Toledo &c. R. Co. v. Brooks (81 Ill. 245), 74.
Toledo &c. R. Co. v. Cory (39 Ind. 218), 341.
Toledo &c. R. Co. v. Crane (68 Ill. 355), 342.
Toledo &c. R. Co. v. Eddy (72 Ill. 138), 541.
Toledo &c. R. Co. v. Eder (45 Mich. 329), 341.
Toledo &c. R. Co. v. Ferguson (42 Ill. 449), 331.
Toledo &c. R. Co. v. Fredericks (71 Ill. 294), 532.
Toledo &c. R. Co. v. Goddard (25 Ind. 185), 23, 48, 270.
Toledo &c. R. Co. v. Grable (88 Ill. 441), 121, 126, 168, 173.
Toledo &c. R. Co. v. Grush (67 Ill. 262; 16 Am. Rep. 618), 258.
Toledo &c. R. Co. v. Howell (38 Ind. 447), 343.
Toledo &c. R. Co. v. Ingraham (58 Ill. 20; 77 Ill. 309), 329, 466.
Toledo &c. R. Co. v. Johnston (74 Ill. 83), 328.
Toledo &c. R. Co. v. Jones (76 Ill. 311), 280.
Toledo &c. R. Co. v. Kid (29 Ill. App. 353), 107.
Toledo &c. R. Co. v. McGinnis (71 Ill. 347), 120, 326, 331.
Toledo &c. R. Co. v. Maxfield (72 Ill. 95), 358.
Toledo &c. R. Co. v. Moore (77 Ill. 217), 98, 502.
Toledo &c. R. Co. v. O'Connor (77 Ill. 391), 120, 460.
Toledo &c. R. Co. v. Owen (43 Ind. 405), 343.
Toledo &c. R. Co. v. Pease (71 Ill. 174), 347.
Toledo &c. R. Co. v. Pindar (53 Ill. 447; 5 Am. Rep. 57), 93, 120, 358, 362.
Toledo &c. R. Co. v. Riley (47 Ill. 514), 276, 292, 566.
Toledo &c. R. Co. v. Schuckman (50 Ind. 42), 276.
Toledo &c. R. Co. v. Spencer (66 Ill. 528), 120.
Toledo &c. R. Co. v. Thomas (18 Ind. 215), 345.
Toledo &c. R. Co. v. Wand (48 Ind. 476), 504.
Toledo &c. R. Co. v. Wingate (143 Ind. 125; 37 N. E. Rep. 274), 212.
Tolhausen v. Davies (57 L. J. Q. B. 392), 81.
Toll Bridge Co. v. Langrell (47 Conn. 228), 383.

[The references are to pages.]

Tolman v. Syracuse &c. R. Co. (98 N. Y. 198; 50 Am. Rep. 649), 269, 612, 615, 619.
Tolson v. Inland &c. Coasting Co. (6 Mackay, 39), 605.
Tomle v. Hampton (129 Ill. 379; 21 N. E. Rep. 800), 126.
Tompkins v. Clay Street R. Co. (66 Cal. 163), 155.
Tonawanda R. Co. v. Munger (5 Denio, 255; 49 Am. Dec. 239; 4 N. Y. 349; 53 Am. Dec. 384), 6, 8, 13, 100, 103, 324, 325, 332, 336, 345, 351.
Tonkins v. New York Ferry Co. (47 Hun, 562), 418.
Toomey v. London &c. Ry. Co. (3 C. B. (N. S.) 146), 631.
Toomey v. Sanborn (146 Mass. 28; 14 N. E. Rep. 921), 83.
Topeka City Ry. Co. v. Higgs (38 Kan. 375; 15 Pac. Rep. 667), 434.
Torians v. Richmond &c. R. Co. (84 Va. 192; 4 S. E. Rep. 339), 511.
Totten v. Phipps (52 N. Y. 354), 83.
Tousey v. Roberts (21 N. E. Rep. 399; 114 N. Y. 312), 83.
Tower v. Providence &c. R. Co. (2 R. I. 404), 324, 326, 354.
Tower v. Utica &c. R. Co. (7 Hill, 47; 42 Am. Dec. 36), 250, 251.
Towler v. Baltimore &c. R. Co. (18 W. Va. 579), 32, 53, 106, 107.
Town of Albion v. Hetrick (90 Ind. 545; 46 Am. Rep. 230), 58, 145, 156, 371, 373, 375.
Town of Gossport v. Evans (112 Ind. 133; 13 N. E. Rep. 256), 57.
Town of Knightstown v. Musgrove (116 Ind. 121; 18 N. E. Rep. 452), 155.
Town of Salem v. Goller (76 Ind. 291), 103.
Towne v. Nashua &c. R. Co. 124 Mass. 101), 323, 327.
Townley v. Chicago &c. R. Co. (53 Wis. 626), 313.
Towns v. Cheshire &c. R. Co. (21 N. H. 364), 354.
Townsend v. Wathen (9 East. Rep. 277), 180, 183, 306.
Township of Burrell v. Uncapher (117 Penn. St. 353; 11 Atl. Rep. 619), 42.
Township of Milcreek v. Perry (12 Atl. Rep. 149), 57.
Township of North Manheim v. Arnold (13 Atl. Rep. 444), 378.
Township of Plymouth v. Graver (125 Penn. St. 24; 24 W. N. C. 220; 17 Atl. Rep. 249), 42.
Townsley v. Missouri Pac. Ry. Co. (89 Mo. 31; 1 S. W. Rep. 15), 338, 339.
Toy v. London &c. Ry. Co. (18 C. B. (N. S.) 225), 238.
Tracy v. Troy &c. R. Co. (38 N. Y. 433), 342, 344.
Transfer Co. v. Kelly (36 Ohio St. 86; 46 Am. Rep. 230; 38 Am. Rep. 558), 145, 154, 156.
Trask v. Shotwell (41 Minn. 66; 42 N. W. Rep. 699), 83.
Travis v. Town of Carrollton (7 N. Y. Supl. 231), 54.
Trihay v. Brooklyn Lead Min. Co. (4 Utah, 468; 11 Pac. Rep. 612), 511.
Trotter v. Chattanooga Furniture Co. (Tenn.) (47 S. W. Rep. 425), 542.
Trout v. Virginia &c. R. Co. (23 Gratt. 619), 328, 331, 334, 350.
Trow v. Vermont &c. R. Co. (24 Vt. 487; 58 Am. Dec. 191), 20, 33, 34, 91, 92, 279, 323, 336, 340, 349, 354, 620, 626, 633.
Troxler v. Richmond &c. R. Co. (74 N. C. 377), 363.
Troy v. Cape Fear &c. R. Co. (99 N. C. 298; 6 S. E. Rep. 77), 275, 316.
Troy &c. Ins. Co. v. Carpenter (4 Wis. 29), 573.
True v. Plumley (36 Me. 466), 391.
Truro, The (31 Fed. Rep. 158), 500, 517, 581.
Tucker v. Chaplin (2 Car. & Kir. 730), 98, 189.
Tucker v. Henniker (41 N. H. 317), 390.
Tucker v. New York &c. R. Co. (124 N. Y. 308; 26 N. E. Rep. 916), 28, 29, 262.
Tucker v. Salt Lake City (10 Utah, 173; 37 Pac. Rep. 261), 373.
Tuel v. Watson (47 Vt. 634), 448.
Tuff v. Warman (2 C. B. (N. S.) 740; 5 C. B. (N. S.) 573), 8, 13, 16, 32, 34, 36, 50, 91, 149, 183.
Tully v. Fitchburg R. Co. (134 Mass. 499), 263.
Tunn v. Ohio R. Co. (42 W. Va. 676; 26 S. E. Rep. 546), 186.
Tunney v. Midland Ry. Co. (L. R. 1 C. P. 291; 2 Jur. (N. S.) 691), 464, 479.
Turberville v. Stampe (1 Lord Raym. 264), 448.
Turess v. New York &c. R. Co. (N. J.) (40 Atl. Rep. 64), 86, 310.
Turner v. Buchanan (82 Ind. 147; 42 Am. Rep. 485), 58, 64, 66, 281.

[The references are to pages.]

Turner v. Goldsboro Lumber Co. (119 N. C. 387; 26 S. E. Rep. 23), 469.
Turner v. Holtzman (54 Md. 148; 39 Am. Rep. 361), 387.
Turner v. Klekr (27 Ill. App. 391), 83.
Turner v. Norfolk &c. R. Co. (40 W. Va. 675; 22 S. E. Rep. 83), 29, 528.
Tuttle v. Chicago &c. R. Co. (48 Iowa, 236), 496.
Tuttle v. Detroit &c. R. Co. (122 U. S. 189), 531, 537.
Tuttle v. Farmington (58 N. H. 126), 390.
Twigg v. Ryland (62 Md. 380; 19 Am. Law Rev. 319), 605.
Twist v. Winona &c. R. Co. (39 Minn. 164; 39 N. W. Rep. 402), 169, 308.
Twogood v. Mayor (11 Daly, 167), 405.
Twogood v. New York (12 Daly (N. Y.) 220), 55.
Twomley v. Central Park &c. R. Co. (69 N. Y. 158; 25 Am. Rep. 162), 64, 66.
Tyler v. Nelson (109 Mich. 37; 66 N. W. Rep. 671), 414.
Tyler v. New York &c. R. Co. (137 Mass. 238), 626, 633.
Tyson v. North Alabama &c. R. Co. (61 Ala. 554; 32 Am. Rep. 8), 507, 512.

U.

Ulrich v. N. Y. &c. R. Co. (108 N. Y. 80; 15 N. E. Rep. 60), 246.
Umbeck v. Lake Shore &c. R. Co. (83 Ind. 191), 530, 538.
Underhill v. Chicago &c. R. Co. (81 Mich. 43; 45 N. W. Rep. 508), 280.
Underwood v. Waldron (33 Mich. 232), 91.
Undhejem v. Hastings (38 Minn. 485; 38 N. W. Rep. 448), 400.
Union Pac. Ry. Co. v. Adams (33 Kan. 427), 263.
Union Pac. Ry. Co. v. Doyle (50 Neb. 555; 70 N. W. Rep. 43), 468, 470.
Union Pac. Ry. Co. v. Dunden (37 Kan. 1; 14 Pac. Rep. 501), 308.
Union Pac. Ry. Co. v. Hand (7 Kan. 380), 206.
Union Pac. Ry. Co. v. Harris (33 Kan. 416; 19 Am. Law Rev. 669), 555.
Union Pac. Ry. Co. v. Henry (36 Kan. 565; 14 Pac. Rep. 1), 24.
Union Pac. Ry. Co. v. Hutchinson (39 Kan. 485; 18 Pac. Rep. 705; 19 Pac. Rep. 312), 291.
Union Pac. Ry. Co. v. McDonald (152 U. S. 262), 305.
Union Pac. Ry. Co. v. Meyers (35 Neb. 204; 52 N. W. Rep. 1099), 298.
Union Pac. Ry. Co. v. Nichols (8 Kan. 505; 12 Am. Rep. 475), 241.
Union Pac. Ry. Co. v. O'Brien (161 U. S. 451), 519.
Union Pac. Ry. Co. v. Ray (46 Neb. 750; 65 N. W. Rep. 773), 361.
Union Pac. Ry. Co. v. Rollins (5 Kan. 167), 19, 39, 123, 127, 128, 325, 626.
Union Pac. Ry. Co. v. Young (57 Kan. 168; 45 Pac. Rep. 580), 185.
Union R. Co. v. State (72 Md. 153; 19 Atl. Rep. 449), 263, 283.
Union Ry. & Transit Co. v. Schacklett (19 Ill. App. 145), 223.
Union Steamship Co. v. New York (24 How. 307), 581.
United States Rolling Stock Co. v. Wilder (116 Ill. 100), 507.
Union Stock Yards Co. v. Conoyer (41 Neb. 617), 607.
Union Trust Co. v. Thomason (25 Kan. 1), 453.

V.

Vahue v. N. Y. &c. R. Co. (18 App. Div. (N. Y.) 452), 447, 457.
Vale v. Bliss (50 Barb. 358), 368, 382.
Valentine v. Broadway &c. R. Co. (4 N. Y. Supl. 481; 14 Daly, 540), 431.
Valleau v. Chicago &c. Ry. Co. (73 Iowa, 723; 36 N. W. Rep. 760), 350.
Valtez v. Ohio &c. R. Co. (85 Ill. 500), 464, 476.
Van Amburg v. Vicksburg &c. R. Co. (37 La. Ann. 650; 55 Am. Rep. 517), 498.
Van Auken v. Chicago &c. Ry. (96 Mich. 307; 55 N. W. Rep. 971), 265.
Van Avery v. Union Pac. Ry. Co. (35 Fed. Rep. 40), 475.
Van Dusen v. Letellier (78 Mich. 492), 510.
Van Horn v. Burlington &c. R. Co. (59 Iowa, 33), 329, 331, 332, 349.
Van Riper v. Van Riper (1 Southard (N. J.) 156; 7 Am. Dec. 576), 391.

[The references are to pages.]

Van Wickle v. Manhattan Ry. Co. (23 Blatchf. 422), 476.
Vandegrift v. Rediker (22 N. J. Law, 185; 51 Am. Dec. 262), 103, 324.
Vanderbeck v. Hendry (34 N. J. Law, 467), 199.
Vandergrift v. Delaware &c. R. Co. (2 Houst. 297), 324.
Vanderkar v. Rensselaer &c. R. Co. (13 Barb. 390), 343.
Vanderplank v. Miller (1 Moody & M. 169), 23, 48, 148, 152, 153, 160, 581.
Varney v. Manchester (58 N. H. 430; 42 Am. Rep. 592), 53, 382, 411. 412.
Vaughan v. Taff Vale Ry. Co. (3 Hurl. & N. 742; 5 Hurl. & N. 678), 355, 358.
Vaughn v. Missouri Pac. Ry. Co. (17 Mo. App. 4), 338.
Vaux v. Sheffer (8 Mo. P. C. 75), 579.
Veerhusan v. Chicago &c. R. Co. (53 Wis. 689), 340.
Vennall v. Garner (1 Cromp. & M. 21), 49, 60, 180.
Vick v. New York &c. R. Co. (95 N. Y. 267; 47 Am. Rep. 36), 479, 481.
Vicksburg, City of, v. Hennessy (54 Miss. 391; 28 Am. Rep. 354), 371, 599.
Vicksburg, City of, v. McLain (67 Miss. 4; 6 So. Rep. 774), 169.
Vicksburg &c. R. Co. v. Alexander (62 Miss. 496), 291.
Vicksburg &c. R. Co. v. Hart (61 Miss. 468), 17. 210.
Vicksburg &c. R. Co. v. McGown (62 Miss. 682; 52 Am. Rep. 205), 313, 314.
Vicksburg &c. R. Co. v. Patton (31 Miss. 157), 327, 330, 333, 337.
Victoria v. Baker (67 N. Y. 366), 383.
Viets v. Toledo &c. R. Co. (55 Mich. 120), 533.
Village of Carterville v. Cook (129 Ill. 152; 22 N. E. Rep. 14), 42.
Village of Clayton v. Brooks (150 Ill. 97; 37 N. E. Rep. 574), 64, 374, 377.
Village of Culbertson v. Holliday (50 Neb. 229; 69 N. W. Rep. 853), 117.
Village of Jefferson v. Chapman (127 Ill. 438; 20 N. E. Rep. 33), 119.
Village of Orleans v. Perry (24 Neb. 831; 40 N. W. Rep. 417), 36, 50.
Vimont v. Chicago &c. R. Co. (71 Iowa, 58; 32 N. W. Rep. 100), 108.
Vincent v. Morgan's &c. R. & S. S. Co. (48 La. Ann. 933; 20 So. Rep. 207), 273.
Vinton v. Middlesex R. Co. (11 Allen, 304), 422.
Virginia &c. R. Co. v. Barksdale's Adm'r (82 Va. 330), 299.
Virginia &c. R. Co. v. Boswell's Adm'r (82 Va. 932; 7 S. E. Rep. 383), 301.
Virginia &c. R. Co. v. Roach (83 Va. 375; 5 S. E. Rep. 175), 221.
Virginia &c. R. Co. v. Sayres (26 Gratt. 328), 248.
Virginia &c. R. Co. v. White's Adm'r (84 Va. 498; 5 S. E. Rep. 573), 275, 279.
Vogel v. Mayor &c. of New York (92 N. Y. 17), 449.
Volkman v. Chicago &c. R. Co. (5 Dak. 69; 37 N. W. Rep. 731), 335.
Vosburgh v. Lake Shore &c. R. Co. (94 N. Y. 374; 46 Am. Rep. 148), 495, 534.
Vosburgh v. Moak (1 Cush. 453; 48 Am. Dec. 613), 386.
Vose v. London & Yorkshire Ry. Co. (2 Hurl. & N. 728), 508.

W.

Wabash Canal Co. v. Mayor (10 Ind. 400), 601.
Wabash &c. Ry. Co. v. Central Trust Co. (23 Fed. Rep. 513; 32 Alb. Law Jour. 96), 605.
Wabash R. Co. v. Speer (156 Ill. 244; 40 N. E. Rep. 835), 102, 104, 259.
Wabash &c. Ry. Co. v. Conkling (15 Ill. App. 157), 521.
Wabash &c. Ry. Co. v. Elliott (98 Ill. 408), 626, 628, 634.
Wabash &c. Ry. Co. v. Henks (91 Ill. 406), 121.
Wabash &c. Ry. Co. v. Jones (5 Ill. 607), 126.
Wabash &c. Ry. Co. v. Nice (99 Ind. 152), 325.
Wabash &c. Ry. Co. v. Peyton (106 Ill. 534; 46 Am. Rep. 705), 490.
Wabash &c. Ry. Co. v. Shacklet (105 Ill. 364; 44 Am. Rep. 791), 150, 153, 156, 157, 626, 634.
Wabash &c. Ry. Co. v. Tretts (96 Ind. 450), 341.
Wabash &c. Ry. Co. v. Wallace (110 Ill. 114), 119.

[The references are to pages.]

Waddell v. Simonson (112 Penn. St. 576), 449, 512.
Waecker v. Erie Electric Motor Co. (176 Penn. St. 451), 28.
Wagner v. Bissell (3 Iowa, 396), 329.
Wagner v. Missouri Pac. Ry. Co. (97 Mo. 512; 10 S. W. Rep. 486, 491), 223.
Wagner v. Township of Jackson (133 Penn. St. 61), 370.
Wagner v. Truesdale (Minn. 436), 260.
Wait v. Burlington &c. R. Co. (74 Iowa, 207; 37 N. W. Rep. 159), 347.
Waite v. Hundred of Stoke (Cro. Jac. 496), 392.
Waite v. Northeastern &c. Ry. Co. (7 W. R. 311; El. Bl. & El. 719), 149, 150, 178, 179, 180, 196.
Wakefield v. Railroad Co. (37 Vt. 330), 277.
Waldhier v. Hannibal &c. R. Co. (87 Mo. 37), 540.
Waldron v. Portland &c. R. Co. (35 Me. 422), 326.
Waldron v. Rensselaer &c. R. Co. (8 Barb. 390), 352.
Walker v. Bowling (22 Ala. 294), 465, 469.
Walker v. Columbia &c. R. Co. (25 S. C. 141), 335.
Walker v. Herron (22 Tex. 55), 331, 607.
Walker v. Reidsville (96 N. C. 382), 55.
Walker v. Vicksburg &c. R. Co. (41 La. Ann. 795; 6 So. Rep. 916), 212.
Walker v. Westfield (39 Vt. 246), 620.
Walker v. York &c. Ry. Co. (2 El. & Bl. 750), 244.
Wall v. Town of Highland (72 Wis. 435; 39 N. W. Rep. 560), 53.
Wallace v. Cannon (38 Ga. 199), 74.
Wallace v. Central Vt. R. Co. (138 N. Y. 302; 33 N. E. Rep. 1069), 529.
Wallace v. Merrimack &c. R. Co. (134 Mass. 95; 45 Am. Rep. 301), 73, 74, 77, 395.
Wallace v. Western &c. R. Co. (98 N. C. 494; 4 S. E. Rep. 503), 224.
Wallace v. Wilmington &c. Ry. Co. (18 Atl. Rep. 818), 232, 233.
Waller v. Hannibal &c. R. Co. (83 Mo. 608), 214.
Waller v. Southeastern Ry. Co. (2 Hurl. & Colt. 102; 7 Jur. (N. S.) 501; 32 L. J. (Exch.) 205), 476, 478.
Wallingford v. Columbia &c. R. Co. (26 S. C. 258; 2 S. E. Rep. 19), 247.
Wallis v. Morgan's &c. R. Co. (38 La. Ann. 156), 475.
Walsh v. Fitchburg R. Co. (145 N. Y. 301; 39 N. E. Rep. 1068), 86, 309.
Walsh v. Oregon &c. R. Co. (10 Or. 250), 30, 601, 627, 629, 630, 633.
Walsh v. Peet Valve Co. (110 Mass. 23), 496, 534.
Walsh v. Porterfield (87 Penn. St. 376), 570.
Walsh v. Missouri Transportation Co. (52 Mo. 434), 16, 33, 34.
Walsh v. Virginia &c. R. Co. (8 Nev. 111), 342.
Walters v. Chicago &c. R. Co. (41 Iowa, 71), 175, 187, 189.
Walton v. Ackerman (49 N. J. Law, 234; 10 Atl. Rep. 709), 632.
Walton v. St. Louis &c. R. Co. (67 Mo. 56), 343.
Wanamaker v. Burke (111 Penn St. 423), 498.
Wanless v. Northeastern Ry. Co. (25 L. T. (N. S.) 103; L. R. 6 Q. B. 481; L. R. 1 Q. B. 277), 282.
Warburton v. Great Western Ry. Co. (L. R. 2 Exch. 30; 36 L. J. (Exch.) 9; 15 L. T. (N. S.) 361; 15 Week. Rep. 108; 4 Hurl. & Colt. 695), 489.
Ward v. Central Park &c. R. Co. (33 N. Y. Super. Ct. 392; 11 Abb. Pr. (N. S.) 411; 42 How. Pr. 289), 435.
Ward v. Chicago, St. P., M. & O. Ry. Co. (85 Wis. 601; 55 N. W. Rep. 771), 321, 564, 565.
Ward v. Milwaukee &c. R. Co. (29 Wis. 144), 24, 26, 358.
Ward v. St. Louis &c. R. Co. (91 Mo. 168), 338.
Warden v. Missouri Pac. Ry. Co. (35 Mo. App. 631), 238.
Warden v. Old Colony R. Co. (137 Mass. 204), 502, 529.
Wardrop-Sims, The, v. Jones (2 Dods. 83), 577.
Ware v. Barataria &c. Canal Co. (15 La. 169; 35 Am. Dec. 189), 448.
Warner v. B. & O. R. Co. (7 App. Dec. 79), 259, 262, 273.

[The references are to pages.]

Warner v. Erie Ry. Co. (49 Barb. 558; 39 N. Y. 468), 494, 502, 506.
Warner v. Holyoke (112 Mass. 362), 382.
Warner v. New York &c. R. Co. (44 N. Y. 465; 45 Barb. 299), 615, 618.
Warner v. Western &c. R. Co. (94 N. C. 250), 97.
Warren v. Boston & Maine R. Co. (163 Mass. 484; 40 N. E. Rep. 895), 518.
Warren v. Fitchburg R. Co. (8 Allen, 227), 282.
Warren v. Keokuk &c. R. Co. (41 Iowa, 484), 347, 348.
Warren v. Southern Kan. Ry. Co. (37 Kan. 408; 15 Pac. Rep. 601), 209.
Washburn v. Chicago &c. R. Co. (68 Wis. 474; 32 N. W. Rep. 234), 275.
Washburn v. Nashville R. Co. (3 Head, 638), 219, 471.
Washburn v. Tracy (2 D. Chip. (Vt.) 128; 15 Am. Dec. 661), 23, 37, 94, 416.
Washington v. Baltimore &c. R. Co. (17 W. Va. 190), 327, 334.
Washington and The Gregory, The (9 Wall. 513), 156.
Washington &c. R. Co. v. Harmon (147 U. S. 571), 605.
Wasmer v. Delaware &c. R. Co. (80 N. Y. 212; 36 Am. Rep. 608), 70, 279, 378, 387.
Waterbury v. New York &c. R. Co. (21 Blatchf. 314), 207, 221, 240.
Waters v. Merchants' Ins. Co. (11 Peters, 213), 573.
Waters v. Moss (12 Cal. 535), 329.
Waters v. Wing (59 Penn. St. 211), 606.
Watkinds v. Southern Pac. R. Co. (38 Fed. Rep. 711), 623.
Watkins v. Raleigh &c. R. Co. (116 N. C. 961; 21 S. E. Rep. 409), 214.
Watkins v. Reddin (2 Fost. & Fin. 629), 389.
Watkins v. St. Louis &c. R. Co. (13 S. W. Rep. 893), 27.
Watson v. Georgia Pac. Ry. Co. (81 Ga. 476; 7 S. E. Rep. 854), 212.
Watson v. Northern &c. R. Co. (24 Upper Can. Q. B. 98), 219.
Watson v. St. Paul &c. R. Co. (42 Minn. 46; 43 N. W. Rep. 904), 420.
Watson v. Wabash &c. Ry. Co. (66 Iowa, 164), 258.
Way v. Foster (1 Allen, 408), 73.
Way v. Illinois &c. R. Co. (40 Iowa, 341), 496, 601, 612.
Wayde v. Lady Carr (2 Dow. & Ry. 255), 414, 416.
Wayne Co. Turnpike Co. v. Berry (5 Ind. 286), 601.
Webb v. Portland &c. R. Co. (57 Me. 117), 263.
Webb v. Richmond &c. R. Co. (97 N. C. 387; 2 S. E. Rep. 440), 531.
Webb v. Rome &c. R. Co. (49 N. Y. 420; 10 Am. Rep. 389), 357, 363.
Webber v. Closson (35 Me. 26), 323.
Webber v. Piper (38 Hun, 353), 542.
Weber v. New York &c. R. Co. (58 N. Y. 451; 67 N. Y. 587), 284.
Webster v. Hudson River R. Co. (38 N. Y. 260), 156.
Webster v. Rome &c. R. Co. (115 N. Y. 112; 21 N. E. Rep. 725; 40 Hun, 161), 218.
Wedgewood v. Chicago &c. R. Co. (41 Wis. 478; 44 Wis. 44), 497, 530.
Weed v. Ballston Spa (76 N. Y. 329), 56, 58.
Weeks v. New Orleans &c. R. Co. (40 La. Ann. 800; 5 So. Rep. 72), 209, 235.
Weeks v. New York &c. R. Co. (72 N. Y. 50; 28 Am. Rep. 104; 9 Hun, 671), 251, 419.
Weger v. Pennsylvania R. Co. (55 Penn. St. 460), 464.
Weil v. Dry Dock &c. R. Co. (119 N. Y. 147; 23 N. E. Rep. 487), 202, 203.
Weil v. Wright (8 N. Y. Supl. 776), 380, 400.
Weiler v. Manhattan Ry. Co. (6 N. Y. Supl. 320; 53 Hun, 372), 107.
Weinberg v. National Steamship Co. (57 N. Y. Super. Ct. 586; 8 N. Y. Supl. 195), 247.
Weiss v. Pennsylvania R. Co. (79 Penn. St. 387), 270, 606.
Welch v. McAllister (15 Mo. App. 492), 82.
Welch v. Pullman Palace Car Co. (16 Abb. (N. S.) 352), 251, 590.
Welch v. Wesson (6 Gray, 505), 41, 45, 72, 73, 386, 391.
Wells v. Beal (9 Kan. 597), 325.
Wells v. Burlington &c. R. Co. (56 Iowa, 520), 529.
Wells v. Coe (9 Colo. 159; 11 Pac. Rep. 50), 537.
Wells v. Howell (19 Johns. 385), 383.

[The references are to pages.]

Wells v. New York &c. R. Co. (26 Barb. 641; 24 N. Y. 181), 99, 245.
Wells v. Sibley (9 N. Y. Supl. 343), 385.
Welsch v. Hannibal &c. R. Co. (72 Mo. 451; 37 Am. Rep. 440), 278.
Welsh v. Jackson Co. &c. R. Co. (81 Mo. 466), 297.
Welsh v. Wilson (101 N. Y. 254; 54 Am. Rep. 698), 377.
Wendell v. Baxter (12 Gray, 494), 258.
Wendell v. New York &c. R. Co. (91 N. Y. 420), 264.
Wenzlick v. McCotter (87 N. Y. 122; 41 Am. Rep. 358), 406.
Werle v. Long Island R. Co. (98 N. Y. 650), 215, 434.
Wert v. Keim (13 Atl. Rep. 548), 442.
Wesley Coal Co. v. Herler (84 Ill. 126), 63.
West v. Chicago &c. R. Co. (77 Iowa, 654; 42 N. W. Rep. 512), 359.
West v. Martin (31 Mo. 375), 36.
West Chester &c. R. Co. v. McElwee (67 Penn. St. 311), 628.
West Chicago Street R. Co. v. McNulty (166 Ill. 203; 46 N. E. Rep. 784), 208, 428.
West End &c. R. Co. v. Mozely (79 Ga. 463; 4 S. E. Rep. 324), 431.
West Mahony v. Watson (112 Penn. St. 574; 56 Am. Rep. 336; 116 Penn. St. 344; 9 Atl. Rep. 430), 42, 371.
West Phila. Pass. Ry. Co. v. Gallagher (108 Penn. St. 524), 436.
Westbrook v. Mobile &c. R. Co. (66 Miss. 560; 6 So. Rep. 321), 169, 185, 187.
Westerberg v. Kinzua Creek R. Co. (142 Penn. St. 471; 21 Atl. Rep. 878), 186.
Westerfield v. Levis (43 La. Ann. 64; 9 So. Rep. 52), 188.
Western &c. R. Co. v. Bishop (50 Ga. 465), 19, 249, 504, 558.
Western &c. R. Co. v. Bloomingdale (74 Ga. 604), 295.
Western &c. R. Co. v. Johnson (55 Ga. 133), 541.
Western &c. R. Co. v. Lazarus (88 Ala. 453), 335.
Western &c. R. Co. v. Meigs (74 Ga. 857), 316.
Western &c. R. Co. v. Stanley (61 Md. 266; 48 Am. Rep. 96), 229.
Western &c. R. Co. v. Strong (52 Ga. 461), 558.
Western &c. R. Co. v. Trimmier (84 Ga. 112), 335.
Western &c. R. Co. v. Wilson (71 Ga. 22), 209.
Western &c. R. Co. v. Young (81 Ga. 397; 7 S. E. Rep. 912), 167, 281.
Western &c. R. Co. v. Young (83 Ga. 512; 10 S. E. Rep. 197), 196.
Western Md. R. Co. v. Kehoe (83 Md. 434; 35 Atl. Rep. 90), 300.
Western Transit Co. v. Hosking (19 Ill. App. 607), 247.
Western Union Telegraph Co. v. Blanchard (68 Ga. 299; 45 Am. Rep. 480), 577.
Western Union Telegraph Co. v. DuBois (128 Ill. 248; 21 N. E. Rep. 4), 576.
Western Union Telegraph Co. v. Harderson (89 Ala. 510; 7 So. Rep. 419), 576.
Western Union Telegraph Co. v. Hoffman (80 Tex. 420; 15 S. W. Rep. 1048), 202.
Western Union Telegraph Co. v. Longwell (21 Pac. Rep. 339), 576.
Western Union Telegraph Co. v. McDaniel (103 Ind. 294), 576.
Western Union Telegraph Co. v. McKibbon (114 Ind. 511; 14 N. E. Rep. 894), 576.
Western Union Telegraph Co. v. McMullen (58 N. J. L. 155; 33 Atl. Rep. 385), 518.
Western Union Telegraph Co. v. Reynolds (77 Va. 173; 46 Am. Rep. 715), 577.
Western Union Telegraph Co. v. Yopst (118 Ind. 248; 20 N. E. Rep. 222), 576.
Weston v. City of Troy (139 N. Y. 281; 34 N. E. Rep. 780), 373, 619.
Weston v. Elevated Ry. Co. (73 N. Y. 595), 207, 239, 372, 373, 405.
Wetherly v. Regent's Canal Co. (12 C. B. (N. S.) 1), 33.
Wettor v. Dunk (4 Fost. & Fin. 298), 145.
Weyl v. Chicago &c. R. Co. (40 Minn. 350; 42 N. W. Rep. 24), 269.
Weymire v. Wolfe (52 Iowa, 533), 33, 78, 293, 301, 563, 567, 570.
Whaalen v. Mad River R. Co. (8 Ohio St. 249), 454, 465, 476, 478.
Whalen v. Centenary Church (62 Mo. 226), 465, 471.
Whalen v. Chicago &c. R. Co. (75 Wis. 654; 44 N. W. Rep. 849), 168, 321.

[The references are to pages.]

Whalen v. Chicago &c. R. Co. (75 Iowa, 563; 39 N. W. Rep. 894), 168, 321, 531.
Whalen v. Citizens' Gas Light Co. (151 N. Y. 70; 45 N. E. Rep. 363), 619.
Whalen v. St. Louis &c. R. Co. (60 Mo. 323), 33, 34, 260, 569.
Whatman v. Pearson (L. R. 3 C. P. 422), 319.
Wheelan v. Georgia &c. Ry. Co. (84 Ga. 506; 10 S. E. Rep. 1091), 212.
Wheeler v. Erie Ry. Co. (2 Thomp. & C. 634), 351.
Wheeler v. Rowell (7 N. H. 515), 323.
Wheeler v. Wason Mfg. Co. (135 Mass. 294), 496.
Wheeler v. Westport (30 Wis. 392), 26, 58, 380.
Wheeler v. Worcester (10 Allen, 591), 157.
Wheelock v. Boston &c. R. Co. (105 Mass. 203), 270, 282.
Wheelwright v. Boston &c. R. Co. (135 Mass. 225), 207, 263, 600.
Whelan v. New York &c. R. Co. (38 Fed. Rep. 15), 156, 283.
Whipple v. West Philadelphia &c. St. R. Co. (11 Phila. 345), 385.
Whirley v. Whiteman (1 Head, 610), 23, 78, 101, 111, 134, 135, 185, 186, 199, 306, 460, 461, 626.
Whitbeck v. Dubuque &c. R. Co. (21 Iowa, 103), 325, 329.
Whitcomb v. Gilman (35 Vt. 287), 256, 397.
White v. Atlanta Consolidated Street Ry. Co. (92 Ga. 494; 17 S. E. Rep. 672), 433.
White v. Cincinnati &c. R. Co. (12 S. W. Rep. 936), 57.
White v. Concord &c. R. Co. (30 N. H. 188), 328, 351, 606.
White v. Conly (14 Lea (Tenn.) 51; 52 Am. Rep. 154), 42.
White v. France (2 C. P. Div. 308), 83.
White v. Lang (128 Mass. 598; 35 Am. Rep. 402), 395.
White v. Nonantum Worsted Co. (144 Mass. 276), 539.
White v. Philipston (10 Metc. 108), 548.
White v. Railroad Co. (121 N. C. 107; 27 S. E. Rep. 1002), 634.
White v. Wabash &c. Ry. Co. (34 Mo. App. 57), 101, 103.
White v. West End. Ry. Co. (165 Mass. 522; 43 N. E. Rep. 298), 431.
White v. Winisimmet Co. (7 Cush. 156), 417.
White v. Wittemann Lithographic Co. (131 N. Y. 631; 30 N. E. Rep. 236), 520.
White Water &c. R. Co. v. Butler (112 Ind. 598; 14 N. E. Rep. 599), 238.
Whitehead v. St. Louis &c. R. Co. (99 Mo. 263; 11 S. W. Rep. 761), 223.
Whitelaw v. Memphis &c. R. Co. (16 Lea, 391; 1 S. W. Rep. 37), 526.
Whitmore v. Boston &c. R. Co. (150 Mass. 474; 23 N. E. Rep. 220), 538.
Whitney v. Maine &c. R. Co. (69 Me. 208), 264.
Whitney v. Pullman's Palace Car Co. (143 Mass. 243), 252.
Whitsett v. Chicago &c. R. Co. (67 Iowa, 150), 27.
Whittaker v. Manchester &c. Ry. Co. (L. R. 5 C. P. 464, n. 3), 235.
Whittaker v. West Boylston (97 Mass. 273), 406.
Whittier v. Chicago &c. R. Co. (24 Minn. 394), 341, 348.
Wichita &c. R. Co. v. Davis (37 Kan. 743; 16 Pac. Rep. 78), 128, 260, 263.
Wiel v. Wright (8 N. Y. Supl. 776), 352.
Wiggett v. Fox (11 Exch. 832; 2 Jur. (N. S.) 955; 25 L. J. (Exch.) 188), 462, 489, 546.
Wiggin v. St. Louis (135 Mo. 558; 37 S. W. Rep. 528), 374.
Wight Fire Proofing Co. v. Roexekai (130 Ill. 139; 22 N. E. Rep. 543), 633.
Wigmore v. Jay (5 Exch. 354; 19 L. J. (Exch.) 300), 98, 451, 462.
Wihnyk v. Second Ave. R. Co. (14 App. Div. (N. Y.) 515), 29.
Wilburn v. St. Louis &c. R. Co. (36 Mo. App. 203), 107.
Wilcox v. Rome &c. R. Co. (39 N. Y. 358), 46, 264, 270, 276, 317.
Wilder v. Chicago &c. R. Co. (70 Mich. 382; 38 N. W. Rep. 289), 344.
Wilder v. Maine &c. R. Co. (65 Me. 332; 20 Am. Rep. 698; 323, 333, 340, 354.
Wilds v. Hudson River R. Co. (33 Barb. 503; 24 N. Y. 430; 29 N. Y. 315), 23, 26, 33, 39, 48, 92, 116, 189, 320, 614, 618.

[The references are to pages.]

Wilkerson v. Corrigan &c. St. Ry. Co. (26 Mo. App. 144), 420.
Wilkins v. Earl (3 Rob. 369; 19 Abb. Pr. 196), 251.
Wilkins v. St. Louis &c. R. Co. (101 Mo. 93; 13 S. W. Rep. 893), 274, 281, 291.
Wilkinson v. State (59 Ind. 416; 26 Am. Rep. 84), 397.
Willard v. Pinard (44 Vt. 34), 49.
Willard v. Swanson (126 Ill. 381; 18 N. E. Rep. 548), 119, 126.
Willets v. Buffalo &c. R. Co. (14 Barb. 585), 98, 167, 301.
Wm. F. Babcock, The (31 Fed. Rep. 418), 486.
Williams v. Chicago &c. R. Co. (64 Wis. 1), 76.
Williams v. Churchill (137 Mass. 243), 461.
Williams v. Clinton (28 Conn. 266), 23, 35.
Williams v. Delaware &c. R. Co. (116 N. Y. 628; 22 N. E. Rep. 117; 2 N. Y. Supl. 435), 523, 529.
Williams v. Edmunds (75 Mich. 92; 42 N. W. Rep. 534), 35, 46.
Williams v. Grealy (112 Mass. 79), 399.
Williams v. Holland (6 Car. & P. 23, 416.
Williams v. Iowa &c. R. Co. (43 Iowa, 396), 530.
Williams v. Kansas City &c. R. Co. (96 Mo. 275; 9 S. W. Rep. 573), 304.
Williams v. Michigan &c. R. Co. (2 Mich. 260; 55 Am. Dec. 59), 103, 324, 326, 332, 341.
Williams v. Moray (74 Ind. 25), 594, 601, 602.
Williams v. New Albany &c. R. Co. (5 Ind. 111), 325, 341.
Williams v. Northern Pac. R. Co. (3 Dak. 168), 330.
Williams v. Richards (3 Car. & Kir. 81), 399.
Williams v. Safford (7 Barb. 309), 383.
Williams v. Southern Pac. R. Co. (72 Cal. 120; 13 Pac. Rep. 219; 11 Pac. Rep. 849), 301, 320.
Williams v. Texas &c. Ry. Co. (60 Tex. 205), 186, 188.
Williams v. Vanderbilt (28 N. Y. 217), 33.
Willis v. Long Island R. Co. (34 N. Y. 670), 215.
Willis v. Oregon Ry. & Nav. Co. (11 Or. 257), 484.
Willis v. Providence Telegram Pub. Co. (38 Atl. Rep. 947), 46.
Willoughby v. Horridge (12 C. B. 745), 417.
Wills v. Lynn &c. R. Co. (129 Mass. 351), 56, 436.
Wills v. Waters (5 Bush, 351), 337.
Wilson v. Baltimore &c. R. Co. (32 Mo. App. 682), 251, 252.
Wilson v. Brett (11 M. & W. 113), 22, 99, 114.
Wilson v. Charlestown (8 Allen, 138), 264, 374, 405.
Wilson v. Chesapeake &c. R. Co. (21 Gratt. 654), 252.
Wilson v. Cunningham (3 Cal. 241; 58 Am. Dec. 407), 27.
Wilson v. Dock Co. (L. R. 1 Exch. 186), 47.
Wilson v. Hamilton (4 Ohio St. 722), 417.
Wilson v. Louisville &c. R. Co. (85 Ala. 269; 4 So. Rep. 701), 537.
Wilson v. Madison &c. R. Co. (81 Ind. 226), 465, 477, 481.
Wilson v. Merry (L. R. 1 Sc. App. 326; 19 L. T. (N. S.) 30), 451, 456, 464, 556.
Wilson v. Northern Pacific R. Co. (26 Minn. 278; 37 Am. Rep. 410), 64, 66, 215.
Wilson v. St. Louis &c. R. Co. (87 Mo. 431), 348.
Wilson v. Trafalgar (93 Ind. 287; 83 Ind. 326), 372, 602.
Wilson v. Wabash &c. Ry. Co. (18 Mo. App. 258), 338.
Wilson v. White (71 Ga. 506; 51 Am. Rep. 269), 378.
Wilson v. Willimantic &c. Co. (50 Conn. 433; 47 Am. Rep. 653), 466, 471. 512, 535.
Wilson v. Wilmington &c. R. Co. (10 Rich. (Law) 52), 331.
Wilson v. Winona &c. R. Co. (37 Minn. 326; 33 N. W. Rep. 908), 540, 542.
Wilton v. Middlesex R. Co. (107 Mass. 108; 9 Am. Rep. 11; 125 Mass. 130), 240, 439.
Winchester v. Case (5 Bradw. 486, 489), 126.
Winkler v. St. Louis &c. R. Co. (21 Mo. App. 99), 237.
Winn v. Lowell (1 Allen, 177), 401, 571.
Winnegar's Adm'r v. Central Passenger Ry. Co. (85 Ky. 547; 4 S. W. Rep. 237), 96.
Winner v. Oakland Township (158 Penn. St. 405; 27 Atl. Rep. 1110), 375.

[The references are to pages.]

Winship v. Enfield (42 N. H. 197), 370, 389, 390, 607.
Winstanley v. Chicago &c. R. Co. (72 Wis. 375; 39 N. W. Rep. 856), 278.
Winters v. Kansas City &c. R. Co. (99 Mo. 509; 12 S. W. Rep. 652), 176, 185, 424.
Wiswell v. Doyle (160 Mass. 42; 35 N. E. Rep. 107), 176.
Withkofsky v. Weir (32 Fed. Rep. 301), 500.
Witherell v. St. Paul &c. R. Co. (24 Minn. 410), 325.
Witherley v. Regent's Canal Co. (12 C. B. (N. S.) 2; 6 L. T. (N. S.) 255; 3 Fost. & Fin. 61), 16, 49, 189.
Wiwirowski v. Lake Shore &c. Ry. Co. (124 N. Y. 420; 26 N. E. Rep. 1023), 163, 273, 619.
Wohlfahrt v. Beckert (92 N. Y. 490; 44 Am. Rep. 406), 56, 583.
Wolf v. Kilpatrick (101 N. Y. 146; 54 Am. Rep. 672), 385.
Womack v. Central R. &c. Co. (80 Ga. 132; 5 S. E. Rep. 63), 96.
Wonder v. Baltimore &c. R. Co. (32 Md. 418; 3 Am. Rep. 143), 462, 478, 496, 504.
Wood v. Andes (11 Hun, 543), 565, 570.
Wood v. Detroit Ry. Co. (52 Mich. 402; 50 Am. Rep. 259), 425.
Wood v. Fenwick (10 M. & W. 195), 513.
Wood v. Heiges (83 Md. 257; 34 Atl. Rep. 872), 518.
Wood v. Jones (36 La. Ann. 1086; 15 Rep. 555), 34, 50, 92.
Wood v. Luscombe (23 Wis. 287), 416.
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[The references are to pages.]

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Y.

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Z.

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CONTRIBUTORY NEGLIGENCE.

CHAPTER I.

INTRODUCTORY.— OF NEGLIGENCE AND OF CONTRIBUTORY NEGLIGENCE GENERALLY.

§ 1. The derivation of the law of negligence.
2. Coggs v. Bernard — Sir William Jones and the later commentators.
3. The scholastic theory.
4. Attempts at definitions of negligence.
5. The definitions of Baron Alderson, John Austin and the American commentators.
6. Negligence defined.
§ 7. Contributory negligence defined.
8. Butterfield v. Forrester.
9. The text of Lord Ellenborough's decision.
10. Davies v. Mann.
11. Davies v. Mann criticised.
12. The reasons for the rule that contributory negligence is a defence.
13. The reasons for the rule further considered.

§ 1. The derivation of the law of negligence.— Our Anglo-American law of Negligence, including that of Contributory Negligence, has come down to us, in ordinary generation, from the civil law of imperial Rome. It is a part of that great debt which the common law owes to the classical and the scholastic jurisprudence. No *corpus juris*, adequate to the social and business necessities of an enlightened and active people, could omit such titles as Bailment and Negligence. They were, therefore, in the nature of things, and by reason of the civilization, the wealth, and the commercial enterprise of Rome, under the empire, included in the consummate system of jurisprudence which the lawyers and the lawmakers of that age originated and developed. The underlying principles and the practical details of the law in this behalf seem to have been fully comprehended and worked out by the jurisconsults, as part of a body of law suited very exactly to the wants of a people that, in

periods of high civilization, controlled the business of the globe. This classical jurisprudence, as is well understood, falling into the hands of the scholastic jurists of a subsequent era, was, by them, loaded and hampered with all the belabored judicial subtleties and idealistic fictions of mediaevalism, and thus perverted and distorted, first presented itself to those earlier English jurists, who, in the seventeenth and eighteenth centuries, began seriously to study the civil law, with a view to adapting it, in some degree, to the growing social and commercial necessities of Englishmen.

§ 2. **Coggs v. Bernard.— Sir William Jones and the later commentators.**— Accordingly, Lord Holt, in the case of Coggs v. Bernard,[1] turning to the Roman law for enlightenment, and relying for his authority, when he found no precedents in the English report,[2] upon the scholastic jurists of the middle ages, engrafted, in his famous opinion in this case, upon a stout stem of the English common law a much bescholiazed exotic from the code of Justinian. In this famous case was laid the foundation of the modern English law of Bailment, a subject with which the law of Negligence is so intimately associated that we are accustomed to regard Lord Holt's learned and exhaustive opinion herein, as the leading authority, in a case of novel impression, as well upon the one title as the other. Sir William Jones' treatise on Bailments, wherein Negligence is a principal topic, is confessedly based upon the learning in Coggs v. Bernard, and Mr. Justice Story, in his works upon Bailments and Agency — the treatise of Gaius not having been discovered when he wrote — followed these two eminent authorities. Chancellor Kent also added the sanction of his great name to the same general exposition of the law. So it has come to pass that our text writers upon this subject have, for the most part, set forth the law essentially from the standpoint of the jurists or scholiasts of the middle age.

1 2 Anne, A. D. 1703; 2 Ld. Raym. 909; Smith's Leading Cases, 8th edition, 369.

2 I have not overlooked Southcote's Case (43 Eliz. A. D. 1601; 4 Rep. 83b; Cro. Eliz. 815), which presents the older English law pure and simple, irrespective of any modern or foreign innovation, but Lord Holt expressly disregards that authority. It is completely overthrown, and the law may fairly be said to date from Coggs v. Bernard. *Vide* Holmes' Common Law, 196.

§ 3. **The scholastic theory.**— The courts, on the other hand, finding this artificial and visionary jurisprudence unsuited to the necessities of our time, have inclined more and more away from the scholastic formulas, accepting the learning, on the authority of the jurists, as theoretically sound, but refusing judicially to impose upon suitors the burdens, inconveniences, and even absurdities they involve. "The consequence was," says Dr. Wharton, in the preface to his learned work upon Negligence, "that our adjudications have been on one plane of jurisprudence, and our principles on another plane." The result of this contrast between scholastic theory and modern common sense has been somewhat remarkable. The courts, after starting out, from Coggs v. Bernard, upon the theory of the middle ages, have, more or less unconsciously, constructed for us, in flat defiance of authority, a jurisprudence upon this topic that very nearly assimilates itself to the jurisprudence of Rome when it was the money power and the business power of the whole earth.[3] It is the highest possible warrant to the soundness and abstract correctness of our present law, as well as to its inherent justness and propriety, that the social and commercial necessities of our age have developed in the courts, in spite of counter theories, a body of law as to this matter singularly like that worked out by the jurists of the most richly civilized and the most commercial era of antiquity. It is as though Aeacus and Rhadamanthus had indorsed our doctrine.[4]

§ 4. **Attempts at definitions of negligence.**— The theorists, the text writers, and the judges have alike stumbled over the definition of this term, and nothing generally satisfactory has ever been proposed, from which it may perhaps be safe to conclude that it is impossible to define it with such scientific ac-

[3] "*Tu regere imperio populos, Romane, memento:*
Hae tibi erunt artes — pacisque imponere morem —"
Virgil's Æneid, VI, 851, 852.

[4] "The Roman law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe." Tindal, C. J., in Acton v. Blundell, 12 M. & W. 324, 353.

curacy as to embrace and conclude all the possibilities.[5] Is it not time to concede the point in law literature, notwithstanding the more or less imperious demand upon every law writer for comprehensive, terse, and infallible definitions, that legal principles and legal terms in general are not capable of definition after the fashion of the exact sciences; that law is scarcely a science at all in the scientific sense, and that the attempt to express its principles in definitions or in rules of mathematical precision misleads oftener than it enlightens? As Dr. Johnson once said, you may walk in a straight line on a desert, but you can not walk in a straight line in Cheapside. The great jurists have not been great definers in the mathematical way, and he who is glibbest at such legal definition is perhaps one who knows a little law wrong.[6] In the High Court of Chancery the term "fraud" is not defined.[7] By the older lawyers it seems to have been regarded as peculiar in this respect, but are not the reasons they assign for the failure to define it for the most part cogent against defining any comprehensive legal term or principle in the sense in which there is a modern tendency to expect and demand definition? Hardly a better illustration of the futility and inutility of legal definitions of this character is at hand than those proposed by various writers and judges of the term "negligence," and the strictures of each of them upon the definitions of the others.

§ 5. The definitions of Baron Alderson, John Austin, and the American commentators.— The definition of Negligence by

[5] "To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it, and rarely indeed is it in their power to frame any definition to which exception may not justly be taken." Lindley on Partnership, p. 1.

[6] "A real definition is a very attractive thing. It seems to offer the conclusion of wisdom in a portable form. It is in fact the condensed result of a great deal of hard thinking; but to understand it and appreciate what it includes and what it excludes, the thoughts of the definer must be thought over again until the disciple has gained the same outlook over the subject as the master — and then he no longer needs the definition." 1 Polit. Science Quarterly, 1.

[7] Park's History of Chancery, 508. "Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go and no farther, in extending their relief against it, or to define

Baron Alderson is often quoted with approval. "Negligence," says that discriminating jurist, "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." [8] This is, it is submitted, no more a definition of negligence than of the opium habit, or the excessive use of intoxicating liquors, or gambling or reckless speculation, or forty other things. Mr. John Austin's definition is this:—"The term 'negligent' applies exclusively to injurious omissions; to breaches by omission of positive duties. The party omits an act to which he is *obliged* (in the sense of the Roman lawyers). He performs not an act to which he is obliged, because the act and the obligation are absent from his mind. An omission," he says "(taking the word in its larger signification), is the not doing a given act without adverting (at the time) to the act which is not done." [9] This, judging from the definition, is not what Baron Alderson was trying to set off by metes and bounds; neither is it what Dr. Wharton understands negligence to be. He proposes this:—"Negligence in its civil relations is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency, or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based." [10] Messrs. Shearman and Redfield do not, I believe,

strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive." Lawson's Snells' Equity, 383; Chesterfield v. Janssen, 1 Atk. 352 (by Lord Hardwicke).

[8] Blyth v. Birmingham Water Works Co., 11 Exch. 784; 2 Jur. (N. S.) 333; 25 L. J. (Exch.) 212.

[9] 1 Austin's Lectures on Jurisprudence (3d London ed.), 439.

[10] Wharton on Negligence, § 3. "This term ('negligence'), like its Latin equivalent, 'culpa,' indicates a state of mind, the description of which has tasked the ingenuity of many generations of commentators. It covers all those shades of inadvertence resulting in injury to others, which range between deliberate intention ('dolus') on the one hand, and total absence of responsible consciousness on the other." Holland's Jurisprudence, 93. The foregoing definition is criticised in the Law Quarterly Review, April, 1886, p. 267, where it is said that "negligence is the opposite of diligence, and diligence is not a state of mind." "Juridical negligence is the inadvertent omission to do something which it would be the

attempt a definition in terms. The three already given are some evidence that a definition of any other value than as an illustration of some phase or phases of the subject is impossible.

§ 6. **Negligence defined.**— From a general view of the subject it may be concluded that legal negligence consists for the most part in the breach, or omission, of a legal duty,[11] which may be either unintentional, as is usually the case, or intentional, as is sometimes the case. This duty may be either one imposed by the rules of civil society, in which case the violation of it is a tort, or one voluntarily assumed by contract, in which the failure is a breach of contract.[12] Whence it appears that negligence, in its legal aspect, is of two distinct sorts, the one springing out of relations resting in contract, and the other not. In the one case there is an action sounding in tort, and in the other there

legal duty of a prudent and reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do — such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of." Summers v. Crescent City R. Co., 34 La. Ann. 139; 44 Am. Rep. 419. "Negligence is defined to be the absence of that care which men ordinarily bestow upon their business." * * * "Negligence is a relative term. What would be negligence under one state of facts might be entirely free from negligence under another." Davis v. Columbia, &c., R. Co., 21 S. C. 102, 104. Williams, in his "Forensic Facts and Fallacies," p. 138, acutely suggests that the definition of negligence laid down in railroad cases is somewhat colored by the popular prejudice against railway companies, and apprehends that "there is some ground for fearing lest the law should recognize a kind of special railway negligence."

[11] Shearman & Redfield on Negligence, § 3 *et seq.;* Thompson on Negligence, preface; Wharton on Negligence, § 3 *et seq.;* 3 Puffendorff's Law of Nations, chap. I. "Negligence, even when gross, is but an omission of duty." Tonawanda R. Co. v. Munger, 5 Denio, 255, 267; 49 Am. Dec. 239; Danner v. South Carolina R. Co., 4 Rich. (Law) 329; 55 Am. Dec. 678; Baltimore, &c., R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72. For a reference to many decisions in which negligence has been defined and discussed, see 11 Am. St. Rep. 548, note; and for a collection of decisions on negligence, especially that consisting of a breach of municipal ordinances, see 12 Am. St. Rep. 700, note.

[12] "Historically the liability in tort is older; and indeed it was by a special development of this view that the action of assumpsit, afterwards the common mode of

is an action for breach of contract. It is clear that the same definitions and the same rules of law cannot equally apply to each, and that in consequence it is always necessary to consider negligence in this dual aspect. While accurate and scientific knowledge, clear thinking and precise expression as to the principles of law governing this subject are possible, to define the term "negligence" in its legal sense — in its application to all human interests as they may become subjects of litigation, or to reduce the law of negligence to rules of mathematical completeness and precision, as one writes magic squares — is hopelessly out of the question. There are theorists among law writers who, considering that the story of Robinson Crusoe has been very cleverly retold in words of one syllable, would apply a somewhat analogous method of revision and simplification to the law books. Shall we not, however, rather rest with a presentation of the law as it really is, in as luminous and orderly a way as the subject reasonably admits, without essaying a method and a simplicity which are not in the nature of things?

§ 7. **Contributory negligence defined.**— Between negligence and contributory negligence there is the difference between genus and species, and it is, accordingly, far easier to state with tolerable precision what contributory negligence is, than to construct a satisfactory definition of the simple term "negligence." In the qualified term we are held more to a definition of the adjective than of the noun. Conceding, then, the unknown quantity, we may proceed to define, or find the value of the co-efficient in terms of the unknown quantity; that is to say, in the result we shall express the unknown quantity with the value of its co-efficient somewhat determined. I therefore, employing some such method of definition as this figure suggests, propose the following: Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.[13] To constitute contrib-

enforcing simple contracts, was brought into use." * * * "Negligence in performing a contract and negligence independent of contract create liability in different ways; but the authorities that determine for us what is meant by negligence are in the main applicable to both." Pollock on Torts, pp. 354, 355.

[13] "Contributory" is the word most used in the decisions to de-

utory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the consideration of the question. "Did the plaintiff exercise ordinary care under the circumstances?" "Was there a proximate connection between his act or omission and the hurt he complains of?" These are the vital questions when contributory negligence is the issue. The definition proposed is believed to cover fairly all the points involved.[14]

§ 8. **Butterfield v. Forrester.**— This is believed to be the earliest reported case in the English law in which the general rule as to contributory negligence is distinctly announced. It was decided by Lord Ellenborough in the Court of King's Bench in 1809,[15] and has ever since been regarded a leading

scribe the sort of negligence on the part of a plaintiff which is juridically sufficient to prevent a recovery of damages — though it is criticised by Crompton, J., in Tuff v. Warman, 5 C. B. (N. S.) 573, 584, as "much too loose," and "a very unsafe word." Sometimes the word "concur" is used and sometimes "co-operate" (*Vide* Shearman & Redfield on Negligence, § 61), but contributory and contribute are the safer words to use, as having a more settled legal signification, and a more unchallenged currency. In The Bernina, L. R. 12 P. & D. 58, the judges use the phrase "partly directly contribute," in describing the negligence which will defeat the plaintiff's action.

[14] Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239; Danner v. South Carolina R. Co., 4 Rich. (Law) 329; 55 Am. Dec. 678; Baltimore, &c., R. Co. v. Woodruff, 4 Md. 442; 59 Am. Dec. 72; O'Brien v. McGlinchy, 68 Me. 552. These two elements must co-exist. In Neanow v. Uttech, 46 Wis. 587, it was held to be good law to charge the jury, that it made no difference, and was of no consequence, what want of care the plaintiff may have been guilty of, or how careless he may have been, unless they found that such want of care contributed to produce the injury complained of. Sutton v. Wauwatosa, 29 Wis. 21, where the court defined contributory negligence to be a relation existing between the act and violation of law on the part of the plaintiff, and the injury or accident of which he complains, which relation must have been such as to have caused, or helped to cause, the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. Harris v. Union Pacific Ry. Co., 4 McCrary, 454.

[15] 11 East, 60.

case. It may safely be said that it has been cited with approval as a controlling authority in every jurisdiction where the common law obtains. The opinion is a model of judicial brevity. It declares the rule, sets forth the reasons for it, and suggests a good illustration, within the compass of a dozen lines.[16] No case is more often referred to in oral argument, and no case in any branch of the law is more generally received as unquestionably sound. It was an action on the case for obstructing the highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown from his horse and injured. It appears that the defendant, for the purpose of making some repairs to his house, which was close by the roadside, had put up a pole partly across the street on his side, leaving, however, free passage through the street along the other side of the way, and that the plaintiff, who was riding rapidly through the street, just at nightfall, but before it was dark, not observing the obstruction, rode violently against it, and, being thrown from his horse, was seriously injured. On this state of facts the court directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and they were satisfied that the plaintiff was riding extremely hard through the street, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.

§ 9. **The text of Lord Ellenborough's decision.**—Upon motion for a new trial, the court say, by Lord Ellenborough, C. J.:—"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road, by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." The doctrine of this case, then, plainly is, that, although the defendant may have been guilty of a want of ordinary care, tending to produce the injury complained of, still the plaintiff will not be entitled

[16] Lord Ellenborough's opinion is delivered in exactly one hundred and sixteen words.

to recover damages if he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, or, what is the same thing, that he cannot recover when his own negligence proximately contributed to produce the injury of which he complains. This rule not only commends itself to our instinctive sense of justice, since what can be a more reasonable requirement than that a man must take ordinary care of himself, or suffer the consequences, but it is also in harmony with the spirit of the law in other respects, in that it puts every man upon his guard, and suffers him not to take advantage of his own lack of prudence or care, by first running into danger, and then calling upon some one else to recompense him in damages for what he suffers. It is a principle of law so consonant with justice and right reason that it can never be overthrown.

§ 10. **Davies v. Mann.**— In this case, decided by Lord Abinger in the Court of Exchequer in 1842,[17] an entirely different rule is laid down, one which is not only subversive of the reasonable rule declared in Butterfield v. Forrester,[18] but which practically repudiates the entire doctrine of contributory negligence. It is known sometimes as "the donkey case," the facts being that the plaintiff's donkey, which he had fettered and negligently allowed to graze at large upon the highway, was run down and killed by the servant of the defendant, driving a wagon through the street. It was conceded that the act of the plaintiff, in leaving his donkey on the highway, so fettered as to prevent his getting out of the way of passing vehicles, was negligent and unlawful, but, inasmuch as it appeared that the defendant, by the exercise of ordinary care, might have avoided running over the animal, the plaintiff was held entitled to recover. The clear doctrine of this case is that a plaintiff, although he be guilty of negligence, tending to produce the injury he complains of, may, notwithstanding that, recover damages for the injury, if the defendant could, in spite of such negligence, by the exercise of ordinary care upon his part, have avoided inflicting the injury.[19]

[17] 10 M. & W. 546; s. c. 6 Jur. 954; 12 L. J. (Exch.) 10.

[18] 11 East, 60.

[19] "The donkey case qualification may be put as correctly and more simply by saying that a plaintiff is not disentitled by his negligence unless such negligence was *the proximate cause* of the damage." Shirley's Leading Cases, 270. Unfortunately Davies v. Mann is not always thus interpreted.

§ 11. Davies v. Mann criticised.— Under this rule no account is taken of the plaintiff's negligence. He is not held to the duty of taking even ordinary care of himself. Let him be never so heedless, or stupid, or careless of his safety, if he can only make it appear that his injury might not have happened to him if the defendant had exercised due care, he may, under Davies v. Mann, have his action, and the defendant, in the suit he brings, is held to responsibility, not only for the consequence of his own neglect as in Butterfield v. Forrester, but he must pay for the neglect of the plaintiff also. Where both parties have been guilty of negligence, concurring to produce an injury, the doctrine of this case completely exonerates the party who suffers the injury, ignores entirely his contributory negligence, and charges the other party with it all. This is sheer injustice, and it is a striking evidence of the chaotic state of the law upon this subject, that Davies v. Mann is esteemed a leading and authoritative case. We find the judges citing it frequently in the reported cases with approval, as enunciating a sound rule of law, and sometimes side by side with Butterfield v. Forrester, which it flatly contradicts, so that the two cases cited together make nonsense. The doctrine of Butterfield v. Forrester applied to the state of facts upon which Davies v. Mann turns would give a judgment to the defendant. Indeed the donkey case is a good deal clearer case than that of the man riding at sundown through the streets of Derby. If this pernicious and mischief-making authority could be distinctly repudiated, much of the uncertainty and confusion in writing and in thinking upon the subject of contributory negligence would disappear. It is the doctrine that has made all the trouble. The attempts to reconcile some such rule or theory as this case propounds, with the obvious and natural justice of the matter, have driven the courts into all sorts of vagaries, and the reported cases show an endless floundering and confusion. If the simple and just and rational rule that a plaintiff guilty of contributory fault cannot recover be adhered to, and all attempts to reconcile that principle with any such rule as that of Davies v. Mann be abandoned and forgotten, the difficulty will be very much at an end. It is submitted that this is the only way to reduce our law in this behalf to an orderly and logical system.

§ 12. The reasons for the rule that contributory negligence is a defense.— The reasons of the rule which denies relief to a

plaintiff guilty of contributory negligence have been variously stated.[20] The common law refuses to apportion damages which arise from negligence. This it does upon considerations of public convenience and public policy, and upon this principle, it is said, depends also the rule which makes the contributory negligence of a plaintiff a complete defense. For the same reason, when there is an action in tort, where injury results from the negligence of two or more persons, the sufferer has a full remedy against any one of them, and no contribution can be enforced between the tort feasors. The policy of the law in this respect is founded upon the inability of human tribunals to mete out exact justice. A perfect code would render each man responsible for the unmixed consequences of his own default; but the common law, in view of the impossibility of assigning all effects to their respective causes, refuses to interfere in those cases where negligence is the issue, at the instance of one whose hands are not free from the stain of contributory fault,[21] and where

[20] The theory of contributory negligence is discussed and the learning of the English, American, and Canadian decisions and of the text-books upon the subject is collected in 26 Canada Law Journal, 130. See, also, an article in 3 Harvard Law Review, 263, by W. Schofield, which includes a discussion of the doctrine of Davies v. Mann.

[21] 1 Am. Law Rev. (N. S.) 770, an article by Ernest Howard Crosby, Esq.:—"It is no more unjust in principle to allow an injured person to recover compensation in damages from an entirely innocent third party than it is to allow him to recover for a self-inflicted injury. The real principle is the same (although the degree of injustice may not be), whether the plaintiff was the sole author of his injuries, or whether his illegal act or fault combined with that of the defendant to produce them, for in such case it is impossible to apportion the damages, or to determine the relative responsibilities of the parties, or whether the plaintiff would have been injured at all, except for his own contribution to the result." Loomis, J., in Broschart v. Tuttle, 59 Conn. 20. In Louisville, &c., R. Co. v. Ynestra, 21 Fla. 700, the court denies the justice of the rule of contributory negligence, whereby the plaintiff may be wholly debarred from recovery, though the defendant may be clearly guilty of negligence. The court prefers the rule in the admiralty, where the damages are apportioned, and declares that "the law, at least in cases where human life is concerned, certainly needs legislative revision." "The parties being mutually in fault, there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." Railroad v. Norton, 24

accordingly the impossibility of apportioning the damage between the parties does not exist, the rule is held not to apply.[22]

§ 13. The reasons for the rule further considered.— It is said again, that the true theory upon which the rule rests is that the defendant is not the cause of the injury if the plaintiff's negligence contributes to it; but this is a very superficial view. If it is meant that the defendant is not the *sole* cause, the argument only goes around in a circle, and if it is meant that the defendant is liable every time he is the sole cause of an injury, it is not true. "The true ground," says Dr. Wharton, "for the doctrine is that, by the interposition of the plaintiff's independent will, the casual connection between the defendant's negligence and the injury is broken."[23] It is also sometimes assumed to rest upon the maxim *volenti non fit injuria*, but the objection to this position, as well as to Dr. Wharton's definition, is that negligence, in its very essence, negatives the idea of an exercise of the will. A person whose negligence causes an injury cannot be spoken of with any accuracy of expression as "willing" it.[24] Negligence can only be conceived upon the hypothesis that the will, as to the particular condition, is inactive. In my judgment no more satisfactory reason for the rule in question has been assigned than that which assumes it to have been founded upon considerations of public policy. We need not seek for any better reason for a rule of law than that, among all the possible rules[25] that might be adopted, it is plainly the best —

Penn. St. 469. If the plaintiff were allowed to recover, he might be obtaining compensation for his own misconduct. Heil v. Glanding, 42 Penn. St. 493; Shearman & Redfield on Negligence, § 63.

22 Needham v. San Francisco, &c., R. Co., 37 Cal. 409. Here the negligence of the plaintiff was held to be only a remote cause of the injury suffered by him. Compare this case with Tonawanda R. Co. v. Munger, 5 Denio, 255, where the plaintiff, under similar circumstances, was still held contributorily negligent, and damages were refused.

23 Wharton on Negligence, § 300, citing Tuff v. Warman, 5 C. B. (N. S.) 573, 585.

24 Where plaintiff charges negligence and not a wilful injury, he cannot prove the latter. Pennsylvania Co. v. Smith, 98 Ind. 42.

25 "The State might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and State aid for those who suffered in person or estate from tempest or wild beasts. As between individuals

that indeed it is the only rule upon the subject for an instant practicable.

it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The State does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*." Holmes' Common Law, 96.

CHAPTER II.

THE GENERAL RULE.

§ 14. General statement of the rule
15. Express or implied waiver of a right of action.
16. The same subject continued.
17. Ordinary care.
18. Ordinary negligence.
19. Ordinary care as affecting the rule in question.
20. Ordinary care and the plaintiff's conduct.
21. What is ordinary care.
21a. Persons under disabilities.
21b. Rule as to children.
22. Ordinary care usually a question of fact.
23. Illustration of this rule.
24. Proximate cause.
25. The doctrine of proximate cause stated.
26. Not the sole proximate cause.
§ 27. Illustration of this rule — The influence of Davies v. Mann.
28. The rule in Davies v. Mann.
29. The influence of Davies v. Mann on the New York courts.
30. The influence of Davies v. Mann in other States.
31. What is a proximate cause.
32. The same subject continued.
33. Distinction between causal connection and a plaintiff's negligence.
34. Connection of the plaintiff's negligence with his injury.
35. Summary statement of the doctrine of contributory negligence as a defense.

§ **14. General statement of the rule.**— Contributory negligence, as we have seen,[1] consists, in contemplation of law, in such acts or omissions, on the part of a plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent acts of the defendant, are a proximate cause, or occasion of the injury complained of. It is a general rule, firmly imbedded in the law, and conclusively settled, that such negligence will defeat a recovery. Says Black, C. J., in Pennsylvania R. Co. v. Aspell:[2]— "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence

1 § 3, *supra*.

2 23 Penn. St. 147; 62 Am. Dec. 323.

of the party injured, concurring with that of the other party, no action can be maintained." From Butterfield v. Forrester,[3] to the latest judgment of the appellate courts in every common law jurisdiction, the rule is consistently and uniformly declared.[4]

[3] 11 East, 60.

[4] Freer v. Cameron, 4 Rich. (Law) 228; 55 Am. Dec. 663 (and especially Mr. Freeman's scholarly and exhaustive note at page 666); Shearman & Redfield on Negligence, § 61; Thompson on Negligence, 1146; Wharton on Negligence, § 300; Saunders on Negligence, 55, 60; Field on Damages, 158, 159, 173, 529. "Gross negligence" is not sufficient to overcome the injured person's contributory negligence, unless it was negligence to a degree that was wanton, reckless, or intentional. Carrington v. Louisville, &c., R. Co., 88 Ala. 472; 6 So. Rep. 410; Rowen v. N. Y., &c., R. Co., 59 Conn. 365; Bridge v. Grand Junction Ry., 3 M. & W. 244. There is no middle ground between the negligent doing of an act causing the injury to another and the wilful injury of the same, wherein the injured party may recover, regardless of his own negligence, because of the gross negligence of the party inflicting the injury. Pennsylvania Co. v. Meyers, 136 Ind. 242. In Tuff v. Warman, 5 C. B. (N. S.) 573, 585, the court says:—"Mere negligence or want of ordinary care and caution would not disentitle the plaintiff to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." Witherley v. Regent's Canal Co., 12 C. B. (N. S.) 2; 3 Fost. & Fin. 61; 6 L. T. (N. S.) 255; Dowell v. Steam Navigation Co., 5 El. & Bl. 195; Moak's Underhill on Torts, 283, 285; 4 Wait's Actions and Defenses, 718, § 2; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Railroad Co. v. Jones, 95 U. S. 439; Munger v. Tonawanda R. Co., 4 N. Y. 349; 53 Am. Dec. 384, and note; Milton v. Hudson River Steamboat Co., 37 N. Y. 212; Central R. Co. v. Letcher, 69 Ala. 106; 44 Am. Rep. 505; Little Rock, &c., R. Co. v. Pankhurst, 36 Ark. 371; Kline v. Central Pacific R. Co., 37 Cal. 400; Colorado, &c., R. Co. v. Holmes, 5 Colo. 197; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Fleytas v. Ponchartrain R. Co., 18 La. 339; 36 Am. Dec. 658; Murray v. Ponchartrain R. Co., 31 La. Ann. 490; State v. Manchester, &c., R. Co., 52 N. H. 528; Pennsylvania R. Co. v. Goodman, 62 Penn. St. 329; Walsh v. Transportation Co., 52 Mo. 434; Zimmerman v. Hannibal, &c., R. Co., 71 Mo. 476. Contributory negligence is such want of care as materially helps in producing the disaster. Palys v. Erie Ry. Co., 30 N. J. Eq. 604; Pennsylvania R. Co. v. Righter, 42 N. J. Law, 180. A party cannot recover for injury sustained through the negligence of another, if his own negligence has contributed to the injury, although the injury might have been avoided if the party causing the same had

And even in those courts that have invented and tolerate the doctrine of " comparative negligence," or that follow, in some

exercised ordinary care. Postman v. City of Decorah, 89 Iowa, 336. If it appears that the party injured has, by any act of omission or commission on his part, contributed to the injury complained of, it is generally *damnum absque injuria*. Morrison v. Cornelius, 63 N. C. 346, 349. In Murphy v. Dean, 101 Mass. 455; 3 Am. Rep. 390, it was contended that contributory negligence on the part of the plaintiff ought not to defeat the action, unless it should appear that it did in fact contribute to such an extent that the injury could not or would not have occurred but for the plaintiff's negligence. But the court held the counter-proposition to be a truer statement of the legal principle, namely, that there can be no recovery unless it shall appear that the injury happened, or would have happened, irrespectively of any negligence on the part of the plaintiff. Richmond, &c., R. Co. v. Morris, 31 Gratt. 200; Richmond, &c., R. Co. v. Anderson, 31 Gratt. 812; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. Rep. 185 (note); Simpson v. Hand, 6 Wharton (Penn.) 311; 36 Am. Dec. 231; Steele v. Central R. Co. of Iowa, 43 Iowa, 109; McKean v. R. Co., 55 Iowa, 192. The principle is well settled that although a defendant has been guilty of culpable fault or negligence, producing an injury, yet if his act was not wanton and intentional, and if the plaintiff, by his own misconduct, or neglect, amounting to the want of ordinary care, essentially contributed to produce the result, he cannot recover. Birge v. Gardner, 19 Conn. 507, 511; 50 Am. Dec. 261; Salem v. Goller, 76 Ind. 291; Hoehl v. Muscatine, 57 Iowa, 444. The plaintiff is equally contributorily negligent when the act done by him exposes him to injury as when it co-operates in causing the misfortune from which the injury results. Ky., &c., R. Co. v. Thomas, 79 Ky. 160, 162; 42 Am. Rep. 208; Bradley v. Andrews, 51 Vt. 530; Erie v. Magill, 101 Penn. St. 616; Abend v. Terre Haute, &c., R. Co., 111 Ill. 203; 53 Am. Rep. 616; Jamison v. San Jose, &c., R. Co., 55 Cal. 593. The rule is not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but that, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately in any degree to the injury, the plaintiff shall not recover. Strong v. Sacramento R. Co., 61 Cal. 326; Nehrbas v. Central, &c., R. Co., 62 Cal. 320; McCoy v. Philadelphia, &c., R. Co., 5 Houst. (Del.) 599; Marean v. N. Y., S. & W. R. Co., 167 Penn. St. 220, 222. Contributory negligence, however slight, bars recovery. Louisville, &c., R. Co. v. Shanks, 94 Ind. 598; Terre Haute, &c., R. Co. v. Graham, 95 Ind. 286; Storey v. Dubuque St. Ry. Co., 51 Iowa, 419; County Com'rs v. Hamilton, 60 Ind. 340; Peverly v. Boston, 136 Mass. 366; 49 Am. Rep. 37; Vicksburg, &c., R. Co. v. Hart, 61 Miss. 468; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Mullen v. Rainear, 45 N. J. Law, 520; Renneker v.

sort or another, the strange gods that led the fathers astray, in Davies v. Mann,[5] *et id omne genus*, the force and integrity of

South Car. R. Co., 20 S. C. 219; Houston, &c., R. Co. v. Richards, 59 Tex. 373; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; Kentucky Central R. Co. v. Lebus, 14 Bush, 518. And the true rule being that if the injured party contributed directly in any way, or in any degree, to the injury, there can be no recovery, an instruction that he cannot recover if he "substantially" or "materially" contributed to the injury is error. Banning v. C., R. I. & P. Ry. Co., 89 Iowa, 74. In Brown v. Milwaukee, &c., R. Co., 22 Minn. 165, 166, the court said:—"The common law impresses upon every one in the full possession of his faculties, when approaching a known place of danger, the exercise of that degree of prudence, care and caution incumbent upon a person of ordinary reason and intelligence in like circumstance; and inasmuch as it may be well presumed that the instinct of self-preservation common to all must naturally prompt an ordinarily prudent and careful man to avoid an apprehended danger by a diligent use of the available means at his command, it has become settled that a failure in this respect, under ordinary circumstances, when it is apparent that the danger might have been avoided if such means had been so used, is to be regarded as concurring negligence, and so declared by the court." Sullivan v. Bridge Co., 9 Bush, 81; Paducah R. Co. v. Hoehl, 12 Bush, 41; Jacobs v. Louisville, &c., R. Co., 10 Bush, 263; Louisville, &c., R. Co. v. Collins, 2 Duv. (Ky.) 114; Louisville, &c., R. Co. v. Robinson, 4 Bush, 507; Martin v. Bishop, 59 Wis. 417; Hoth v. Peters, 55 Wis. 405; Otis v. Janesville, 47 Wis. 422. *Remote* negligence of the plaintiff will not prevent his recovery for an injury *immediately* caused by the negligence of the defendant. The negligence of the plaintiff, which defeats his recovery, must be a proximate cause of the injury. Sheff v. City of Huntington, 16 W. Va. 307; Cronin v. Delavan, 50 Wis. 375. A man contributes to an injury himself when the injury is one which a prudent man might well anticipate as resulting from the circumstances to which he exposed himself. No speculation should be entered into as to whether it might result in the breaking of a finger or the smashing of his leg. When anything of that character is anticipated, he is guilty of contributory negligence if he exposes himself in such a way as a careful and prudent man would not. Rexter v. Starin, 73 N. Y. 601. Where there is mutual negligence, the principle is, that where the negligence of each party was a proximate cause of the injury, no action can be maintained. Levy v. Carondelet Canal Co., 34 La. Ann. 181; Jeffrey v. Keokuk, &c., R. Co., 56 Iowa, 546; Addison on Torts, 23 *et seq.*, 227, 493; 1 Sedgwick on Damages, 172, and 2 id. 347. A replication setting up negligence of the defendant in reply to a plea of contributory negligence on the part of the plaintiff is bad, negligence not being an answer to a plea of contributory negligence. Davis v. Miller, 109 Ala. 589.

[5] 10 M. & W. 546.

this rule are equally admitted.[6] It would require far greater judicial hardihood to challenge its soundness than it does to explain it away.

§ 15. Express or implied waiver of a right of action.— It is held entirely lawful for one, by an express contract, to waive the right of action which he may have against another for damages for an injury occasioned by the negligence of such other person, provided that this contract is supported by some consideration deemed valuable in law, and is in other respects without such fraud or mistake as to its procurement, as would avoid any other contract.[7] And when the contract of waiver is made after the injury is received, if it is in other particulars a lawful one, being founded upon a valuable consideration, and procured without imposition or duress, the courts uphold it as valid.[8] Such a contract may be implied as well as express, as, for example, between a master and servant, when the servant enters into, or continues in, the service with full knowledge of the risk to which he exposes himself, by reason of his master's negligence.[9] This is held to be an implied contract on the part of the employee to run the risk of the danger, and a waiver of his right to an action against

6 Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Chicago, &c., R. Co. v. Johnson, 103 Ill. 512, where it is expressly said that in the absence of ordinary care on the part of the plaintiff, there is no right of action, and can be no recovery. (See, also, *infra*, § 85.) Macon, &c., R. Co. v. Winn, 19 Ga. 440; Union Pacific Ry. Co. v. Rollins, 5 Kan. 167. In New Jersey the rule has not been changed by legislation. Pennsylvania R. Co. v. Goodenough, 55 N. J. Law, 577, 588.

7 Western, &c., R. Co. v. Bishop, 50 Ga. 465; Memphis, &c., R. Co. v. Jones, 2 Head, 517; Mitchell v. Pennsylvania R. Co., 1 Am. Law Rep. 717; Galloway v. Western, &c., R. Co., 57 Ga. 512. Here, in consideration of the employment, a servant of a railroad company made an agreement to assume all risks incident to his labors. This agreement was held to preclude all right to sue and recover for injuries sustained while so employed. But see *contra*, Roesner v. Hermann, 10 Biss. 486, where Judge Gresham, in an oral opinion, held that such a contract, the sole consideration being the employment, was absolutely void as against public policy.

8 If there be no mistake or fraud, the amount received in the settlement is not material to its validity as a settlement. Curley v. Harris, 11 Allen, 112; Chicago, &c., R. Co. v. Doyle, 18 Kan. 58; Illinois, &c., R. Co. v. Welch, 52 Ill. 183; 4 Am. Rep. 593; Schultz v. Chicago, &c., R. Co., 44 Ill. 638.

9 This is fully considered in the chapter on Master and Servant, *post*, *q. v.*

his employer if injury results. Upon this principle, also, one who goes upon the premises of another to do business, or as a guest, impliedly accepts the risk of any open or seen dangers that exist about the premises.[10]

§ 16. **The same subject continued.**—It is clear that this voluntary act, by which one waives his right of action for damages resulting to him from the negligence of another, is not at all the same thing as contributory negligence, though in each case the result is the same — that the plaintiff recovers nothing. In the former case the defense is that the plaintiff is barred of his action by his voluntary assumption of the risk, that he has deliberately and with his eyes open, disabled himself from recovering damages, that his case comes within the principle of the maxim *volenti non fit injuria*, while in the latter case the defensive matter is that the plaintiff, without any act of the will, was guilty of such negligent acts as, concurring with the acts of the defendant, produced or occasioned the injury of which he complains, or, what is the same thing, that, in the first instance, he is deprived of his right of action by his express or implied contract, which operates as a sort of estoppel, and in the second instance, he is deprived of his right to recover by his negligence. This distinction between a voluntary act and an involuntary one, between a contract and an act of pure negligence, is an important one. There is a confusion of ideas implied in such expressions as that one cannot recover damages "where he has consented or contributed to the act which occasioned the injury."[11] It is one thing to *consent*, as we have seen, and an essentially different thing to *contribute* to an injury, and, in order to right thinking upon the question of contributory negligence, the distinction should not be overlooked.

§ 17. "**Ordinary care.**"—The Roman jurists of the classical period recognized but two grades of negligence, *culpa lata*, gross negligence,[12] and *culpa levis*, ordinary negligence, or the

[10] Indermaur v. Dames, L. R. 1 C. P. 274; s. c. L. R. 2 C. P. 311; Kohn v. Lovett, 44 Ga. 251; Hargreaves v. Deacon, 25 Mich. 1; Thompson on Negligence, chap. VII, and the cases there collected. (See *infra*, § 50.)

[11] Callahan v. Warne, 40 Mo. 136; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191.

[12] *Lata culpa est nimia negligentia, id est non intelligere quod omnes intelligunt.*" L. 213, § ult. D. de V. S. Ulpianus lib. 1, Regularum; Williams' Institutes of Justinian, 154.

failure to exercise the diligence belonging to a *diligens, bonus, studiosus paterfamilias, "qui sobrie et non sine exacta deligentia rem suam administrat."* To these the scholastic jurists added a third, *culpa levissima,* slight or infinitesimal negligence. They insisted upon this as a material and essential distinction, but it is conceded at present, that it was not recognized by the classical jurists, and that it is a troublesome and unnecessary refinement. While the text writers and theorists cling to it, it has been found incompatible with the necessities of our modern business jurisprudence, and the courts practically ignore it. The common law, however, recognizes, in theory at least, the soundness of this triple classification. The law students have it "trippingly on the tongue." Ordinary negligence, slight negligence, and gross negligence, for so the text-books expound it. It may be said to date from Coggs v. Bernard (2 Anne, A. D. 1703).[13] In Lord Holt's famous opinion in this case, the scholastic law of negligence, as he had learned it in Bracton, is incorporated into the law of England, and while, as we have seen, the courts of later times have more or less entirely disregarded *culpa levissima,* and the impracticable refinements it involves, the authority of that great case has not been challenged, and the learning in it has formed the unquestioned basis of our law in point.

§ 18. Ordinary negligence.— Three grades of negligence imply three correlative grades of diligence, and so we have slight care, ordinary care, and great care, corresponding respectively to gross negligence, ordinary negligence, and slight negligence. Gross negligence is the failure to exercise even slight care,[14] and slight negligence the failure to exercise great or extraordinary care; while the failure to use ordinary care is ordinary negligence. This somewhat alliterative terminology and artificial classification have provoked much criticism,[15] both from the text

[13] Ld. Raym. 909; s. c. 1 Smith's L. C. (8th ed.) 369.

[14] "Gross negligence" and "the want of slight care" are convertible terms, and mean the same thing. Chicago, &c., Ry. Co. v. Chapman, 30 Ill. App. 504. In Missouri P. Ry. Co. v. Brown, 75 Tex. 267; 12 S. W. Rep. 1117, a definition of gross negligence as the want of ordinary care and caution was held fatally defective.

[15] Steamboat New World v. King, 16 How. (U. S.) 469, 474, where the court says:—"The meaning of these three grades is not fixed, or capable of being so. One degree, thus described, not

writers and the courts, and from a practical point of view they must be conceded to be obnoxious, to grave objection; "gross" as applied to negligence is said to be merely, in most instances, a species of vituperation,[16] and the term "gross negligence" to have no uniform meaning.[17] For the purposes of this treatise it is not necessary to more than advert to the difficulties involved in a complete and exhaustive discussion of the grades of negligence with their correlative grades of carefulness. We proceed, therefore, to consider "ordinary care" in its bearings upon the rule in question.

§ 19. Ordinary care as affecting the rule in question.—The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of, the rule being that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part.[18] The law does not require the

only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation."

[16] Wilson v. Brett, 11 M. & W. 113, where Baron Rolfe said that he could see no difference between *negligence* and *gross* negligence — that it was the same thing, with the addition of a vituperative epithet. And in Barnum v. Terpenning, 75 Mich. 557; 42 N. W. Rep. 967, the absence of gross negligence was defined as conduct "not wanting in reasonable care and prudence, in view of all the circumstances and surroundings of the injury." Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600. See, also, 1 Smith's L. C. (8th ed.) 384 (n).

[17] Austin v. Manchester, &c., Ry. Co., 16 Jur. 766. See, also, Wharton on Negligence, §§ 26-29; Campbell on Negligence (London, 1871), § 11; Phillips v. Clark, 5 C. B. (N. S.) 884, and a valuable article on "Degrees of Negligence" in the American Law Review, vol. 5 (1870), p. 38.

[18] Butterfield v. Forrester, 11 East, 60; Marriott v. Stanley, 1 Scott's N. R. 392; Smith v. Smith, 2 Pick. 621; 13 Am. Dec. 464; Steele v. Central R. Co., 43 Iowa, 109; Hughes v. Muscatine, 44 Iowa, 672; Priest v. Nicholls, 116 Mass. 401; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Hill v. New Orleans, &c., R. Co., 11 La. Ann. 292; Mercier v. New Orleans, &c., R. Co., 23 La. Ann. 264; Railroad Co. v. Jones, 95 U. S. 439; Railroad, &c., Co. v. Morris, 31 Gratt. 200; Crommelin v. Coxe, 30 Ala. 329; Gothard v. Alabama, &c., R. Co., 67 Ala. 114; Strong v. Sacramento, &c., R. Co.,

plaintiff to be entirely free from any negligence whatever contributing to the injury, although there is a line of cases to that effect,[19] because that is the same thing as to hold him responsible for slight negligence. This the law does not do; slight negligence is the want of extraordinary or great care, and that is not what is required.[20] But while extraordinary care is not to be required of a plaintiff who brings an action of negligence, and although slight negligence on his part will not defeat a recovery, it is held that *the slightest want of ordinary care* contributing proximately to the injury will do so. This distinction is made in several cases by the Supreme Court of Wisconsin. It is ingenious and philosophical, and capable of useful applica-

61 Cal. 326; Peverly v. Boston, 136 Mass. 366; 49 Am. Rep. 37; Jeffery v. Keokuk, &c., R. Co., 56 Iowa, 546; Sullivan v. Louisville Bridge Co., 9 Bush, 81; O'Brien v. Philadelphia, &c., R. Co., 3 Phila. 76; Marble v. Ross, 124 Mass. 44; Jalie v. Cardinal, 35 Wis. 118; Runyon v. Central R. Co., 25 N. J. Law, 556; Sawyer v. Sauer, 10 Kan. 472; Kansas, &c., R. Co. v. Pointer, 9 Kan. 620; s. c. 14 Kan. 37; Cleveland, &c., R. Co. v. Crawford, 24 Ohio St. 631; Indianapolis, &c., R. Co. v. Stout, 53 Ind. 143; Daley v. Norwich, &c., R. Co., 26 Conn. 591; Williams v. Clinton, 28 Conn. 266; Fox v. Glastenbury, 29 Conn. 204; Cremer v. Portland, 36 Wis. 99; Beatty v. Gilmore, 16 Penn. St. 463; 55 Am. Dec. 514; Washburn v. Tracy, 2 D. Chipman (Vt.) 128; 15 Am. Dec. 661; Noyes v. Shepherd, 30 Me. 173; 50 Am. Dec. 625; Johnson v. Whitfield, 18 Me. 286; 36 Am. Dec. 721.

[19] New Jersey Express Co. v. Nichols, 33 N. J. Law, 434, where the court, while admitting that in many cases the plaintiff was allowed to recover whose *conduct* was, to some extent, contributory to his injury, nevertheless holds that if he be *negligent in any degree*, he is without redress, unless the act of the defendant was an intentional wrong. Phila., &c., R. Co. v. Boyer, 97 Penn. St. 91; Wilds v. Hudson River R. Co., 24 N. Y. 430. So in Grippen v. New York Central R. Co., 40 N. Y. 34, it was held that the injury must be "*solely*" caused by the negligence of the defendants. It is not enough that it should be "essentially" so caused. Even Chief Judge Hunt, in dissenting, upheld this statement as the correct formulation of the law. Vanderplank v. Miller. Moody and M. 169; Toledo, &c., R. Co. v. Goddard, 25 Ind. 185.

[20] "The mere want of a *superior* degree of care or diligence cannot be set up as a bar to the plaintiff's claim for redress; although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover." Whirley v. Whiteman, 1 Head (Tenn.) 610; Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347; Mabley v. Kittleberger, 37 Mich. 360; Galena, &c., R. Co. v. Jacobs,

tion.[21] To essentially the same effect it is said that, although there may have been slight negligence, that is to say, a want of extraordinary or great care on the part of the person injured, an action will nevertheless lie if there was no want of ordinary care contributing to the injury.[22]

§ 20. Ordinary care and the plaintiff's conduct.— The standard by which the plaintiff's negligence is to be measured is the standard of ordinary care, and the rule upon the subject is correctly and pertinently summed up in Cremer v. Portland[23] by the Supreme Court of Wisconsin, viz.:— "If the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to produce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence, and the law does not require of a person injured by the

20 Ill. 478; Daniels v. Clegg, 28 Mich. 32; Cremer v. Portland, 36 Wis. 92; Springett v. Ball, 4 Fost. & Fin. 472. But in Little Rock, &c., Ry. Co. v. Haynes, 47 Ark. 497; 1 S. W. Rep. 774, an instruction "that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery," was held to be obscure and misleading.

21 McGrath v. Village of Bloomer, 73 Wis. 29; Bloor v. Town of Delafield, 69 Wis. 273; Cremer v. Portland, 36 Wis. 92; Dreher v. Fitchburg, 22 Wis. 675, where it is well said that the law does not attempt to measure how little or how greatly the plaintiff may have fallen short of using ordinary care, but that any failure in this respect or a slight want of such care, contributing directly to the injury, will forbid a recovery. Ward v. Milwaukee, &c., R. Co., 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35; Griffin v. Willow, 43 Wis. 509; Otis v. Janesville, 47 Wis. 422; Cronin v. Delavan, 50 Wis. 375.

22 Union Pac. Ry. Co. v. Henry, 36 Kan. 18; 14 Pac. Rep. 1; Bloor v. Town of Delafield, 69 Wis. 273; 34 N. W. Rep. 115; Strong v. Placerville R. Co. (Cal.), 14 Rep. 110; Baltimore, &c., R. Co. v. Fitzpatrick, 35 Md. 32, containing a very lucid exposition of the rule. Manley v. Wilmington, &c., R. Co., 74 N. C. 655; Korwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Dush v. Fitzhugh, 2 Lea, 307; Houston, &c., R. Co. v. Gorbett, 49 Tex. 573; Bridge v. Grand Junction Ry. Co., 3 M. & W. 244, where the plea that the plaintiff was simply negligent was held bad. Absence of ordinary care should have been alleged. But a general charge of negligence in a complaint was held good on demurrer, in Cleveland, &c., Ry. Co. v. Wynant, 100 Ind. 160.

23 36 Wis. 92.

carelessness of others, the exercise of that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained." [24] The weight of the most intelligent authority will, it is believed, sustain this position. Not slight negligence, but any want, however slight, of ordinary care on the part of a plaintiff, is sufficient to defeat the action. This want of ordinary care may, in order to operate as a defense to the plaintiff's action, be, in point of time, either prior,[25] or subsequent to the negligence of the defendant,[26] or contemporary therewith.[27]

[24] Where the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may not have been in the exercise of the highest degree of care. The North Chicago Street R. Co. v. Eldridge, 151 Ill. 542. The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action, and what would under some circumstances be a want of reasonable care might not be such under others. Lent v. N. Y. C. & H. R. R. Co., 120 N. Y. 467, 473. Any citizen in the prosecution of his own business may everywhere act upon the assumption that no other citizen will by misfeasance, or nonfeasance, cause him an injury, unless there is something in the circumstances of the case which casts upon him the duty of active vigilance for his own safety. The New York, Lake Erie & Western R. Co. v. Atlantic Refining Co., 129 N. Y. 597, 602.

[25] Thus, it was held an absence of ordinary prudence for a plaintiff to walk deliberately upon the track of a railroad. Such a one will be presumed to assume the risk of the peril he may encounter. Illinois, &c., R. Co. v. Hall, 72 Ill. 222; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Pennsylvania R. Co. v. Morgan, 82 Penn. St. 134; Carroll v. Minnesota, &c., Ry. Co., 13 Minn. 930. In Austin v. New Jersey Steamboat Co., 43 N. Y. 75, 82, it would seem that the court errs when it says that the plaintiff's negligence "*must* be one occurring at the time the accident happened."

[26] As where one attempts to cross a swollen stream, the bridge over it being out of repair, when it is apparent that the stream is swollen and dangerous to cross. Jackson v. County Com'rs, 76 N. C. 282; Lilley v. Fletcher, 81 Ala. 234; 1 So. Rep. 273; Eaton v. Or. Ry. & Nav. Co. (Or.), 24 Pac. Rep. 415, 417; Mills v. Chicago, M., &c., Ry. Co., 76 Wis. 422; 45 N. W. Rep. 225; Krum v. Anthony, 115 Penn. St. 431; 8 Atl. Rep. 598; Butterfield v. Forrester, 11 East, 60; Brown v. Milwaukee, &c., R. Co., 22 Minn. 163; Martensen v. Chicago, &c., R. Co., 60 Iowa, 705. (See *infra*, §§ 58, 59.)

[27] No action lies "where both parties are contemporaneously and actively in fault." O'Brien v. Mc-

§ 21. What is ordinary care.— What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. Chancellor Walworth, in the case of the Mayor, &c., of New York v. Bailey,[28] says:— "The degree of care and foresight which it is necessary to use" (in any given case) "must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against. And it should be that care and prudence which a discreet and cautious individual would, or ought to, use if the whole risk and loss were to be his own exclusively." This doctrine is declared in many other cases.[29] He who does what is more than ordinarily danger-

Glinchy, 68 Me. 552; Doggett v. Richmond, &c., Ry. Co., 78 N. C. 305; Chicago, &c., R. Co. v. Becker, 76 Ill. 26; 84 Ill. 483; Moak's Underhill's Torts, 285.

[28] 2 Denio, 433.

[29] City of Madison v. Ross, 3 Ind. 236; 54 Am. Dec. 481; Brown v. Milwaukee, &c., R. Co., 22 Minn. 165; *The Nitro-Glycerine Case*, Parrott v. Wells, Fargo & Co., 15 Wall. 524; s. c. *sub nom.*, Parrott v. Barney, 2 Abb. C. C. 197; 1 Deady, 405; 1 Sawyer, 423. "He who does what is more than ordinarily dangerous, is bound to use more than ordinary care." Morgan v. Cox, 22 Mo. 373; Northern Central R. Co. v. Price, 29 Md. 420; Beers v. Housatonic R. Co., 19 Conn. 566; Moore v. Central R. Co., 24 N. J. Law, 268; Wyandotte v. White, 13 Kan. 191. Ordinary care is that which the great mass of mankind, or ordinarily prudent men, usually exercise in matters affecting their own interests. Wheeler v. Westport, 30 Wis. 392; Ward v. Milwaukee, &c., R. Co., 29 Wis. 144; Railroad Co. v. Pollard, 22 Wall. 341; Stokes v. Saltonstall, 13 Peters, 181; Reynolds v. Burlington, 52 Vt. 300; Strong v. Placerville, &c., R. Co. (Cal.), 14 Rep. 550. That another method of doing a thing would have been safer does not show negligence. Conway v. Hannibal, &c., R. Co., 24 Mo. App. 235. "To walk within six inches of the curbstone of a sidewalk is not careless; but to walk as near the edge of a precipice is the act of a madman." Wild v. The Hudson River R. Co., 24 N. Y. 430, 434; Johnson v. West Chester, &c., R. Co., 70 Penn. St. 357; Lynch v. Nurdin, by Lord Denham, C. J., 1 Q. B. 29; s. c. 4 Per. & Dav. 672; 5 Jur. 797; Baltimore, &c., R. Co. v. State (Md.), 11 Rep. 160. "Negligence is the absence of care under the circumstances." Lancaster v. Kissinger (Penn.), 12 Rep. 635; Aurora, &c., R. Co. v. Grimes, 13 Ill. 585. The definition of "ordinary care," which seems to be most in vogue, with immaterial deviations, is that degree of care which persons of ordinary prudence would exercise under similar circumstances. Austin, &c., R. Co. v. Beatty, 73 Tex. 592; 11 S. W. Rep. 358; City of Austin v. Ritz, 72 Tex. 391; 9 S. W. Rep. 884; Atwater v. Town of Veteran, 6 N. Y. Supl.

ous, is bound to use more than ordinary care, that is to say, it will require greater care under those circumstances to amount in law to ordinary care than it would if the undertaking were less hazardous.[30] And the measure of diligence required of him is greater or less in the direct ratio of the risk his acts entail upon others. The duty of a plaintiff is to be measured by the same rule that is applied to a defendant, and just in proportion as the danger increases must the care of the plaintiff be in-

907; Hoyt v. New York, &c., R. Co., 118 N. Y. 399; 23 N. E. Rep. 565; Needham v. Louisville & N. R. Co., 85 Ky. 423; 3 S. W. Rep. 797; Matson v. Maupin, 75 Ala. 312; Watkins v. St. Louis, &c., Ry. Co. (Mo.), 13 S. W. Rep. 893; Scott v. Pennsylvania R. Co., 9 N. Y. Supl. 189; International, &c., R. Co. v. Dyer, 76 Tex. 156; 13 S. W. Rep. 377; Richmond & D. R. Co. v. Howard, 79 Ga. 44; 3 S. E. Rep. 426; Pallez v. Brooklyn City R. Co., 4 N. Y. Supl. 384. The care of an "ordinary man," or "ordinary business man;" (Houston & T. C. Ry. Co. v. Smith, 77 Tex. 179; 13 S. W. Rep. 972;) or person of "average" prudence; (Marsh v. Benton County, 75 Iowa, 469; 39 N. W. Rep. 713;) or of other "well-regulated" railroads in a turn-table case; (Bridger v. Asheville, &c., R. Co., 25 S. C. 24,) have been held objectionable as standards. But the care of prudent, &c., "railroad men," as applied to a railroad company, was tolerated in Rost v. Missouri Pac. Ry. Co., 76 Tex. 168; 12 S. W. Rep. 1131. The courts are so jealous of any departure from the established definition that an exposition of ordinary care to a jury as the "care of a man of ordinary prudence" as "just such care as one of you, similarly employed, would have exercised under the circumstances," was held to be erroneous. Louisville, &c., R. Co. v. Gower, 1 Pickle (Tenn.) 465; 3 S. W. Rep. 824. Evidence that the plaintiff was habitually reckless or careless in the particular matter is inadmissible. Brennan v. Friendship, 67 Wis. 223; Chase v. Maine Central R. Co., 77 Me. 62; 52 Am. Rep. 744; *Contra*, Anglo-American, &c., Co. v. Baier, 20 Ill. App. 376; Parkinson v. Nashua, &c., R. Co., 61 N. H. 416. The plaintiff may show that he did as men usually did in like circumstances. Whitsett v. Chicago, &c., Ry. Co., 67 Iowa, 150.

[30] Wilson v. Cunningham, 3 Cal. 241; 58 Am. Dec. 407; Parvis v. Philadelphia, &c., R. Co. (Del.), 17 Atl. Rep. 702; Scott v. Hogan, 72 Iowa, 614; 34 N. W. Rep. 444. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted, but this means no more than that he is under all the circumstances required to exercise ordinary care. Omaha Street R. Co. v. Martin, 48 Neb. 65. Where a diligent use of the senses by the plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the trial court. Missouri Pacific R. Co. v. Moseley, 12 U. S. App. 601.

creased, if it is to be held ordinary care under the circumstances. It is clear that what might be entirely prudent in one condition of things would be reckless and grossly negligent in another.

§ **21a. Persons under disabilities.**— The question as to what constitutes ordinary care may also be governed by the disability of the person injured. The degree of care and caution required by the law depends upon the maturity and capacity of the individual.[31] On the other hand, a person's disability may require him to exercise greater care than other persons. For example, a blind person must use more care to avoid danger than a person in the full possession of the faculty of sight.[32]

§ **21b. Rule as to children.**— As a child of very tender years cannot apprehend danger, it is not chargeable with contributory negligence.[33] But no arbitrary rule can be established fixing the age at which a child, without legal capacity for other purposes, may be declared wholly capable or incapable of understanding and avoiding the danger threatened.[34] And in determining whether a child has been guilty of contributory negligence, it is proper to consider his age, intelligence and ability to understand the character of his act and its consequences.[35] If he has reached the age of discretion, and is considered *sui juris* as matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment and experience.[36] If there is any doubt

[31] Swift v. Staten Island Rapid Transit Co., 123 N. Y. 645, 649; Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308, 316.

[32] Stewart v. Nashville, 96 Tenn. 50.

[33] Waecker v. Erie Electric Motor Co., 176 Penn. St. 451 (child three years and four months old); Bamberger v. Citizens' Ry. Co., 95 Tenn. 18 (child three years old); Bottoms v. Seaboard, &c., R. Co., 114 N. C. 699 (child twenty-two months old); Barnes v. Shreveport City Ry. Co., 47 La. Ann. 1218 (child under three years of age); Gunn v. Ohio River R. Co., 42 W. Va. 676.

[34] Spillane v. Missouri Pacific Ry. Co., 111 Mo. 555, 562-563. A girl of nine and one-half years of age is not of such tender years as to be held, as matter of law, *non sui juris*. McGrell v. Buffalo Office Building Co., 153 N. Y. 215.

[35] Texas & Pacific Ry. Co. v. Phillips (Tex.), 42 S. W. Rep. 852.

[36] Consolidated Traction Co. v. Scott, 58 N. J. Law, 682; Swift v. Staten Island Rapid Transit Co., 123 N. Y. 645, 649-650; Thompson v. Buffalo Ry. Co., 145 N. Y. 196; Central R. Co. v. Phillips, 91 Ga. 526; Central R., &c., Co. v. Golden, 93 Ga. 510; East Tenn., Va. & Ga. Ry. Co. v. Hughes, 92

as to the facts, or as to the inferences to be drawn from them, the question cannot be determined as matter of law, but must be submitted to the jury.[37]

§ 22. Ordinary care usually a question of fact.— Ordinary care is generally, therefore, a question of fact, and the question is not whether the actor thought his conduct was that of a prudent man, but whether the jury thinks it was.[38] The law prescribes

Ga. 388; Ga., C. & N. R. R. Co. v. Watkins, 97 Ga. 381; Pierce v. Cannon, 20 Colo. 178; Springfield Consolidated Ry. Co. v. Welsch, 155 Ill. 511, 513; City of Pekin v. McMahon, 154 Ill. 154; Roth v. Union Depot Co., 13 Wash. 525; Turner v. Norfolk & W. R. R. Co., 40 W. Va. 675; Felton v. Aubrey, 43 U. S. App. 278; Hayes v. Norcross, 162 Mass. 546, 548. In the case last cited, it was said:—"That there may be other boys who carelessly expose themselves on the streets, does not help him in his suit. While he is only bound to show that he exercised such care as ordinary boys of his age and intelligence are accustomed to exercise under like circumstances, the standard is the conduct of boys who are ordinarily careful."

[37] Consolidated Traction Co. v. Scott, 58 N. J. Law, 682; Spillane v. Missouri Pacific Ry. Co., 111 Mo. 555, 562-563; Schmeer v. Gas Light Co. of Syracuse, 147 N. Y. 529; Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308, 316; McGarragher v. Rogers, 120 N. Y. 527, 534, 535; Hyland v. Burns, 10 App. Div. (N. Y.) 386; Penny v. Rochester R. Co., 7 id. 595, 598; Wihnyk v. Second Ave. R. R. Co., 14 id. 515; Swift v. Staten Island Rapid Transit Co., 123 N. Y. 645, 649-650. In the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which would be required of an adult, he must be deemed *sui juris*. Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308. So a person sixteen years of age is presumed to be *sui juris*, and in the evidence of evidence tending to show that he was not qualified to understand and appreciate the situation in which he was placed and the possible danger arising therefrom, he is chargeable with the same degree of care and with the same knowledge of his environment that an adult would be charged with under the circumstances. Kohler v. Syracuse Specialty Co., 12 App. Div. (N. Y.) 47, 53. For cases where contributory negligence of infant is matter of law, see Guichard v. New, 9 App. Div. (N. Y.) 485; Spillane v. Missouri Pacific Ry. Co., 135 Mo. 414, 426; Payne v. Chicago & Alton R. Co., 136 Mo. 562.

[38] Blyth v. Birmingham Water-Works Co., 11 Exch. 784; Smith v. London & Southwestern Ry. Co., L. R. 5 C. P. 102; Hays v. Millar, 77 Penn. St. 238; and see Gumb v. Twenty-Third St. Ry. Co., 9 N. Y. Supl. 316. "Suppose that a defendant was allowed to testify that, before acting, he considered carefully what would be the con-

as a standard of conduct — to which all must conform at their peril — the conduct of an ideal average prudent man,[39] whose equivalent for practical purposes the jury is generally taken to be, and whose culpability or innocence is the supposed test. This is a constant, and his conduct under given circumstances is theoretically always the same.[40] But while ordinary care is primarily a question for the jury, there may be observed in the growth of the law a manifest tendency to reduce the featureless generality that a plaintiff is bound to exercise such care as a prudent man would exercise under the circumstances, which means little or much, and leaves every case without compass or rudder, very largely to the caprice of a jury, to some specific rule or requirement of law, that he is bound to use this or that precaution under these or those circumstances.[41]

§ 23. **Illustration of this rule.**— In the infancy of the law of railroads, for an example, it was the rule that a traveler, upon approaching a point where a railway track crossed a highway upon the same level, must exercise due and ordinary care not to be run over by a passing train of cars, and the question of what was ordinary care went to the jury. Now it is tolerably well settled that under such circumstances a traveler must look up and down the track attentively, and a failure to do this is generally negligence as a matter of law. So the question of ordinary care tends more and more to definiteness and certainty, and the law in this behalf grows more and more concrete by judicial decision and by statute. There is less and less danger that the term will be misapplied or misunderstood. Specific rules for specific cases are taking the place of the general rule that one

duct of a prudent man under the circumstances, and acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard. But supposing any such evidence to have got before a jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was." Holmes' Common Law, p. 107.

[39] The *diligens, bonus, studiosus, paterfamilias* of the Roman lawyers.

[40] Holmes' Common Law, 111; Walsh v. Oregon, &c., R. Co., 10 Oregon, 250; Fassett v. Roxbury, 55 Vt. 552; Martin v. Bishop, 59 Wis. 417; Hassenger v. Michigan, &c., R. Co., 48 Mich. 205; 42 Am. Rep. 470; Cronin v. Delevan, 50 Wis. 375; Otis v. Janesville, 47 Wis. 422.

[41] See chapter XVI, Law and Fact.

must use ordinary care and prudence; but whenever no such rules have been laid down, we revert to the original theory and decide the case upon the only remaining rational principle, that ordinary care is to be held to mean that measure of prudence and carefulness that the average prudent man [42] might be expected under the circumstances to exercise, allowing the degree of it to vary in proportion to the hazard of the particular enterprise, and referring the ultimate decision to a jury of twelve men.[43]

§ 24. Proximate cause.— The essence of contributory negligence is, as has been shown, a want of ordinary care on the part

[42] In Hassinger v. Michigan Central R. Co., 48 Mich. 205; 42 Am. Rep. 470, it was decided by Cooley, J., that while sex can be taken into account as a circumstance in judging negligence, yet it cannot be laid down that a less degree of care is required of a woman than of a man. The rule of reasonable care and prudence knows nothing of sex. See, also, Fox v. Glastenbury, 29 Conn. 204.

[43] Mr. Justice Oliver Wendell Holmes, Jr., of the Supreme Judicial Court of Massachusetts, in his learned work entitled "The Common Law," says, at page 108: —"The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is that when men live in society a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of heaven; but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account. The rule that the law does in general determine liability by blameworthiness is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts it is our misfortune. So much as that we must have at our peril for the reasons just given."

of a plaintiff, which is *a proximate cause*, an occasion of the injury. We have considered, in the preceding section, the law affecting ordinary care. It remains to set forth the rules of law in regard to that lack of ordinary care as a proximate cause of the injury of which the plaintiff complains. The courts declare, and it is a settled rule of law, that, not only must the negligence of one injured by another's culpable neglect contribute to produce the injury, but that, if it is to constitute contributory negligence, it must contribute as a proximate cause, and not as a remote cause or mere condition.[44]

[44] Muehlhausen v. St. Louis R. Co., 91 Mo. 332; 2 S. W. Rep. 315. Tuff v. Warman, 2 C. B. (N. S.) 741; where the jury was charged that if the negligence of the plaintiff was in any degree the *direct* or *proximate* cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant. 5 C. B. (N. S.) 573; Irwin v. Sprigg, 5 Gill (Md.) 200; Northern, &c., R. Co. v. Price, 29 N. W. Rep. 420; Kline v. Central, &c., R. Co., 37 Cal. 400; Needham v. San Francisco, &c., R. Co., 37 Cal. 409. The question of proximate cause is usually for the jury. Atkinson v. Goodrich Transportation Co., 60 Wis. 141. And where the plaintiff had a verdict, notwithstanding his negligence, it was supported on the theory that the jury did not consider such negligence the proximate cause of the accident. Brown v. Central Pacific R. Co. (Cal.), 12 Pac. Rep. 512. The rule releasing a defendant from responsibility for damages because of the negligence of the plaintiff, is limited to cases where the act or omission of the plaintiff is the proximate cause of the injury. Flynn v. San Francisco, &c., Ry. Co., 40 Cal. 14; Baltimore, &c., R. Co. v. Reaney, 42 Md. 117; Doggett v. Richmond, &c., R. Co., 78 N. C. 305; Shaffer v. Railroad Co., 105 U. S. 249; Fernandez v. Sacramento, &c., R. Co., 52 Cal. 45; Meeks v. Southern Pac. R. Co., 56 Cal. 513; 38 Am. Rep. 67. No action will lie if the plaintiff's negligence has been simultaneous in its operation with that of the defendant, of the same kind, immediate, growing out of the same transaction, and not something distinct and independent, of prior date, remotely related to the negligence of the defendant. Isbell v. New York, &c., R. Co., 27 Conn. 393, 406; The State v. Manchester, &c., R. Co., 52 N. H. 528; Gunter v. Wicker, 85 N. C. 310; Dudley v. Camden, &c., Ferry Co., 45 N. J. Law, 368; Palys v. Erie Ry. Co., 30 N. J. Eq. 604; Thirteenth Street Ry. Co. v. Boudrou, 92 Penn. St. 475; 37 Am. Rep. 707; Oil City Gas Co. v. Robinson, 99 Penn. St. 1; Drake v. Kiley, 93 Penn. St. 492; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Barbee v. Reese, 60 Miss. 906; Louisville, &c., R. Co. v. Wolfe, 80 Ky. 82; O'Connor v. North Truckee Ditch Co., 17 Nev. 246; Towler v. Baltimore, &c., R. Co., 18 W. Va. 579; Thompkins v. Kanawha Board, 21 W. Va. 224; Harris v. Union Pacific R. Co., 4 McCrary, 454; Haff

§ **25. The doctrine of proximate cause stated.**—This rule is stated over and over in the reports, with almost every possible limitation, and in almost every possible way; as, for example, that if the negligence of both parties be proximately the cause of the injury, or when the plaintiff's negligence only is proximate, while that of the defendant is remote, there can be no recovery,[45] but that when the defendant's negligence is the proximate cause and that of the plaintiff the remote cause, the

v. Minneapolis, &c., R. Co., 4 McCrary, 622; Crandall v. Goodrich Trans. Co., 11 Biss. 516; 16 Fed. Rep. 75; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Fent v. Railroad Co., 59 Ill. 349; 14 Am. Rep. 13; Grant v. Mosly, 29 Ala. 302; Gothard v. Alabama, &c., R. Co., 67 Ala. 114; Dyer v. Talcott, 16 Ill. 300; Weymire v. Wolfe, 52 Iowa, 533; Walsh v. Miss. Trans. Co., 52 Mo. 434; Whalen v. St. Louis, &c., R. Co., 60 Mo. 323; Stepp v. Chicago, &c., R. Co., 85 Mo. 229; Byram v. McGuire, 3 Head, 530; Brown v. Chicago, &c., R. Co., 54 Wis. 342; 41 Am. Rep. 41. Nave v. Flack, 90 Ind. 205, 211; 46 Am. Rep. 168, where the court says:—"A contribution to an injury does not preclude a recovery, unless it was a wrongful or negligent contribution. Even a negligent contribution does not necessarily bar a recovery. Unless it proximately contributes, mere negligence does not defeat a plaintiff's action." Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; Williams v. Vanderbilt, 28 N. Y. 217; Gunner v. Second Avenue R. Co., 67 N. Y. 596; Sauter v. New York, &c., R. Co., 66 N. Y. 50; Johnson v. Hudson River R. Co., 5 Duer, 27; Button v. Hudson River R. Co., 18 N. Y. 248; Austin v. N. J. Steamboat Co., 43 N. Y. 75; Healey v. Dry Dock, &c., R. Co., 46 Super. Ct. Rep. 473; Harvey v. New York, &c., R. Co., 19 Hun, 556; Mark v. Hunson, &c., B. Co., 56 How. Pr. 108; Lannen v. Albany Gas Light Co., 44 N. Y. 459; Cosgrove v. New York, &c., R. Co., 13 Hun, 329. See, also, 2 Sedgwick on Damages, 348, 362; Field on Corporations, 462, 464; Cooley on Torts, 76, and note; Sutherland on Damages, 62; 2 Bishop on Criminal Law, 637, 639; 1 Hales' Pleas of the Crown, 428; 1 Hawkins' P. C., 93; Mr. Freeman's Note, 55 Am. Dec. 668; Thompson, Wharton, and Shearman & Redfield, *in loco*.

[45] Irwin v. Sprigg, 6 Gill (Md.), 200; s. c. 46 Am. Dec. 667; Trow v. Vermont, &c., R. Co., 24 Vt. 487; Richmond, &c., R. Co. v. Anderson, 31 Gratt. 812; Alston v. Herring, 11 Exch. 822; Wetherly v. Regent's Canal Co., 12 C. B. (N. S.) 1; Callahan v. Warne, 40 Mo. 131; Frederick v. Taylor, 14 Abb. Pr. (N. S.) 77; Wilds v. Hudson River R. Co., 24 N. Y. 430; Stiles v. Geesey, 71 Penn. St. 441; Sherman v. Stage Co., 24 Iowa, 515; Flower v. Adam, 2 Taunt. 314. (In the head-note of this case it is said that if the *proximate cause* of the injury is the plaintiff's negligence, he cannot recover, although the *primary cause* was the defendant's negligence.)

plaintiff may have his action.[46] And again, if the negligence of the plaintiff being only a remote cause, the defendant might have avoided inflicting the injury by the exercise of ordinary care, the action for damages is maintainable.[47] In such a case the defendant's negligence is the proximate cause, and he is liable.[48] But if, on the contrary, the defendant's negligence being only the remote cause, the plaintiff might have escaped the injury by the exercise of ordinary care, his own negligence is the proximate cause, and he can maintain no action.[49]

[46] If the negligence of the defendant be the proximate cause of the injury to the plaintiff, it is of no consequence whether it be omission or commission. Harriman v. Pittsburgh, &c., R. Co., 45 Ohio St. 11; 12 N. E. Rep. 451; Pacific R. Co. v. Hauts, 12 Kan. 328; Walsh v. Miss. Trans. Co., 52 Mo. 434; Whalen v. St. Louis, &c., R. Co., 60 Mo. 323; Steele v. Burkhardt, 104 Mass. 59; Needham v. San Francisco, &c., R. Co., 37 Cal. 417; Nashville, &c., R. Co. v. Smith, 6 Heisk. 174; Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Trow v. Vermont, &c., R. Co., 24 Vt. 487; State v. Manchester, &c., R. Co., 52 N. H. 528; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172. The rule which renders a defendant liable for injuries, notwithstanding some negligence on the part of the person injured, where such negligence was the remote and not the proximate cause of the injury, cannot govern where both parties are contemporaneously and actively in fault, or where the negligence of the party injured continued up to the very moment of the injury, and was a contributing and efficient cause thereof. Everett v. Los Angeles Consolidated Electric Ry. Co., 115 Cal. 105.

[47] Tuff v. Warman, 2 C. B. (N. S.) 740; Day v. Crossman, 4 Thomp. & Cook (N. Y. Sup. Ct.) 122; Doggett v. Richmond, &c., R. Co., 78 N. C. 305.

[48] Schierhold v. North Beach, &c., R. Co., 40 Cal. 447; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. Rep. 185; McKean v. Burlington, &c., R. Co., 55 Iowa, 192; Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347; O'Brien v. McGlinchy, 68 Me. 582; People's, &c., R. Co. v. Green, 56 Md. 84; Isbell v. New York, &c., R. Co., 27 Conn. 393; Zimmerman v. Hannibal, &c., R. Co., 71 Mo. 476; Bunting v. Central Pacific R. Co., 16 Nev. 277; Gunter v. Wicker, 85 N. C. 310; Richmond, &c., R. Co. v. Anderson, 31 Gratt. 812; 31 Am. Rep. 750; Radley v. London, &c., Ry. Co., L. R. 9 Exch. 71; 43 L. J. (Exch.) 73; 1 App. Cas. 754.

[49] Butterfield v. Forrester, 11 East, 60; Wood v. Jones, 36 La. Ann. 1086; Hoehl v. City of Muscatine, 57 Iowa, 444; Macon, &c., R. Co. v. Winn, 19 Ga. 440; Walsh v. Miss. Trans. Co., 52 Mo. 434; Gothard v. Alabama, &c., R. Co., 67 Ala. 114; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Newhouse v. Miller, 35 Ind. 463; Robinson v. Western, &c.. R. Co., 48 Cal. 409; Hearne v. Southern, &c., R. Co., 50 Cal. 482; Morrissey v. Ferry

§ 26. Not the sole proximate cause.—The plaintiff's negligence, in order to constitute a defense to the action he brings, need not, of course, be the *sole* proximate cause of the injury, for this excludes the idea of negligence on the part of the defendant, as in any legal sense material. If his negligence is the sole cause of his injury, it is not contributory negligence at all. So the Supreme Court of Iowa declares the rule to be that if the plaintiff's want of ordinary care was *in whole or in part* a proximate cause of his injury, he cannot recover.[50] And where the court instructs the jury that the plaintiff cannot recover if his negligence caused the injury, they should not be left to suppose that such negligence, in order to defeat him, must have been the sole cause.[51] There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.[52] So it is said that a plaintiff's negligence must *substantially* contribute to produce the injury, in order to avail the defendant anything,[53] and also that it must

Co., 43 Mo. 383; Schaabs v. Wheel Co., 56 Mo. 173; Williams v. Clinton, 28 Conn. 266; Artz v. Chicago, &c., R. Co., 38 Iowa, 293, and generally the cases cited *supra*.

[50] McAunich v. Mississippi, &c., R. Co., 20 Iowa, 338. So in Muldowney v. Illinois, &c., R. Co., 39 Iowa, 615, it was *held* that a brakeman who, by the exercise of ordinary care, had the power to regulate the speed of approaching cars, could not recover for an accident, of which his failure to check the rate of speed was *wholly or in part* the proximate cause. To the same effect are also North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; 7 So. Rep. 360; Williams v. Edmunds, 75 Mich. 92; 42 N. W. Rep. 534; Deeds v. Chicago, &c., Ry. Co., 69 Iowa, 164; Dougherty v. Missouri R. Co., 97 Mo. 647; 11 S. W. Rep. 251; McKeller v. Township of Monitor, 78 Mich. 485; 44 N. W. Rep. 412.

[51] McKeller v. Township of Monitor, 78 Mich. 485; Deeds v. Chicago, &c., Ry. Co., 69 Iowa, 164; Dougherty v. Missouri R. Co., 97 Mo. 647.

[52] Wharton on Negligence, chap. III, and §§ 323-333; Ohio & M. Ry. Co. v. Hecht, 115 Ind. 443; 17 N. E. Rep. 297; Savage v. Corn Exchange Insurance Co., 36 N. Y. 655; Norris v. Litchfield, 35 N. H. 271. As is said in Silliman v. Lewis, 49 N. Y. 379, 383:—"It is not enough that the plaintiffs have been negligent and an injury has occurred; but the plaintiffs' neglect must be the proximate cause, to some extent, at least, of the injury; in other words, their negligence must have *contributed* to it." Glenn v. Columbia, &c., R. Co., 21 S. C. 466; Alger v. Lowell, 3 Allen, 402; Morrison v. Gen. Steam Nav. Co., 8 Exch. 733; Shearman & Redfield on Negligence, § 93.

[53] Montgomery Gas-Light Co. v. Montgomery & E. Ry. Co., 86 Ala. 372; 5 So. Rep. 735; Daley v. Nor-

not only concur in the transaction, but also co-operate in producing the injury.[54] In Sullivan v. Louisville Bridge Co., a leading authority in Kentucky,[55] it is said to be the rule that the plaintiff's negligence, in order to constitute a defense, must have been so far an *efficient cause* of the injury, that, without it, the injury would not have happened. So also there is a line of cases to the effect that, when the plaintiff, though negligent, could not, by the exercise of ordinary care, have escaped the consequence of the defendant's negligence, he may recover.[56]

§ 27. Illustration of this rule.— The influence of Davies v. Mann.— This is a correct rule, but, in the judgment of the author, it is a dangerous way of expressing it. Lord Macaulay said of his style, when some one complimented him about it, that it came very near to being a very bad style; and so the courts, when they fall into this category, come very near to a wrong statement of the rule. There is but a single step from such a rule as this, expressed in this way, to the heresy in Davies v. Mann,[57] which ignores entirely the negligence of the plaintiff, and makes an end of the whole theory upon which the law of

wich, &c., R. Co., 26 Conn. 591; West v. Martin, 31 Mo. 375; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420. See, also, Grippen v. New York, &c., R. Co., 40 N. Y. 34. But see Banning v. C., R. I. & P. Ry. Co., 89 Iowa, 74.

[54] Carroll v. New Haven, &c., R. Co., 1 Duer, 571; Colegrove v. New Haven, &c., R. Co., 20 N. Y. 492.

[55] 9 Bush, 81.

[56] Brown v. Sullivan, 71 Tex. 470; 10 S. W. Rep. 288; Village of Orleans v. Perry (Neb.), 40 N. W. Rep. 417; Radley v. London, &c., Ry. Co., L. R. 9 Exch. 71; 43 L. J. (Exch.) 73; 1 App. Cas. 754; Tuff v. Warman, 5 C. B. (N. S.) 573; Kennard v. Burton, 25 Me. 39; s. c. 43 Am. Dec. 249; Cummins v. Presley, 4 Harr. (Del.) 315; Scott v. Dublin, &c., Ry. Co., 11 Ir. Com. Law (N. S.) 377. In Northern Central Ry. Co. v. Geis, 31 Md. 357, the rule is laid down that where the party inflicting the injury, by proper care, might have avoided the consequences of the negligence of the party injured, or where the latter could not, by a proper degree of caution, avoid the consequences of the negligence of the former, an action will lie. Richmond & D. R. Co. v. Howard, 79 Ga. 44; 3 S. E. Rep. 426. And Code Ga. § 2972 makes a defendant liable under circumstances stated in the text. But Georgia has a tendency toward the rule of comparative negligence (*infra*, § 88), and the foregoing provision was held to be inapplicable where plaintiff claims full damages, and not as in case of contributory negligence. Pierce v. Atlanta Cotton Mills, 79 Ga. 782; 4 S. E. Rep. 381.

[57] 10 M. & W. 546.

contributory negligence rests. If the rule, as these cases put it, means that whenever the plaintiff's negligence is the proximate or a proximate cause of the injury he suffers, he cannot recover, and whenever it is not, that he may recover, it is a sound rule. But if it means anything less than this, it is unsound. It seems to me that nothing is gained by these various roundabout statements of the rule. The attempts of the judges to ring a new change, or to find some novel and original phrase in which to express the rule, that, whenever the negligence of a plaintiff proximately contributes to cause the injury for which he seeks to recover damages, he has no cause of action, has thrown the law into confusion.

§ **28. The rule in Davies v. Mann.**— Davies v. Mann[58] has contributed more than the full share of any one decision to this end. It may be cited as authority for any one, or all, of the four following propositions: 1. When the plaintiff's negligence is only a remote cause of the injury he sustains, it is not contributory negligence and he may recover. 2. Contributory negligence is no bar to an action for a wilful injury. 3. The negligence of the plaintiff and defendant should be compared, and the one most in fault should be held solely responsible. 4. The defendant is on trial, not the plaintiff,[59] and if he is in fault, he is liable without regard to any contributory negligence of the plaintiff, which is not a material element in the case. The first two of these propositions are unquestionably sound rules of law, and it is believed that they will cover exactly every case in which a correct conclusion has been reached under the rule as declared in Davies v. Mann.[60]

§ **29. The influence of Davies v. Mann on the New York courts.**— This is well illustrated by a consideration of the cases in the New York reports that assume to follow it, and in which it

[58] 10 M. & W. 546.

[59] Washburn v. Tracy, 2 D. Chipman (Vt.) 128; 15 Am. Dec. 666, an old case where, in the first instance, the charge to the jury was such that the fate of the defendant was made to depend entirely on the amount of care exercised by him. The plaintiff's conduct was completely ignored. Fortunately, however, for the rule of law involved, and for the defendant, Skinner, Ch. J., saw the error of the lower court, and made the plaintiff's negligence figure as a lever in the case.

[60] 10 M. & W. 546.

is cited with approval. It was decided in the Court of Exchequer in 1842, but the first appearance in New York of the doctrine it announces seems to have been in 1855, in the case of Johnson v. Hudson River R. Co.,[61] where it is spoken of as "somewhat novel," but "highly reasonable." The language of the court, after citing Davies v. Mann, is:— "The defendant is not shielded from a recovery notwithstanding contributory negligence on the part of the plaintiff is proved when it appears that, but for his own subsequent negligence, the accident would never have occurred, *that is when it appears that his own negligence was its sole proximate cause.*" This is assumed in the opinion to be the doctrine in Davies v. Mann. Again in Button v. Hudson River R. Co.,[62] decided in 1858, the rule in Davies v. Mann,[63] is laid down without qualification, *in ipsissimis verbis*, and Mr. Justice Harris, in stating the rule of remote cause, expressly affirms it to be the equivalent of the rule as declared in the English authority upon which he relies. He says, in concluding his opinion,— "Where the negligence of the defendant is proximate and that of the plaintiff remote, the action may be sustained. The question then is whether, it being conceded that the plaintiff was not without fault, the defendant might by the exercise of reasonable care and prudence at the time of the injury have avoided it." [64] In another line of cases in New York, Davies v. Mann is cited as authority for the second of our propositions, viz.: that contributory negligence is no bar to an action for wilful injury. In Kenyon v. New York, &c., R. Co.,[65] after citing Davies v. Mann, and laying down the doctrine of that case broadly, the court says:— "Neglect on the part of the person in charge of the engine to use ordinary care to avoid injuring a person on the track is in contemplation of law equivalent to intentional mischief, and in Green v. Erie Ry. Co.,[66] Davies v. Mann is cited as a controlling authority, and the rule therein is assumed to be equivalent to the proposition that wilful neglect

[61] 5 Duer, 27.

[62] 18 N. Y. 248.

[63] 10 M. & W. 546.

[64] See, also, the following later cases in New York, in which Davies v. Mann is cited as sustaining the doctrine that the remote negligence of a plaintiff is not contributory negligence. Austin v. New Jersey Steamboat Co., 43 N. Y. 75; Cosgrove v. New York, &c., R. Co., 13 Hun, 329; Healey v. Dry Dock, &c., R. Co., 46 Super. Ct. Rep. 473; also, Steves v. Oswego, &c., R. Co., 18 N. Y. 422; Gorton v. Erie Ry. Co., 45 N. Y. 660.

[65] 5 Hun, 479.

[66] 11 Hun, 333.

is not to be excused by contributory negligence. We think it was a proper question for the jury," says the Supreme Court in this case, " whether the defendant was not guilty of such gross negligence as was equivalent to intentional mischief." [67]

§ 30. **The influence of Davies v. Mann in other States.**— To this extent there is no objection to the doctrine in Davies v. Mann. So far as it teaches the principle that remote causes are not to be regarded, that only when the plaintiff's negligence is a proximate cause will it bar his action, and that contributory negligence is no defense to an action for wilful negligence, it is a sound authority. But it does not end there. It is equally an authority for the doctrine of comparative negligence, short of which there is no place to stop if we frankly accept the rule to its full extent. In the earlier cases in Illinois and other States where the doctrine of comparative negligence obtains, there is no trace of that doctrine,[68] and it seems clear that it originated in an attempt to adopt and apply the rule in Davies v. Mann.[69] In those jurisdictions where comparative negligence is not the rule the influence of this case has been to confuse the law and undermine the sound principles upon which it should be based. Its apparent resemblance to the two sound principles which have been referred to, and the rather ingenious, but really clumsy way in which the fallacy is concealed, have enabled it to pass current; but until the falseness of its reasoning and statement are recognized and its authority is distinctly repudiated, the doctrine of contributory negligence is in peril.

§ 31. **What is a proximate cause?**—To return from this *excursus* on Davies v. Mann, let us consider the definitions the reported cases and the text writers propose for the term " prox-

[67] See, also, to the same effect, Wilds v. Hudson River R. Co., 33 Barb. 503; 24 N. Y. 430, and 29 N. Y. 315; Grippen v. New York, &c., R. Co., 40 N. Y. 34, and an essay by Edward E. Sprague, Esq., of New York, " Contributory Negligence and the Burden of Proof," in Vol. VI of the Proceedings of the New York State Bar Association, for 1883, page 197.

[68] Aurora, &c., R. Co. v. Grimes, 13 Ill. 585; where the broad rule is laid down that where a party seeks to recover damages for a loss caused by negligence or misconduct, he must show that his own negligence or misconduct has not concurred in producing the injury. Macon, &c., R. Co. v. Davies, 18 Ga. 679; Union Pacific Ry. Co. v. Rollins, 5 Kan. 167.

[69] Thompson on Negligence, 1165.

imate cause." The plaintiff's want of ordinary care must, we have seen, be a proximate cause of his injury or it will not be contributory negligence. What then precisely is a proximate cause? It is a general rule of law that a man is responsible for the natural and probable consequences of his acts, and for these consequences only so far as they are natural and proximate, and such as may on this account be foreseen by ordinary forecast or, as it is sometimes expressed, a man is presumed to intend the natural and probable consequences of his acts. An act is the proximate cause of an event when in the natural order of things, and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result, the *causa causans* of the schoolmen. "If the wrong and the resulting damages are not known by common experience to be usually and naturally in sequence and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action," says Judge Cooley.[70] That is to say, for remote or secondary causes, men are not legally responsible.[71] From the nature of the matter there can be no fixed and immediate rule upon this subject that can be applied to all cases — much must depend upon circumstances, and what is, or what is not, a proximate cause will very often have to be determined upon considerations of sound judgment and enlightened common sense[72] without the aid of any certain rule or infallible precedent.

§ 32. The same subject continued.— Says Judge Agnew, in Fairbanks v. Kerr:[73]— "Many cases illustrate, but none define what is an immediate, or what is a remote cause. Indeed such a cause seems to be incapable of any strict definition which will suit every case." * * * "We are not to link together as cause and effect events having no probable connection in the

70 Cooley on Torts, 69.

71 *Causa proxima non remota spectatur.*

72 "Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall coucur to produce the consequence, or may be traced in those causes. *To a sound judgment must be left each particular case.*" Harrison v. Berkley, 1 Strobh. Law (S. C.) 525; 47 Am. Dec. 578.

73 70 Penn. St. 86; 10 Am. Rep. 664.

mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection when engaged in the act." For the practical purposes of this treatise nothing can probably be gained by any further consideration of this vexed metaphysical question. All the learning of the speculative philosophers from Aristotle to John Stuart Mill has not availed to reduce it even to tolerable certainty. Lord Bacon in his Maxims [74] paraphrases the Latin rule,[75] as follows:— "It were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree." He then proceeds to illustrate the meaning of the rule by citations of familiar cases from the Year Books, avoiding any philosophical discussion of it, and not attempting a definition. I accordingly shall content myself with citing several cases where the distinction between proximate and remote causes is aptly illustrated, *quas vide*.[76]

[74] Reg. 1.

[75] "*In jure non remota causa sed proxima spectatur.*"

[76] The Lords Bailiff-Jurats of Romney Marsh v. The Corporation of the Trinity House, L. R. 5 Exch. 204; L. R. 7 Exch. 247; Salisbury v. Herchenroder, 106 Mass. 458; 8 Am. Rep. 354; Burrows v. Marsh Gas & Coke Co., L. R. 5 Exch. 67; L. R. 7 Exch. 96; Welch v. Wesson, 6 Gray, 505; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277; 12 Am. Rep. 689. (These five cases are selected by Judge Thompson and printed in full in his collection of leading cases on Negligence, page 1063 *et seq.);* Collins v. Middle Levee Commissioners, L. R. 4 C. P. 279; 38 L. J. (C. P.) 236; 20 L. T. (N. S.) 442. Defendant's act, charged to be negligent, may be deemed the proximate cause of the injury complained of if the injury might reasonably be expected to result. It is not enough to show merely that the injury was the natural consequence of the act. Atkinson v. Goodrich Transportation Co., 60 Wis. 141; Cleland v. Thornton, 43 Cal. 439; Lawrence v. Jenkins, L. R. 3 Q. B. 274; 42 L. J. (Q. B.) 147. Even though two causes of an accident exist, without both of which the accident would not have occurred, and both are due to negligence, one party guilty of negligence cannot render the excuse that he is not liable to plaintiff for damages

§ 33. Distinction between causal connection and a plaintiff's negligence.—The distinction between the negligence of a plaintiff, and the causal connection between such negligence and the injury of which he complains must not be overlooked. It is

caused thereby because a third party was also in fault. Township of Burrell v. Uncapher, 117 Penn. St. 353; 11 Atl. Rep. 619; Ball's Leading Cases, 238; Holland's Jurisprudence, 130. Although the negligence of the latter may have been nearest in point of time to the injury. Township of Plymouth v. Graver, 125 Penn. St. 24; 24 W. N. C. 220; 17 Atl. Rep. 249; Rompillon v. Abbott, 1 N. Y. Supl. 662; Phillips v. De Wald, 79 Ga. 732; 7 S. E. Rep. 151; Gilman v. European, &c., R. Co., 60 Me. 235; Carter v. Towne, 109 Mass. 507; Mott v. Hudson River R. Co., 24 N. Y. Supr. Ct. 585.

Defective Highways.— Village of Carterville v. Cook, 129 Ill. 152; 22 N. E. Rep. 14; Galveston v. Posnainsky, 62 Tex. 118; 50 Am. Rep. 517; De Camp v. Sioux City, 74 Iowa, 392; 37 N. W. Rep. 971; West Mahanoy v. Watson, 112 Penn. St. 574; 56 Am. Rep. 336; Aldrich v. Gorham, 77 Me. 287; Campbell v. Stillwater, 32 Minn. 308; 50 Am. Rep. 567; Beall v. Township of Athens (Mich.), 45 N. W. Rep. 1014; Mahogany v. Ward (R. I.), 17 Atl. Rep. 860; Chartiers Township v. Phillips, 122 Penn. St. 601; 61 Atl. Rep. 26.

Obstruction of Crossing by Cars.— Andrews v. Mason City & Ft. D. R. Co., 77 Iowa, 669; 42 N. W. Rep. 513; Selleck v. Lake Shore, &c., Ry. Co., 58 Mich. 195; Brown v. Wabash, &c., Ry. Co., 20 Mo. App. 222; Jackson v. Nashville, &c., Ry. Co., 13 Lea (Tenn.), 491; 49 Am. Rep. 663.

Runaway Horse — Breaking of Reins.— Putnam v. New York, &c., R. Co., 47 Hun, 439; Oglesby v. Smith, 38 Mo. App. 67. Ala. Code, § 2641, gives a right of action to the personal representative of one whose death was "caused by the wrongful act or omission of another." It was held, that the administratrix of one who died immediately after drinking liquor sold him by one knowing his intemperate habits, could not maintain an action against the liquor seller, because the sale was not the immediate cause of the death, and because the contributory negligence of the deceased would constitute a defense. King v. Henkie, 80 Ala. 505; Hine v. Cushing, 6 N. Y. Supl. 850; 53 Hun, 519. "If a candidate for parliamentary honors makes a stump oration inveighing against his opponents generally, and waves his hat into the bargain, that is not a proximate cause of one of those opponents getting his windows or his head broken." Shirley's Leading Cases, 260. King v. Ohio, &c., Ry. Co., 25 Fed. Rep. 799; Louisville & N. R. Co. v. Kelsey, 89 Ala. 287; 7 So. Rep. 648; White v. Conly, 14 Lea (Tenn.), 51; 52 Am. Rep. 154. Where a conductor forced a boy off the rear of a street car and he ran under the wheels of a car going in the opposite direction, it was held, in Mack v. Lombard, &c., R. Co., 8 Pa. Co. Ct. Rep. 305; 18 Wash. Law Rep. 84, that the conductor's act was not the proximate cause of the injury. But in McCann v. Sixth Ave. R. Co.,

plain that negligence is one thing, and causal connection an essentially different thing. In order to avail the defendant anything there must be on the part of the plaintiff, not only negligence in the juridical sense, but *contributory* negligence, and in

117 N. Y. 505; 23 N. E. Rep. 164, that point seems to have been ignored, and the questions of negligence and contributory negligence were left to the jury. Renner v. Canfield, 36 Minn. 90; 30 N. W. Rep. 435; Fawcett v. Pittsburgh, &c., Ry. Co., 24 W. Va. 755. A. sued B. for burns received in rescuing a horse from a fire which B.'s negligence caused. It was held that he could not recover. Cook v. Johnston, 58 Mich. 437; 55 Am. Rep. 703; Mars v. Delaware & H. Canal Co., 8 N. Y. Supl. 107; 54 Hun, 625; Alabama, &c., R. Co. v. Chapman, 80 Ala. 615; 2 So. Rep. 738; Fox v. Borkey, 126 Penn. St. 164; 24 W. N. C. 49; 17 Atl. Rep. 604. By reason of a defective ladder a workman fell and struck another workman. In an action by the latter against the master it was held that the defective ladder was the direct cause of the injury. Ryan v. Miller, 12 Daly (N. Y.) 77. A brakeman caught his foot in a tie, and an engine, defective in that it could not be quickly stopped, ran over the foot. It was left for the jury to say whether the catching the foot or the defect in the engine was the cause of the injury. Bajus v. Syracuse, &c., R. Co., 34 Hun (N. Y.) 153. Knapp v. Sioux City, &c., Ry. Co., 65 Iowa, 91; 50 Am. Rep. 569, note; Crowley v. Burlington, &c., Ry. Co., 65 Iowa, 658; Omslaer v. Philadelphia Co., 31 Fed. Rep. 354; Lowery v. Manhattan Ry. Co., 99 N. Y. 158; 52 Am. Rep. 12. Evidence that the proximate cause of the injuries was the wrongful interference of a third person, is admissible, though such third person was an infant under the age of discretion. Otten v. Cohen, 1 N. Y. Supl. 430; Lehman v. Brooklyn City R. Co., 47 Hun, 355; Sweeney v. New York Steam Co., 6 N. Y. Supl. 528; Wright v. Chicago, &c., Ry. Co., 27 Ill. App. 200; South Side Passenger Ry. Co. v. Trich, 117 Penn. St. 390; 11 Atl. Rep. 627; Cosulich v. Standard Oil Co., 55 N. Y. Super. Ct. 384; Spaulding v. Town of Sherman, 75 Wis. 77; 43 N. W. Rep. 558; Lewis v. Flint, &c., Ry. Co., 54 Mich. 55, which contains an exhaustive discussion by Judge Cooley of the question of proximate cause. George v. Smith, 6 Ired. (N. C.) Law, 273; Texas, &c., R. Co. v. Anderson (Sup. Ct. Texas), 4 Texas L. Rev. 211; Brooks v. Boston, 19 Pick. 174.

The Squib Case.— Scott v. Shepherd, 2 Wm. Black. 892, is an interesting one. Here A., the defendant, threw a lighted squib into a market house. The said squib falling on the stand of B., C., his neighbor, picked it up and threw it across the said market place, where it fell on the stand of D., who, in order to save his wares, cast it away, and accidentally struck with it the plaintiff, putting out one of his eyes. While Blackstone, J., argued that the injury was not a direct consequence of the defendant's act, since two independent agencies — C. and D. — had given the squib very different impulses from the one which first impelled it, yet the majority

order to be contributory, as the law understands that limitation, there must be, as we have seen, a true proximate causal connection between the negligence and the injury. Collateral negligence, by which is meant such negligence as is neither a cause

of the court held that the action was maintainable. In throwing the squib, the defendant intended wanton mischief, and whatever mischief followed, he was the author of it; the intervention of C. and D. was not that of free agents, since they acted under a compulsive necessity for their own safety. The injury, therefore, could only be regarded as the direct and immediate act of the defendant. Bellefontaine, &c., R. Co. v. Snyder, 18 Ohio St. 399; McGrew v. Stone, 53 Penn. St. 436; Greenland v. Chaplin, 5 Exch. 243; Harrison v. Berkley, 1 Strobh. Law (S. C.) 549; 47 Am. Dec. 578; Page v. Bucksport, 64 Me. 51; 18 Am. Rep. 239; Thomas v. Winchester, 6 N. Y. 397; 57 Am. Dec. 455, and note; Milwaukee, &c., R. Co. v. Kellogg, 94 U. S. 469; Ehrgott v. The Mayor, &c., 96 N. Y. 264; 48 Am. Rep. 622; Heney v. Dennis, 93 Ind. 452; 47 Am. Rep. 378, and the note. Where a fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for such a loss could not be reasonably anticipated from the careless setting of the first fire, taking all the concomitant circumstances at the time under consideration. Fent v. Toledo, &c., R. Co., 59 Ill. 349; 14 Am. Rep. 13; Beauchamp v. Saginaw Mining Co., 50 Mich. 163; 45 Am. Rep. 30; Henry v. St. Louis, &c., R. Co., 76 Mo. 288; 43 Am. Rep. 762. See, likewise, Read v. Nichols, 118 N. Y. 224; 23 N. E. Rep. 468, where the fire apparatus was defective and the wind changed; and Haverly v. State Line, &c., R. Co., 135 Penn. St. 50; 19 Atl. Rep. 1013; 26 W. N. C. 321, where the fire was supposed to have been put out and a wind arose, and the question was left to the jury. In Brown v. Chicago, &c., R. Co., 54 Wis. 342; 41 Am. Rep. 41 and note, a pregnant woman was carelessly directed by a brakeman to leave the train at a point three miles short of her station, and she walked to her destination. This walk brought on miscarriage and death, and it was held that for these consequences the carrier was responsible. In East Tennessee, &c., R. Co. v. Lockhart, 79 Ala. 315, a girl of eight was compelled to walk a mile over a rough road, and recovered damages for sickness. But see *contra*, Corrister v. Kansas City, &c., R. Co., 25 Mo. App. 619, where defendant was held not liable for damages resulting from exposure of plaintiff who, being unlawfully put off a train thirty miles from his destination late in the afternoon, and without money, walked on all night in the rain. See, also, Texas, &c., R. Co. v. Cole, 66 Tex. 562; 1 S. W. Rep. 629; Hadley v. Baxendale, 9 Exch. 341; 23 L. J. (Exch.) 179; Drake v. Kiely, 93 Penn. St. 492. In Scheffer v. Railroad Co., 105 U. S.

nor a condition of the injury, is not material,[77] neither is remote negligence, which is described as a condition and not a cause of the catastrophe, nor are even collateral violations of law, if they do not legally contribute to the injury, a defense.[78]

249, the facts were that, by reason of a collision of railway trains, a passenger was injured, and becoming thereby disordered in mind and body, he some eight months thereafter committed suicide. *Held*, that his own act was the proximate cause of his death. The court said:—"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends." Compare, however, Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168, where it is held that when an injury to a passenger, caused by the negligence of the carrier, is such as to render the system of the injured man liable to take on disease and to make it less liable to resist its inroads, and death results, the death is, in legal contemplation, attributable to the negligence of the carrier, which, in other words, must be considered a proximate cause. Murdock v. Boston, &c., R. Co., 133 Mass. 15; Penn. R. Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 431; Penn. R. Co. v. Hope, 80 Penn. St. 373; 21 Am. Rep. 100.

Pleading.— The complaint in an action founded on negligence must state facts showing that the negligence was the proximate cause of the injury for which damages are sought. Pittsburgh, &c., Ry. Co., 104 Ind. 64. Otherwise it is demurrable. Kistner v. Indianapolis, 100 Ind. 210. Where the petition, after setting forth the acts and omissions constituting negligence, alleged "that in consequence of the aforesaid wrongful acts, neglect and default of defendants, and without fault on his part, the said W. * * * fell into and through the hatchway," etc., it was held that the negligence was sufficiently alleged as a proximate cause of the injury. Schultz v. Moon, 33 Mo. App. 329. See, generally, on proximate and remote cause, 3 Sutherland on Damages, 714, 715; Cooley on Torts, 69; Wharton on Negligence, §§ 134, 138; Addison on Torts (3d ed.), 5; Shearman & Redfield on Negligence, § 94.

[77] Penn. R. Co. v. Righter, 42 N. J. Law, 180; Hayes v. 42d St. R. Co., 14 N. Y. Week. Dig. 28; Gray v. Scott, 66 Penn. St. 345, where a car was negligently pushed over the end of a track and killed a boy playing in the passage. This boy had been frequently warned not to be in the passage on account of danger from trucks and wheelbarrows. Hence, as he had no reason to expect harm from cars, his not heeding the warning was held to be no contributory negligence to the injury.

[78] Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191, and note; Welch v. Wesson, 6 Gray, 505. Thus, where a plaintiff was injured by reason of a defective

§ 34. Connection of the plaintiff's negligence with his injury.—What the causal connection between the plaintiff's negligence and his injury must be, if it is to amount to a defense to his action, has been precisely defined by the courts. His negligence need not be the *sole* proximate cause of the injury on the one hand,[79] nor is he required to be wholly free even from slight negligence on the other hand.[80] Those cases which hold that

way, he was allowed to recover, though he was driving at a rate which was a violation of a city ordinance. Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274; Neanow v. Ulech, 46 Wis. 581.

79 Radley v. London, &c., R. Co., L. R. 9 Exch. 91; s. c. 43 L. J. (Exch.) 73; McAunich v. Miss., &c., R. Co., 20 Iowa, 338; Muldowney v. Illinois, &c., R. Co., 39 Iowa, 615; North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; 7 So. Rep. 360; Williams v. Edmunds, 75 Mich. 92; 42 N. W. Rep. 534; and the jury should be so instructed. Deeds v. Chicago, &c., Ry. Co., 69 Iowa, 164; Dougherty v. Missouri R. Co., 97 Mo. 647; 11 S. W. Rep. 251; McKeller v. Township of Monitor, 78 Mich. 485; 44 N. W. Rep. 412.

80 Bridge v. Grand Junction Ry. Co., 3 Mee. & W. 244; Cremer v. Portland, 36 Wis. 92; Hammond v. Mukwa, 40 Wis. 35; Baltimore, &c., R. Co. v. Fitzpatrick, 35 Md. 32; Houston, &c., R. Co. v. Gorbett, 49 Tex. 573; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Manly v. Wilmington, &c., R. Co., 74 N. C. 655. One whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the more proximate cause of the injury, but it is, did the negligence of the complainant directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant does not excuse it. Pyle v. Clark, 49 U. S. App. 260; 79 Fed. Rep. 744; Railway Co. v. Davis, 10 U. S. App. 422, 426; 3 C. C. A. 429, 431; 53 Fed. Rep. 61, 63; Railway Co. v. Moseley, 12 U. S. App. 601, 604, 608; 6 C. C. A. 641, 643, 646; 57 Fed. Rep. 921-923, 925; Reynolds v. Railway Co., 32 U. S. App. 577; 16 C. C. A. 435; 69 Fed. Rep. 808, 811; Motey v. Granite Co., 36 U. S. App. 682; 20 C. C. A. 366; 74 Fed. Rep. 156; Schofield v. Railway Co., 114 U. S. 615, 618; Railroad Co. v. Houston, 95 U. S. 697, 702; Hayden v. Railway Co., 124 Mo. 566, 573; 28 S. W. Rep. 74; Wilcox v. Railroad Co., 39 N. Y. 358. And after contributory negligence is shown, the plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of the defendant to have been the proximate cause, by offering testimony that merely raises a conjecture. He must show the nature of such act or omission, so that the jury may fairly infer that it was the immediate cause of the injury. Norwood v. Raleigh & Gaston R. Co., 111 N. C. 236. In Willis v. Providence Telegram Pub. Co., 38 Atl. Rep. 947, it was held that where plaintiff's horse became frightened by a collision with de-

the plaintiff must be entirely free from negligence, and that the

fendant's negligently driven team, and plaintiff seized her horse by the bridle rein in her attempt to prevent him from running away, and was injured in so doing (her baby being in the wagon to which her horse was hitched at the time), the proximate cause of the injury could not be said, as matter of law, to be some act intervening between the collision and the injury. The court said:—"The doctrine of proximate cause, in cases of accident resulting from the frightening and consequent running away of horses on the highway, as deduced from the numerous adjudications thereon, seems to be that the negligence which causes the fright and consequent running away of the horse is the proximate cause of the injury, and that this is so although some intervening cause contributed to the injury." Busw. Pers. Inj., § 99. At any rate, the question of concurring causes, as held by this court in Yeaw v. Williams, 15 R. I. 20; 23 Atl. Rep. 33, is a question for the jury, under proper instructions, and hence cannot be determined on demurrer, unless, indeed, it clearly appears from the declaration that the proximate cause of the injury was the plaintiff's carelessness. (See, also, Wilson v. Dock Co., L. R. 1 Exch. 186.) Judge Cooley, in his work on Torts, states the law of proximate cause thus:—"If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." And this summary of the law is abundantly sustained by the authorities. See Addison on Torts, § 12; Shearman & Redfield on Negligence (2d ed.), §§ 10, 33; Campbell v. City of Stillwater, 32 Minn. 308; 20 N. W. Rep. 320; Wood v. Railroad Co., 177 Penn. St. 306; 35 Atl. Rep. 699; Hoag v. Railroad Co., 85 Penn. St. 293; Derry v. Flitner, 118 Mass. 134; Kennedy v. Mayor, &c., 73 N. Y. 365; Sturgis v. Kountz, 165 Penn. St. 358; 30 Atl. Rep. 976; Brown v. Railway Co., 20 Mo. App. 222; Billman v. Railroad Co., 76 Ind. 166; 16 Am. & Eng. Enc. of Law, 436, and cases cited; Jagg. on Torts, chap. 5; Scott v. Shepherd, 1 Smith's Leading Cases (Hare & W. Notes), *549; McGrew v. Stone, 53 Penn. St. 436; Railroad Co. v. Snyder, 18 Ohio St. 399; Connell's Exrs. v. Railway Co., 93 Va. 44; 24 S. E. Rep. 467. In the case of McDonald v. Snelling, 14 Allen, 290, where the question as to the proximate cause of an injury caused by a runaway horse through the negligence of the defendant was very fully considered, the court, in overruling the demurrer to the declaration, said, among other things:—"It is clear, from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or

injury must be wholly due to the defendant's negligence,[81] have not been generally followed. It is not, however, sufficient that the plaintiff's negligence should have contributed merely to aggravation of the injury without having contributed to the happening of the accident.[82] The true rule is, that if the neg-

agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result which might reasonably have been foreseen as probable, the legal liability continues." In Mahogany v. Ward, 16 R. I. 479; 17 Atl. Rep. 860, this court recognized the same doctrine; for while it was there held that the independent act of a responsible person arrests causation, and is to be regarded as the proximate cause of the injury, the original negligence being considered merely the remote cause thereof, yet the court said that this rule "is subject to the qualification that, if the intervening act is such as might reasonably have been anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable." See, also, Lee v. Railroad Co., 12 R. I. 383. It certainly cannot be said that a person who attempts to prevent his horse from running away when it has become frightened by a collision with another team is necessarily guilty of negligence, even though the person in charge of the horse is not in his carriage, and does not actually have hold of the reins at the time of the collision. And this is even more clearly so when a helpless child is in the carriage, and when the first impulse of every rational person would be to prevent the horse from running away. Whether or not the act of the plaintiff in any given case is in fact a rash, or even negligent, one, and, hence, such as would prevent him from recovering in an action of this sort, is for the jury to determine in view of all the circumstances of the particular case."

[81] Philadelphia, &c., R. Co. v. Boyer, 97 Penn. St. 91; New Jersey Express Co. v. Nichols, 33 N. J. Law, 434 (but see Runyon v. Central R. Co., 25 N. J. Law, 556, and Telfer v. Northern R. Co., 30 N. J. Law, 188); Toledo, &c., R. Co. v. Goddard, 25 Ind. 185; Wilds v. Hudson River R. Co., 24 N. Y. 430; Griffen v. New York, &c., R. Co., 40 N. Y. 34; Vanderplank v. Miller, Moody & M. 169.

[82] If plaintiff's negligence aggravated the injury, without tending to cause it, it would not bar a recovery, but defendant would be liable only for such damages as its negligence produced. City of Goshen v. England, 119 Ind. 368; 21 N. E. Rep. 977. Even assuming that there could be no recovery for the death of a child caused by negligent treatment after the accident, the claim for the original injury would not be affected. City of Bradford v. Downs, 126 Penn. St. 622; 24 W. N. C. 153; 17 Atl. Rep. 884. The defendant is liable

ligence of the plaintiff contributed *in any degree* to cause or occasion the accident, there can be no recovery. The law refuses to apportion damages in such a case or to weigh the wrong of one party over against the fault of the other, and thus strike a book-keeper's balance, and accordingly, when the plaintiff's negligence is in any degree, however small, contributory to the injury he has no remedy.[83] This is of the very essence of the law of contributory negligence. The rule is sometimes said to be that it must appear, in order to defeat the right of action, that, but for the plaintiff's negligence operating as an efficient

for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured. McNamara v. Clintonville, 62 Wis. 207; 51 Am. Rep. 722; Louisville, &c., Ry. Co. v. Jones, 108 Ind. 551. In an action for killing an ox, a refusal to instruct that if plaintiff was informed of the accident on the evening of the day when it occurred, and could by reasonable diligence have used the hide, or meat, and did receive the hide, then the value of the hide, and of the meat that was or could have been used, should be deducted from the value of the ox when killed, was held to be error. Memphis & C. R. Co. v. Hembree, 84 Ala. 182; 4 So. Rep. 392. The question is not whether the plaintiff contributed to the *amount* of the injury, but to its *occurrence*. Coleridge, J., in Sills v. Brown, 9 Car. & P. 601, 606; Stebbens v. Central R. Co., 54 Vt. 464; 41 Am. Rep. 855; Gould v. McKenna, 86 Penn. St. 297; 27 Am. Rep. 705; Secord v. St. Paul, &c., Ry. Co., 5 McCrary, 515; Shearman & Redfield on Negligence, § 93, and cases cited in their note; Wharton on Negligence, § 868 *et seq.*

83 Oil City Fuel Supply Co. v. Boundy, 122 Penn. St. 449; 15 Atl. Rep. 865; Monongahela City v. Fischer, 111 Penn. St. 9; 56 Am. Rep. 241; Dowell v. General Steam Navigation Co., 5 El. & Bl. 195; Witherley v. Regents Canal Co., 12 C. B. (N. S.) 2; 6 L. T. (N. S.) 255; 3 Fost. & Fin. 61; Lack v. Seward, 4 Car. & P. 106; Luxford v. Large, 5 Car. & P. 421; Woolf v. Beard, 8 Car. & P. 373; Vennall v. Garner, 1 Cromp. & M. 21; Kent v. Elstob, 3 East, 18; Cremer v. Portland, 36 Wis. 92; Otis v. Janesville, 47 Wis. 422; Knight v. Ponchartrain R. Co., 23 La. Ann. 462; Johnson v. Canal, &c., R. Co., 27 La. Ann. 53; Laicher v. New Orleans, &c., R. Co., 28 La. Ann. 320; Broadwell v. Swigert, 7 B. Mon. 39; 45 Am. Dec. 47, and the note; O'Brien v. Phila., &c., R. Co., 3 Phila. 76; Catawissa R. Co. v. Armstrong, 49 Penn. St. 186; Stiles v. Geesey, 71 Penn. St. 439; Needham v. San Francisco, &c., R. Co., 37 Cal. 409; Flemming v. Western, &c., R. Co., 49 Cal. 253; Hearne v. Southern, &c., R. Co., 50 Cal. 482; Coombs v. Purrington, 42 Me. 332; Murphy v. Deane, 101 Mass. 455; Willard v. Pinard, 44 Vt. 34; Munger v. Tonawanda, &c., R. Co., 4 N. Y. 349; Crandell v. Goodrich Trans. Co., 11 Biss. 516; 16 Fed. Rep. 75.

cause of the injury, in connection with the fault of the defendant, the injury would not have happened.[84] And so it is said that the negligence of the plaintiff must "directly" contribute to the happening of the injury or the plaintiff may have his action.[85]

§ 35. Summary statement of the doctrine of contributory negligence as a defense.—However it may have been expressed, the principle underlying all these decisions seems to be, and verily it is the only sound basis upon which they can rest, that when-

[84] Paducah, &c., R. Co. v. Hoehl, 12 Bush (Ky.) 41; Kentucky, &c., R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208; Houston, &c., R. Co. v. Clemmons, 55 Tex. 88; 40 Am. Rep. 799; Hickey v. Boston, &c., R. Co., 14 Allen, 429; Pennsylvania R. Co. v. Langdon, 92 Penn. St. 21; 137 Am. Rep. 651. In Colorado, &c., R. Co. v. Holmes, 5 Colo. 197, the rule is more qualifiedly laid down. It is there held that where the plaintiff himself so far contributes to the injury by his own negligence, as that but for such fault on his part the injury would not have happened, he is not entitled to recover, unless the defendant, by the exercise of care on his part, might have avoided the consequences of the negligent conduct of the plaintiff. Murphy v. Deane, 101 Mass. 455; 3 Am. Rep. 390; Richmond, &c., R. Co. v. Morris, 31 Gratt. 200; Richmond, &c., R. Co. v. Anderson, 31 Gratt. 812; Wood v. Jones (La.), 15 Rep. 555; Railroad Co. v. Jones, 95 U. S. 439; Runyon v. Central R. Co., 25 N. J. Law, 556; Moore v. Central R. Co., 24 N. J. Law, 268; Telfer v. Northern, &c., R. Co., 30 N. J. Law, 188; Wharton on Negligence, § 324.

[85] In Tuff v. Warman, 2 C. B. (N. S.) 740; 5 C. B. (N. S.) 573, much of the discussion on the motion for a new trial turned upon the use of the word "directly," the defendant's counsel contending that the instruction should have been that there could be no recovery if the plaintiff contributed in any way to the accident. The court, however, refused the correction, and held that the only way in which the imputed negligence could operate was direct, and hence the instruction could not mislead. Village of Orleans v. Perry, 24 Neb. 831; 40 N. W. Rep. 417, is *in quattuor pedibus* with Tuff v. Warman, *supra*. See, also, Johnson v. Hudson R. Co., 20 N. Y. 65; Norris v. Litchfield, 35 N. H. 271; Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570. The Farmer v. McCraw, 27 Ala. 109; McNaughton v. Caledonian R. Co. (Scotch), 22 Dunl. B. & M. 160; 31 Jur. 94; Hay's Dec. 206; Shearman & Redfield on Negligence, § 94. But see *contra*, Button v. Hudson River R. Co., 18 N. Y. 248, where Harris, J., held that the word "directly" did mislead the jury, and any concurrence by the plaintiff in the production of the accident would bar recovery. The other judges, while agreeing, still doubted whether the word did any practical injury to the defendant.

ever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury for which he brings his action, his right to recover is thereby destroyed. Anything more than this imposes upon the plaintiff the duty of exercising more than ordinary care, and refuses him a remedy for injuries that others inflict upon him; and anything less than this, covered up never so mistily in belabored and confusing legal phraseology, imposes upon the defendant the duty of exercising more than ordinary care, requires him to take better care of the plaintiff than the law requires the plaintiff to take of himself, and compels him to pay damages for injuries that he did not inflict. There can be no middle ground; either the truth of these elementary propositions must be conceded or the whole theory of our modern law of contributory negligence must be abandoned. Without this it is a theory of oppression and injustice. There is no room for it in the common law.

CHAPTER III.

THE PLAINTIFF'S CONDUCT OR CONDITION AS AFFECTING THE RIGHT TO RECOVER.

§ 36. The plaintiff's previous knowledge.
37. Voluntary exposure to danger.
38. Plaintiff's failure to anticipate the fault of defendant.
39. This rule further stated.
40. Plaintiff acting erroneously under the impulse of fear produced by the defendant.
41. The same subject continued.
42. Plaintiff acting erroneously in trying to save human life.
43. Same subject where defendant not negligent.
44. Exposure in effort to save property.
44a. Where one is in discharge of legal duty.
45. Plaintiff doing an illegal act.
46. Wilful negligence of the defendant.
47. Where plaintiff acts in violation of law.
48. A misapplication of this rule.
§ 49. When plaintiff and defendant are *in pari delicto*.
50. Plaintiff a trespasser.
51. Invitation upon or license to go upon dangerous premises.
51a. Children as trespassers — Liability of landowner — Dangerous attractions.
52. A trespass as *per se* contributory negligence.
53. The same subject continued.
54. Plaintiff's prior negligence in connection with defendant's subsequent negligence.
55. Judge Thompson's position criticised.
56. When the plaintiff's negligence precedes the defendant's in point of time.
57. Plaintiff's negligence after the catastrophe.
58. The same subject continued.
59. This statement of the rule examined.
60. Negligence of the decedent under Lord Campbell's act.

§ 36. The plaintiff's previous knowledge.—Knowledge on the part of the plaintiff as to the danger to which he is exposed, or, what is the same thing in law, a legal obligation to know of it, is an essential element in the case, when contributory negligence is the issue. The law holds no one responsible for exposing himself to a danger of which he knew nothing, and of which he was under no obligation to inform himself. We must use ordinary care and prudence to avoid the ordinary and usual perils that beset us, but we are not bound to guard against those which

we have no reason, under the circumstances, to suspect.[1] Hence, knowledge of the probable danger, or a sufficient reason to apprehend it, is essential to constitute contributory negligence. When it appears that the plaintiff has suffered an injury at the hands of the defendant from a cause which neither of them knew, or had reason to believe would produce the result, it is an inevitable accident, and the defendant is not responsible. No one is judicially responsible, and the damage must lie where it falls. In the language of Chief Justice Nelson, of New York:— "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. * * * All the cases concede that an injury arising from inevitable accident, or which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."[2] And so, by parity of reasoning, when a plaintiff suffers an injury at the hands of a defendant, and it appears that the sufferer neither knew of the danger to which his conduct exposed him, nor had any reasonable ground to apprehend it, he is not guilty of contributory negligence, and if the negligence of the defendant is established, he may recover.

[1] Wall v. Town of Highland, 72 Wis. 435; 39 N. W. Rep. 560; Pennsylvania Tel. Co. v. Varnau (Penn.), 15 Atl. Rep. 624; Moomey v. Peak, 57 Mich. 259; Jeffrey v. Keokuk, &c., R. Co., 56 Iowa, 546; Langan v. St. Louis, &c., R. Co., 72 Mo. 392; Thirteenth Street R. Co. v. Boudrou, 92 Penn. St. 475; 37 Am. Rep. 707; Towler v. Baltimore, &c., R. Co., 18 W. Va. 579; Gray v. Scott, 66 Penn. St. 345; Dush v. Fitzhugh, 2 Lea, 307. A saloon-keeper is not to be presumed to know that sewer gas, when mixed in certain proportions with air, will explode; and, therefore, is not necessarily negligent in not making known the fact that the gas is escaping into his house. Kibele v. Philadelphia, 105 Penn. St. 41. Thus, in McGuire v. Spence, 91 N. Y. 303, it was held that one passing along a sidewalk has a right to presume it to be safe, and hence cannot be charged with negligence for not being on his guard against an unlawful obstruction, or for not looking for it, although it is visible. See, also, to the same point, County of Howard v. Legg (Ind.), 11 N. E. Rep. 612; Bloomsburg S. & E. L. Co. v. Gardner, 126 Penn. St. 80; 24 W. N. C. 21; 17 Atl. Rep. 521; McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510; Varney v. Manchester, 58 N. H. 430; 42 Am. Rep. 592; Murray v. McShane, 52 Md. 217; 36 Am. Rep. 367.

[2] Harvey v. Dunlop, Lalor's Sup., Hill & Denio, 193.

§ 37. Voluntary exposure to danger.— While it is unquestionably true that one may voluntarily and unnecessarily expose himself, or his property, to danger without thereby becoming guilty of contributory negligence as matter of law,[3] it is, nevertheless, an established rule that, where one does knowingly put himself or his property in danger, there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct,[4] as where one goes voluntarily upon a railway track, without keeping watch, at a point where it is known to be especially dangerous,[5] or ventures upon a bridge, track, or highway which he knows to be defective or unsafe.[6] And where one knowing the danger temporarily for-

[3] Dublin, &c., Ry. Co. v. Slattery, 3 L. R. App. Cas. 1155; Albion v. Hetrick, 90 Ind. 545; Jeffrey v. Keokuk, &c., R. Co., 56 Iowa, 546.

[4] Frazer v. South. & N. Ala. R. Co., 81 Ala. 185; 1 So. Rep. 85. A man cannot place himself in a position of known danger, and recover for an injury resulting therefrom. Chicago & Alton R. Co. v. Murphy, 17 Ill. App. 444; Schoenfeld v. Milwaukee City Ry. Co., 74 Wis. 433; 43 N. W. Rep. 162; Allen v. Johnson, 76 Mich. 31; 42 N. W. Rep. 1075; Goldstein v. Chicago, &c., R. Co., 46 Wis. 404; Fisher v. Town of Franklin, 89 Wis. 42. "A party cannot knowingly expose himself to danger, and then recover damages for an injury which he might have avoided by the use of a reasonable precaution." Lake Shore, &c., R. Co. v. Clemens, 5 Brad. 77, 80; Palmer v. Dearing, 17 Week. Dig. (N. Y.) 145.

[5] Baltimore, &c., R. Co. v. Depew, 40 Ohio St. 121; Pittsburgh, &c., R. Co. v. Collins, 87 Penn. St. 405; 30 Am. Rep. 371; Louisville, &c., R. Co. v. Yneistra, 21 Fla. 700. Plaintiff's intestate was killed by a train at a crossing, the view of which was obscured by smoke. Had he waited a moment he could have seen the train. It was held that a verdict for the defendant was properly ordered. McCrory v. Chicago, &c., Ry. Co., 31 Fed. Rep. 531. For cases on the duty to "look and listen" at a railroad crossing, see *infra*, § 181 *et seq.*

[6] In the following cases plaintiff's knowledge of the defect or danger precluded him from recovery:—

Bridges.— In Morrison v. Shelby County, 116 Ind. 431; 19 N. E. Rep. 316, plaintiff had known for some time before the accident that the bridge was out of repair, that the boards were loose and travel-worn, and had usually avoided it. He testified that on the occasion of the accident he exercised great care and caution in driving over the bridge, which was then in public use. Nevertheless, the court was held warranted in finding him guilty of contributory negligence. Travis v. Town of Carrollton, 7 N. Y. Supl. 231; Splittorf v. State, 108 N. Y. 205; 15 N. E. Rep. 322. Knowledge is to be presumed from habitual use for a long time. Dale v. Webster

gets it, and in consequence suffers, his forgetfulness will not avail him as an excuse. What he knows he must remember at his peril, and not to remember is contributory negligence if it

County, 76 Iowa, 370; 41 N. W. Rep. 1. But see Tift v. Jones, 74 Ga. 469. "If a bridge is in general use by the public, and a person drives upon it carefully, even though he should know that it is not in all respects in a proper state of repair, but believing that he could cross without danger, the law will not count it contributory negligence if he do so. He is not bound to apprehend every possible danger. This was a gravel road, a public highway leading to the county seat, and the appellee was under no obligation to drive out of her way to seek another road, unless, indeed, she had actual knowledge that it was unsafe to continue upon this road." Board of Commissioners of Boone County v. Mutchler, 137 Ind. 140, 148. In Homan v. Franklin County, 90 Iowa, 185, 188-189, it was said:—"To our minds, the effect of the invitation to the public to cross or use a bridge that is really unsafe, and cannot be prudently used, ceases in behalf of any person who actually knows of the unsafe condition. When such knowledge obtains, then the reason for the rule ceases, for the person does not then rely upon the invitation or apparent conditions as to safety, but he assumes the risk of using that which he actually knows to be unsuitable for use. Reasonable care and caution do not go hand in hand with one who thus assumes to act. A reasonably cautious and prudent man, with two ways open before him, one of which is safe and convenient, and the other known to be so unsafe that it cannot be prudently used, would not choose the latter. Such an act is one of venture, rather than prudence."

Highway.— Delaware, L. & W. R. Co. v. Cadow, 120 Penn. St. 559; 14 Atl. Rep. 450; Phillips v. Ritchie County, 31 W. Va. 477; 7 S. E. Rep. 427; Walker v. Reidsville, 96 N. C. 382. See, also, Hopkins v. Town of Rush River, 70 Wis. 10; 34 N. W. Rep. 909. The phrase "known dangerous obstruction," in instructions was held to mean an obstruction known to plaintiff. Jochem v. Robinson, 72 Wis. 199; s. c. 39 N. W. Rep. 383.

Sidewalks.— Barnes v. Sowden, 119 Penn. St. 53; s. c. 12 Atl. Rep. 804; Macomb v. Smithers, 6 Bradw. 470. Here the plaintiff, knowing the sidewalk to be slippery, because of the snow and ice thereon, walked on it as if no obstruction existed. He was not allowed to recover. Twogood v. New York, 12 Daly (N. Y.) 220. One who, knowing of the existence of an obstruction in the sidewalk, stumbles over it in the dark, cannot recover. Indianapolis v. Cook, 99 Ind. 10. Especially if there is a safe walk near by. McGinty v. Keokuk, 66 Iowa, 725. And see Hartman v. Muscatine, 70 Iowa, 511. But held a question for the jury in Fulliam v. Muscatine, 70 Iowa, 436. See Bullock v. New York, 99 N. Y. 654; Emporia v. Schmidling, 33 Kan. 485, where it was held that the presumption of negligence is not conclusive, and also cases cited in note at end of this section. Driv-

occasions the injury.[7] Knowledge, however, in this respect, does not necessarily constitute contributory negligence.[8] It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence; but it is a disputable presumption and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances.[9]

ing on ice-field. Woodman v. Pitman, 79 Me. 456; 10 Atl. Rep. 321. Falling into turn-table pit. Early v. Lake Shore, &c., Ry. Co., 66 Mich. 349; 33 N. W. Rep. 813. Through draw-bridge. Muhr v. City of New York, 2 N. Y. Supl. 59. Down river bank. Montgomery, &c., Ry. Co. v. Thompson, 77 Ala. 448; 54 Am. Rep. 72. Unguarded elevator well. Taylor v. Carew Manuf. Co., 140 Mass. 150. Diving into shallow water. Hinz v. Starin, 3 N. Y. Supl. 290. Exposing horse to object frightening other horses. Pittsburgh Southern Ry. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580; City of Erie v. Magill, 101 Penn. St. 616; 47 Am. Rep. 739; Corbett v. Leavenworth, 27 Kan. 672; Mehan v. Syracuse, &c., R. Co., 73 N. Y. 585; Mansfield, &c., Coal Co. v. McEnery, 91 Penn. St. 185; 36 Am. Rep. 662. See, also, Lancaster v. Kissinger, 12 Rep. 635; Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Miller v. Union Pacific R. Co., 2 McCrary, 87. So, where a passenger occupies a position in a car, against the warning of the driver and the rules of the corporation. Wills v. Linn, &c., R. Co., 129 Mass. 351; Lehigh Valley Coal Co. v. Jones, 6 Rep. 125; Lake Shore, &c., R. Co. v. Roy, 5 Bradw. 82; Marquette, &c., R. Co. v. Spear, 44 Mich. 169; 38 Am. Rep. 142, where it was held that one who invites another to bring upon his premises for use a dangerous implement, knowing it to be such, will take upon himself the consequences which naturally follow. Stebbins v. Township of Keane, 55 Mich. 552; 22 N. W. Rep. 37; Wohlfahrt v. Beckert, 92 N. Y. 490; 44 Am. Rep. 406; Griffiths v. Gidlow, 3 Hurl. & N. 648; Smith v. St. Lawrence, &c., Co., L. R. 5 P. C. 308; Caswell v. Worth, 5 El. & Bl. 849.

[7] As where a person familiar with a dangerous railroad crossing, in a fit of absent-mindedness, omitted to ascertain whether a train was coming, and consequently was injured. Baltimore, &c., R. Co. v. Whitacre, 35 Ohio St. 627; Bruker v. Covington, 69 Ind. 33; 35 Am. Rep. 202; Bassett v. Fish, 75 N. Y. 303; Weed v. Ballston Spa, 76 N. Y. 329.

[8] Therefore, a complaint which sets forth facts showing that plaintiff had knowledge of the danger is not demurrable on that ground. Evansville, &c., R. Co. v. Crist, 116 Ind. 446; 19 N. E. Rep. 446.

[9] *Bridges.*— One is not necessarily precluded from recovering damages from a town for an accident sustained from a defect in a bridge, by the fact that he knew

§ 38. Plaintiff's failure to anticipate the fault of the defendant.— It is sometimes said that, inasmuch as there is a natural presumption that every one will act with due care, it cannot be

of the defect before he drove on to it. Spearbracker v. Larrabee, 64 Wis. 573; Kelly v. New York, &c., R. Co., 9 N. Y. Supl. 90; Monongahela Bridge Co. v. Bevard (Penn.), 11 Atl. Rep. 575; Taylor v. Town of Constable, 10 N. Y. Supl. 607; Gulf, &c., Ry. Co. v. Gasscamp, 69 Tex. 545; 7 S. W. Rep. 227.

Highway.— Where plaintiff was injured while traveling in a dark night, an instruction that if "the highway was defective and dangerous, and was left open and unguarded, to be traveled by the public, and the plaintiff, while traveling on said highway, was injured in consequence of the defect, the fact that the plaintiff was acquainted with the condition of the road does not of itself constitute negligence on his part, and would not defeat his recovery, provided he was exercising due care and caution at the time of his injury," was held to be correct. Millcreek Township v. Perry, (Penn.), 12 Atl. Rep. 149; Kelly v. Town of Blackstone, 147 Mass. 448; 18 N. E. Rep. 217; Evansville, &c., R. Co. v. Carvener, 113 Ind. 51; 14 N. E. Rep. 738. In Frost v. Waltham, 12 Allen, 85, which was an action against a town to recover damages sustained by reason of a defective highway, by a citizen who lived near the place of the defect and fully knew of its existence, it was held that the plaintiff had no ground of exception to a ruling that he might nevertheless recover if he had used due care, but that his residence and knowledge were evidence tending to show carelessness on his part. Elyton Land Co. v. Mingea, 89 Ala. 521; 7 So. Rep. 666; Nichols v. Minneapolis, 33 Minn. 430. Whether one who, knowing of the existence of a hole in the street, steps into it on a dark night, is guilty of negligence, is a question of fact. Lowell v. Watertown, 58 Mich. 568; Fulliam v. Muscatine, 70 Iowa, 436. In determining whether plaintiff exercised ordinary care in attempting to travel a highway known to him to be partially obstructed, evidence that there was no other road by which he could reach his destination is competent. Skjeggerud v. Minneapolis, &c., Ry. Co., 38 Minn. 56; 35 N. W. Rep. 572.

Sidewalks.— A pedestrian, in a city on a dark night, well acquainted with the unsafe condition of a sidewalk, is not guilty of contributory negligence in taking it as the most direct way to his home, instead of some other way also unsafe, if he acted with that care with which a prudent man should act; and this is a question of fact for the jury. Altoona v. Lotz, 114 Penn. St. 238; Smith v. Ryan, 8 N. Y. Supl. 853; Town of Gossport v. Evans, 112 Ind. 133; 13 N. E. Rep. 256; Brezee v. Powers, 80 Mich. 172; 45 N. W. Rep. 130; Ross v. Davenport, 66 Iowa, 548. Falling into area alongside public alley. Bond v. Smith, 44 Hun (N. Y.) 219; Baldwin v. St. Louis, &c., Ry., Co., 63 Iowa, 210.

Railroad platforms.— White v. Cincinnati, &c., Ry. Co. (Ky.), 12 S. W. Rep. 936; Pennsyl-

imputed to the plaintiff, as negligence, that he did not anticipate that another person would violate the law, or would act negligently in a given particular, and in accordance with such an anticipation provide against the consequences of it. A long line of authorities is at hand in support of this proposition,[10] and if

vania Co. v. Marion, 123 Ind. 415; 23 N. E. Rep. 973; Gulf, &c., R. Co. v. Fox (Tex.), 6 S. W. Rep. 569. Erecting buildings near chimney with defective spark-arrester. Alpern v. Churchill, 53 Mich. 607. Falling down hatchway. Post v. Stockwell, 44 Hun (N. Y.) 28. Where there is no evidence of plaintiff's negligence, he is not entitled to an instruction that knowledge of the danger of that which he was doing was not conclusive evidence of neglect in failing to avoid it. Joyce v. Worcester, 140 Mass. 245; Reed v. Northfield, 13 Pick. 94; 23 Am. Dec. 662; Snow v. Housatonic R. Co., 8 Pick. 450; Coombs v. New Bedford Cordage Co., 102 Mass. 585; 3 Am. Rep. 506; Marble v. Ross, 124 Mass. 44; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; Osage City v. Brown, 27 Kan. 74; Wheeler v. Westport, 30 Wis. 392; Turner v. Buchanan, 82 Ind. 147; 42 Am. Rep. 485; Henry Co., &c., Co. v. Jackson, 86 Ind. 111; 44 Am. Rep. 274; Town of Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Estelle v. Lake Crystal, 27 Minn. 243; Thomas v. Mayor, &c., 28 Hun, 110; 15 Week. Dig. (N. Y.) 378; Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; Bassett v. Fish, 75 N. Y. 303; Weed v. Ballston Spa, 76 N. Y. 329; Ochsenbein v. Shapley, 85 N. Y. 214. See, also, Schaefler v. Sandusky, 33 Ohio St. 246; Pittsburgh, &c., R. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580.

[10] "We are entitled to count on the ordinary prudence of our fellow-men until we have specific warning to the contrary. The driver of a carriage assumes that other vehicles will observe the rule of the road, the master of a vessel that other ships will obey the statutory and other rules of navigation and the like, and generally no man is bound (either for the establishment of his own claims or to avoid claims of third persons against him) to use special precautions against merely possible want of care or skill on the part of others." Pollock on Torts, 388. A railroad company is not bound to expect persons will use the track at other places than at road crossings. Nolan v. New York, &c., R. Co., 53 Conn. 461. An engineer who sees a person walking on the track far ahead of the train is not guilty of negligence in supposing that he will get out of the way before the train reaches him. Frazer v. S. & N. Ala. R. Co., 81 Ala. 185; Central Trust Co. v. Wabash, &c., Ry. Co., 26 Fed. Rep. 896; Maloy v. Wabash, &c., Ry. Co., 84 Mo. 270; Ohio & M. Ry. Co. v. Walker, 113 Ind. 196; 15 N. E. Rep. 234. But if the person on the track is a child, a higher degree of care is required. Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179; 10 N. E. Rep. 70. Whether the person be a child or an adult, all

it means that it is not contributory negligence not to look out for danger, *when there is no reason to apprehend any*, it is a

the duty resting on the company is to try to avoid injuring him *after* he is discovered. Nolan v. New York, &c., R. Co., 53 Conn. 461. A traveler crossing a railroad track may assume that the train will not run at a speed prohibited by city ordinance. Hart v. Devereux, 41 Ohio St. 565; Schmidt v. Burlington, &c., Ry. Co., 75 Iowa, 606; 39 N. W. Rep. 916. And that the statutory warning will not be omitted. Missouri Pac. Ry. Co. v. Stevens, 35 Kan. 622; 12 Pac. Rep. 25. And need not anticipate a negligent act. O'Connor v. Missouri Pac. Ry. Co., 94 Mo. 150; 7 S. W. Rep. 106. But, in Milburn v. Kansas City, &c., R. Co., 86 Mo. 104 (Norton, J., dissenting), it was held that where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, if he does not, and they are injured by a passing train, he cannot recover. The owner has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. It was held in Gumb v. Twenty-third St. Ry. Co., 53 N. Y. Super. Ct. 466, that the driver of a street car has a right to presume that teams will keep out of the way. *Contra*, Gallagher v. Coney I., &c., R. Co., 4 N. Y. Supl. 870. A pedestrian crossing the highway need not anticipate reckless riding. Stringer v. Frost, 116 Ind. 477; 19 N. E. Rep. 331. Nor that a wagon will overtake and strike him, when there is ample room to pass on either side. Shea v. Reems, 36 La. Ann. 966. Customers of a railroad company, loading and unloading cars, and servants of the company in the performance of their duties, are justified in supposing that trains will not be run carelessly or contrary to rules. Chicago, &c., Ry. Co. v. Goebel, 119 Ill. 515; Hobson v. New Mexico & A. R. Co. (Ariz.), 11 Pac. Rep. 545; Iltis v. Chicago, &c., Ry. Co., 40 Minn. 273; 41 N. W. Rep. 1040; Gessley v. Missouri Pac. Ry. Co., 32 Mo. App. 413; Chicago, &c., Ry. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. Rep. 15; Nichols v. Chicago, &c., Ry. Co., 69 Iowa, 154; Central R. Co. v. Harrison, 73 Ga. 744; Yik Hon v. Spring Valley Water-Works, 65 Cal. 619; Stephens v. Martins (Penn.), 17 Atl. Rep. 242; 23 W. N. C. 475; New York, &c., R. Co. v. Grand Rapids, &c., R. Co., 116 Ind. 60; 18 N. E. Rep. 182; Ebright v. Mineral R. & M. Co. (Penn.), 15 Atl. Rep. 709; Anderson v. Scholey, 114 Ind. 553; 17 N. E. Rep. 125; Ernst v. Hudson River R. Co., 35 N. Y. 9; Newson v. New York, &c., R. Co., 29 N. Y. 383; Harpell v. Curtis, 1 E. D. Smith, 78; Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570; Fox v. Sackett, 10 Allen, 535; Fisk v. Wait, 104 Mass. 71; Reeves v. Delaware, &c., R. Co., 30 Penn. St. 454; Brown v. Linn, 31 Penn. St. 510; Shea v. Potrero, &c., R. Co., 44 Cal. 414; Damour v. Lyons, 44 Iowa, 276. In Kellogg v. Chicago, &c., Ry. Co., 26 Wis. 223, the general statement is made that in the exercise of his lawful rights, every person has a right to presume that every other will perform his duty and obey the law,

sound rule of law. That all men will under all circumstances act with due care may be a presumption of law. It is after the analogy of the presumption in the criminal law as to innocence, and therein lies the fallacy. Presumptions, or rules of evidence, applicable to guilt and innocence are obviously wholly inapplicable to care and carelessness. There is no sound analogy between carefulness and innocence, or guilt and negligence in this respect, and it is submitted that it is not a presumption of fact that men will exercise care rather than carelessness, on the average, under a given set of circumstances. Men of ordinary carefulness do not act upon such a presumption in the general conduct of their affairs.

§ 39. This rule further stated.—It is a duty to some extent to anticipate the probable carelessness and wrong doing of others.[11] The average prudent man does it every day, in watching the details of his business, in warning his employees, in insuring his property and his life, in bolting his doors at night, and, in short, in about everything he does, that marks him as a prudent and cautious man, and distinguishes him from the most careless and hapless of his neighbors. Not to exercise this measure of carefulness is to fall below the standard that men call "ordinary care." In a great variety of instances of everyday occurrence,

and it is not negligence for him to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. In Fraler v. Sears Union Water Co., 12 Cal. 555, the learned judge says: —"We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that, by reasonable care, the other might have got out of the way. * * * A mere want of reasonable care to *prevent the injury*, does not impair the right to recover." Robinson v. Western, &c., R. Co., 48 Cal. 409; Moulton v. Aldrich, 28 Kan. 300; Langan v. St. Louis, &c., R. Co., 72 Mo. 392; Gee v. Metropolitan, &c., R. Co., L. R. 8 Q. B. 161. In a case for running down a ship, it was held that the plaintiff could recover, although he might have prevented the collision, provided that he had the right to assume, because of the positions of the ships, that the defendant would make way. Vennall v. Gardner, 1 Cromp. & M. 21; The Mangerton, 1 Swab. 120; Foy v. Brighton, &c., R. Co., 18 C. B. (N. S.) 225; Clayards v. Dethick, 12 Q. B. 439; Shearman & Redfield on Negligence (5th ed.), § 92; Wharton on Negligence, §§ 74-78, incl.; Thompson on Negligence, 1172; 1 Sedgwick on Damages (8th ed.), p. 332.

[11] Texas, &c., R. Co. v. Young, 60 Tex. 201.

to proceed upon the presumption of other's carefulness is nothing short of gross negligence. Prudent men, on the average, instead of acting, in general, upon any such happy-go-lucky presumption as this, rather proceed upon the opposite presumption, and conduct themselves according to the maxim of the Kentucky backwoodsman, "*Be sure you are right*, then go ahead." [12] The rule that a plaintiff must exercise ordinary care under the circumstance in order to escape the imputation of contributory negligence will more often require him to act upon a presumption of the probable or possible negligence, or wrong doing, of others, than it will justify him in acting upon the contrary presumption. This, in the author's judgment, is a view that commends itself to the common experience and common sense of the average of mankind, though it has found little sanction at the hands of the judges.[13]

§ **40. Plaintiff acting erroneously under the impulse of fear produced by the defendant.**— When a plaintiff, through the negligence of the defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible, and for which the defendant is responsible,[14] he acts wildly or negligently, and

[12] Attributed to Davy Crockett.

[13] The Supreme Court of Texas, in the case of Texas, &c., R. Co. v Young, decided in 1883, reported in 60 Texas, 201, suggests the theory I have developed, but, as far as I have searched, no other reported case has been found precisely in point.

[14] In Austin, &c., R. Co. v. Beatty, 73 Tex. 592; 11 S. W. Rep. 858, the trial court, in charging the jury, overlooked an indispensable prerequisite to a legal verdict against the defendant, namely, *the negligence of the defendant.* That the plaintiff was frightened, and under the stress of fear pursued a course resulting in injury to himself, is no ground of action, unless some negligent act or omission of the defendant is proximately connected with the plaintiff's excitement, and the latter exercises the care of a person of ordinary prudence under the circumstances. A passenger in the caboose of a moving freight train, frightened by the falling of a pile of lumber from a flat car next before the caboose, jumped out. The court held that he was to blame for the injuries sustained, even though the company was negligent in piling the lumber so that it could fall. Woolery v. Louisville, &c., Ry. Co., 107 Ind. 381; 57 Am. Rep. 114. In Reary v. Louisville, &c., Ry. Co., 40 La. Ann. 32; 3 So. Rep. 390, it was decided that a railway company is not liable for injuries sustained by a person who, because of fear, jumps from a train

suffers in consequence, such negligent conduct, under these circumstances, is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. In such a case the negligent act of the defendant is the proximate cause of the injury, and the plaintiff may have his action.[15]

in motion, unless such fear was caused by an agent of the company. In Chicago, &c., Ry. Co. v. Felton, 125 Ill. 458; 17 N. E. Rep. 765, a train running on a road which had a double track was stopped by a snow-bank. There was a curve in the track at that point, and during the night some passengers saw the light of an engine which they supposed was on the same track with them, approaching rapidly from behind, and at the same time the engine of the passenger train gave certain sharp whistles, which they took for whistles of alarm. The light was on a snow-plow, which was on the other track, and was known by those in charge of the passenger train to be on that track. One passenger, being alarmed, ran out, and was caught in the snow-plow and killed. It was held that the whistle not being for passengers the sounding of it was not negligence, and the company was not liable. A woman waiting for a train received from the station agent permission to sit in a certain car while the waiting-room was being cleaned, he assuring her that the car would remain there. While she was sitting there the car started, and she jumped out and was injured. A verdict against the railroad company was sustained. Shannon v. Boston, &c., R. Co., 78 Me. 52. Hemmingway v. Chicago, &c., Ry. Co., 72 Wis. 42; 37 N. W. Rep. 804, where a boy of ten, who had told the conductor where he was going, jumped off at the station, not knowing that the train would stop at a switch above and back down. The company was held guilty of negligence.

[15] Jones v. Boyce, 1 Stark. 493; Wright v. Great Northern Ry. Co., 8 Ir. L. R. (C. P. Div.) 257. A man who, by another's want of care, finds himself in a position of danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. That which appears the best way to a court examining the matter afterwards at leisure and with full knowledge is not necessarily obvious even to a prudent and skillful man on a sudden alarm. Pollock on Torts, § 386. Jumping to avoid collision. Cody v. New York, &c., R. Co., 151 Mass. 462; 24 N. E. Rep. 402; Pennsylvania Tel. Co. v. Varnau (Penn.), 15 Atl. Rep. 624. If a child goes upon a railroad trestle bridge to escape from cattle of which she is afraid, it is not contributory negligence on her part. Cassida v. Oregon Ry. & Nav. Co., 14 Ore. 551; 13 Pac. Rep. 438; Holzab v. New Orleans, &c., R. Co., 38 La. Ann. 185. Jumping from overturning stage-coach. Lawrence v. Green, 70 Cal. 417. De-

Said Lord Ellenborough:— "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible

fendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom. Silver Cord Mining Co. v. McDonald, 14 Colo. 191; 23 Pac. Rep. 346; Ladd v. Foster, 31 Fed. Rep. 827. Jumping from runaway horse-car. Dimmey v. Wheeling, &c., R. Co., 27 W. Va. 32; Dutzi v. Geisel, 23 Mo. App. 676; South Covington, &c., Ry. Co. v. Ware, 84 Ky. 267; 1 S. W. Rep. 493. Woolley v. Scovell, 3 Man. & R. (K. B.) 105, substantially giving the rule in the text, and adding that even if the defendant gives the plaintiff warning immediately before the accident, the former will not be protected. Buel v. New York, &c., R. Co., 31 N. Y. 314; Filer v. New York, &c., R. Co., 49 N. Y. 47; Coulter v. American, &c., Express Co., 56 N. Y. 585; Pittsburgh v. Grier, 22 Penn. St. 54; Johnson v. Westchester, &c., R. Co., 70 Penn. St. 357; Pennsylvania R. Co. v. Werner (Penn.), 8 Rep. 59; Lancaster v. Kissinger (Penn.), 12 Rep. 635; Pittsburgh, &c., R. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580; Cook v. Parham, 24 Ala. 21. It would be absurd to hold that a person in time of imminent danger is negligent, unless he take every precaution that a careful calculation afterward will show he might have taken. Karr v. Parks, 40 Cal. 188, 193. To say, however, that failure on the part of the person injured, in cases involving risk of life and limb, to take *unusual* care is no defense to the action, as it is said in Indianapolis, &c., R. Co. v. Stout, 53 Ind. 143, 155, is apt to prove a confusing formulation of the rule. Cook v. Central, &c., R. Co. (Ala.), 12 Rep. 356; Gothard v. Alabama, &c., R. Co., 67 Ala. 114; Frick v. Potter, 17 Ill. 406; Galena, &c., R. Co. v. Yarwood, 17 Ill. 500. Chicago, &c., R. Co. v. Becker, 76 Ill. 25, lucidly states the rule as follows:—Where, as a direct and immediate result of the defendant's negligence, the injured party is placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection, the law will not hold him responsible for contributory negligence. Illinois, &c., R. Co. v. Able, 59 Ill. 131; Wesley Coal Co. v. Herler, 84 Ill. 126; Ingalls v. Bills, 9 Metc. 1; 43 Am. Dec. 346; Lund v. Tyngsboro, 11 Cush. 563; 59 Am. Dec. 159; Brooks v. Petersham, 16 Gray, 181; Eastman v. Sanborn, 3 Allen, 4; Stevens v. Boxford, 10 Allen, 25; Sears v. Dennis, 105 Mass. 312; Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692; Mark v. St. Paul, &c., R. Co., 30 Minn. 493; Card v. Ellsworth, 65 Me. 547; 20 Am. Rep. 722; Page v. Bucksport, 64 Me. 51; Stickney v. Maidstone, 30 Vt. 738; Southwestern, &c., R. Co. v. Paulk, 24 Ga. 356. And the rule even holds good when the party injured, believing himself in great peril, causes by his actions the very accident which he feared. Stokes v. Saltonstall, 13 Peters, 181; Han v. Minneapolis, &c., R. Co., 4 McCrary, 622; Stevenson v. Chicago, &c., R. Co., 18 Fed. Rep. 493;

for the consequences." [16] And this is equally the rule even though it turn out that no injury would have been sustained had there been no attempt to escape the threatened danger.[17] The principle is that errors in judgment on the part of a plaintiff, in trying to escape imminent danger brought about by the defendant's negligence, do not constitute contributory negligence, if the acts done were such as ordinarily prudent persons might have been expected to do under like circumstances,[18] even

Hemmingway v. Chicago, &c., Ry. Co., 72 Wis. 42; 37 N. W. Rep. 804; Shannon v. Boston & A. R. Co., 78 Me. 52; Wharton on Negligence, §§ 305, 307; Thompson on Negligence, 1092, 1174.

[16] Jones v. Boyce, 1 Stark. 493.

[17] South Covington, &c., Ry. Co. v. Ware, 84 Ky. 267; 1 S. W. Rep. 493; Brown v. Chicago, &c., R. Co., 54 Wis. 342; 41 Am. Rep. 41, and note; Gumz v. Chicago, &c., R. Co., 52 Wis. 672; Schultz v. Chicago, &c., R. Co., 44 Wis. 638; Turner v. Buchanan, 82 Ind. 147; 42 Am. Rep. 485; Iron Ry. Co. v. Mowery, 36 Ohio St. 418; 38 Am. Rep. 597; Wilson v. Northern Pacific R. Co., 26 Minn. 278; Roll v. Northern, &c., R. Co., 15 Hun, 496. It is said in Twomley v. Central Park, &c., R. Co., 69 N. Y. 158; 25 Am. Rep. 162, that where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of apparently grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary care *placed in the same situation might make*, and injury results therefrom, the fact that if he had chosen the other hazard he would have escaped injury does not prove contributory negligence. Bernhard v. Rensselaer, &c., R. Co., 1 Abb. App. Dec. 131; Rexter v. Starin, 73 N. Y. 601; McKinney v. Neil, 1 McLean, 540. See, also, Commonwealth v. Boston, &c., R. Co., 129 Mass. 500; 37 Am. Rep. 382, and note; Pennsylvania R. Co. v. Roney, 89 Ind. 453; 46 Am. Rep. 173; Cottrill v. Chicago, &c., R. Co., 47 Wis. 634; 32 Am. Rep. 796; Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692, and Eckert v. Long Island R. Co., 43 N. Y. 502; 3 Am. Rep. 721, and the cases generally cited *supra*.

[18] Wynn v. Central Park, &c., Ry. Co., 133 N. Y. 575; Felice v. N. Y. C. & H. R. R. Co., 14 App. Div. (N. Y.) 345, 351; Dunham Towing Co. v. Dandelin, 143 Ill. 409; Clarke v. Pennsylvania Co., 132 Ind. 199, 200; Village of Clayton v. Brooks, 150 Ill. 97, 106. In Richmond & Danville R. Co. v. Farmer, 97 Ala. 141, it is said that he is not bound to act with coolness and deliberation, and is not guilty of contributory negligence, if, considering his surroundings at the time, he exercised the prudence of a reasonable man. So in Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332, it is said that his attempt to escape danger by doing an act which is also dangerous and from which injury results is not contributory negli-

through the injury would not have happened if the acts had not been done.[19] So, where a passenger, apprehending a collision, rushes out of the car, where he would have been safe, and goes upon the platform, where he is hurt, his act is, upon this principle, justifiable, and he has his action for damages against the railway company;[20] and where one, being lawfully upon a railway track when a train suddenly appears, jumps the wrong way in the excitement of the moment, it is not contributory negligence.[21]

gence, if the attempt were one such as a person acting with ordinary prudence might, under the circumstances, make. But this rule is criticised in International & Great Northern Ry. Co. v. Neff, 87 Tex. 303, 308-310, where the court say: — "In this definition Mr. Beach includes the qualification, 'if the acts done are such as an ordinarily prudent person might have been expected to do under like circumstances.' This qualification we believe to be useless, if not calculated to confuse the jury when expressed in a charge. If one placed in imminent peril by the negligence of another is required to act with care and prudence, then the imprudent man who is easily alarmed is not protected at all under that state of the case. It is a fact as well known as any other connected with the subject of ordinary care, that a man of prudence under such conditions may at one time act wisely, and at another, being terrified by sudden danger, will do things that could not be attributed to a person of ordinary prudence, because, at the time, under the influence of fear, he is not a prudent person, being deprived of his presence of mind by the perils of his situation. If it be said that a man of ordinary prudence could not be expected to exercise care under those conditions, then there is no need to use the qualifying words, because they do not express any duty resting upon the imperilled person. * * * The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." In further support of the rule as stated in the text, see Bischoff v. People's Ry. Co., 121 Mo. 216; Haney v. P., C. C. & St. L. Ry. Co., 38 W. Va. 570.

[19] Bischoff v. People's Ry. Co., 121 Mo. 216.

[20] Iron Ry. Co. v. Mowery, 36 Ohio St. 418.

[21] Indianapolis, &c., R. Co. v. Carr, 35 Ind. 510; Coulter v. American, &c., Express Co., 56 N. Y. 585; Schultz v. Chicago, &c., R. Co., 44 Wis. 638.

§ 41. The same subject continued.— This rule is also frequently applied where persons leap from trains, or vehicles on the highway, under apprehension of injury from collision or derailment, or other accident, when, if they had not done so, they would have escaped unhurt.[22] The question in these cases is not what a prudent man under ordinary circumstances would have done, for the suddenness of the emergency, the excitement, and the influence of terror, must be taken into the account;[23] and what other persons did at the same time may be given in evidence to show what may have been reasonably prudent under the circumstances.[24] In the New York case just cited it appears that the driver of one of the defendant's street cars, in which the plaintiff and several other persons were passengers, attempted to cross the track of the New York Central and Hudson River Railroad, upon which a train was rapidly approaching, and that the passengers in the car, seeing the danger of being run over, rushed out of the car, with a single exception, and that the plain-

22 South Covington, &c., Ry. Co. v. Ware, 84 Ky. 267; 1 S. W. Rep. 493; Buel v. New York, &c., R. Co., 31 N. Y. 314; Twomley v. Central Park, &c., R. Co., 69 N. Y. 158; 25 Am. Rep. 162; Dyer v. Erie Ry. Co., 71 N. Y. 228; Wilson v. Northern Pacific R. Co., 26 Minn. 278; Mobile, &c., R. Co. v. Ashcraft, 48 Ala. 15; Georgia, &c., Banking Co. v. Rhodes, 56 Ga. 645; Turner v. Buchanan, 82 Ind. 147; 42 Am. Rep. 485; Bell v. N. Y., &c., R. Co., 17 Week. Dig. (N. Y.) 79; Cook v. Central R. Co. (Ala.) 12 Rep. 356, which was a case where a man, walking over the trestle-work of a railroad, to avoid an advancing train, let himself down between the ties on the trestle, and endeavored to hang down until the train should pass above him; unable to draw himself up, he fell, and died from the effect of the injuries. It was held that a person is not chargeable with contributory negligence, who, when unwarned, peril comes on him, suddenly acts wildly and madly. The question whether the deceased exercised due caution was a proper one for the jury. Cuyler v. Decker, 20 Hun, 173; Siegrist v. Arnot, 10 Mo. App. 197.

23 Johnson v. West Chester, &c., R. Co., 70 Penn. St. 357; Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692; Pittsburgh, &c., R. Co. v. Rohrman, 13 Week. Notes Cas. 258; 29 Albany Law Jour. 97; Karr v. Parks, 40 Cal. 188. The law makes allowance for the conduct of persons under the imminency of great peril, and leaves the circumstances to the jury to find if the party acted rashly and under an undue apprehension of the danger. Galena, &c., R. Co. v. Yarwood, 17 Ill. 509, 521; Indianapolis R. Co. v. Stout, 53 Ind. 143.

24 Twomley v. Central Park, &c., R. Co., 69 N. Y. 158; 25 Am. Rep. 162; Mobile, &c., R. Co. v. Ashcraft, 48 Ala. 15.

tiff in so doing fell and was hurt. The car, however, passed the track in safety and avoided the threatened collision. Upon the question of the prudence of leaving the car, evidence as to the conduct of the other passengers was held competent.

§ 42. Plaintiff acting erroneously in trying to save human life.— So, also, upon a somewhat analogous principle, when one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, it has been held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.[25] Eckert v. Long Island R. Co.[26] is a leading authority in point. In that case it appears

[25] Eckert v. Long Island R. Co., 57 Barb. 555; affirmed, 43 N. Y. 503; 3 Am. Rep. 721; Sann v. Johns Mfg. Co., 16 App. Div. (N. Y.) 252. It is not contributory negligence in a mother to attempt to rescue her infant child from an approaching train, although she may have negligently allowed it to go on the track. But the defendant is not chargeable unless negligent in respect to the child before, or in respect to the mother or child after, the attempt at rescue. Donahoe v. Wabash, &c., Ry. Co., 83 Mo. 560; 53 Am. Rep. 594. A mother who is injured by falling into an open hatchway while trying to prevent her four-year-old child, who has stumbled, from falling therein, is not necessarily guilty of contributory negligence, although the hatchway was reasonably guarded. Clark v. Famous Shoe and Clothing Co., 16 Mo. App. 463. Where the plaintiff went on the track to save younger children from danger, knowing that the train was coming, and only half a mile away, she was not a trespasser. Spooner v. Delaware, &c., R. Co., 115 N. Y. 22; 21 N. E. Rep. 696. In Peyton v. Texas & P. Ry. Co., 41 La. Ann. 861; 6 So. Rep. 690, plaintiff jumped on a railroad track, immediately in front of a train approaching at high speed, to rescue the life of another, and was held not guilty of contributory negligence. Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692; Cottrill v. Chicago, &c., R. Co., 47 Wis. 634; 32 Am. Rep. 796; Pennsylvania Co. v. Raney, 89 Ind. 453; 46 Am. Rep. 173.

[26] 57 Barb. 555. On the other hand, in Blair v. Grand Rapids, &c., R. Co., 60 Mich. 124; 26 N. W. Rep. 855, the facts were that A., who was not an employee of defendant railroad company, was requested by a watchman to go up the track and notify the conductor of an approaching train that there was a broken rail on the track, and being anxious to

that the plaintiff intestate, while endeavoring to rescue a child from being run over by an approaching railway train, was himself struck by the train and so injured that he died.[27] In Penu-

prevent loss of life, A. did as he was bid and signaled the train to stop. The conductor stopped his train, but started on again, and, while the cars were running at about four miles an hour, A., fearing his signal had not been understood, attempted to get on the train and speak to the conductor, when he was thrown off and injured. It was held that A. was guilty of gross contributory negligence, and could not recover. Where a person who was killed because of his own gross negligence, not only exposed himself by going upon a high trestle over which the railroad track passed, but encumbered himself with a small boy, exposing him also, if such person could have saved himself after discovering his danger from an approaching train had he not been so encumbered, and his care of the boy was the chief reason why he did not succeed in protecting himself, he was nevertheless chargeable with ordinary care for his own safety, irrespective of the presence of the boy. The case stands as if he, the deceased, had been upon the trestle alone, since it cannot be an excuse for him, as against the railroad company, that he neglected his own safety to preserve the boy with the care of whom he had voluntarily encumbered himself. Atlanta & Charlotte Air-Line Ry. Co. v. Leach, 91 Ga. 419.

27 Mr. Justice Grover, in delivering the opinion of the court, said: — "The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a non-suit made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he, for his own purposes, attempted to cross the track, or, with a view to save property, placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no

sylvania Co. v. Roney,[28] this rule is applied to the case of an engineer of a passenger train who stuck to his locomotive in the face of impending death, and lost his life in an heroic attempt to save his train and the lives of the passengers on board, when he might easily, by jumping from the locomotive, have escaped personal injury.[29]

§ 43. Same subject — Where defendant not negligent.— It will be borne in mind that the fundamental principles of the law of negligence cannot be abandoned even to indemnify one who has suffered injury while exhibiting consummate courage and self-sacrifice in an extremity of peril. The defendant must not be a "forgotten man." There must be a default on his part, a want of ordinary care, or the plaintiff cannot recover. Thus, in Evansville, &c., R. Co. v. Hiatt,[30] the plaintiff ran upon a railway track in front of an approaching train to save his aged father who was carelessly on the track. The plaintiff was himself struck by the train, but the railroad operatives had made every effort to stop, and upon all the facts in the case the proximate cause of the injury could not possibly be traced to them.

time for deliberation. He must act instantly if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated."

[28] 89 Ind. 453; s. c. 46 Am. Rep. 175.

[29] The same rule was applied in Central R. Co. v. Crosby, 74 Ga. 737, where an engineer remained at his post and lost his life, though he might have saved it by jumping out. See, also, Cottrill v. Chicago, &c., R. Co., 47 Wis. 634; 32 Am. Rep. 796, which presents a similar state of facts. The court well said:— "Who shall sit in judgment upon this brave engineer to coolly determine the alternative risks and chances which he is compelled to take instantly? It will never do to establish a rule by which a man's standing at his post and facing danger will be negligence."

[30] 17 Ind. 102.

The court held the defendant not liable,[31] and this is a sound rule.

§ 44. **Exposure in effort to save property.**— But a person cannot place himself in a position of danger simply to save his property without being guilty of such negligence as will preclude a recovery for a personal injury received in so doing.[32] Thus, a man who goes upon a railroad track at a farm crossing, knowing that a train is approaching, for the purpose of endeavoring to save his cattle by getting them over before the train reaches the crossing is guilty of contributory negligence.[33] And so of one who goes upon a railroad track after he sees a train approaching for the purpose of saving his horse and buggy.[34] But when such risks are assumed, even to save property from destruction, allowance may be made for the excitement under which one acts in such a case, and running into danger for this purpose may not, in view of all the circumstances, be such negligence as will bar a recovery for a negligent injury.[35]

§ 44a. **Where one is in discharge of legal duty.**—And, upon the same theory, perhaps, it has been held that when one, in the discharge of a legal duty, does an act manifestly perilous, and suffers in consequence of the negligence of another, he may

[31] But in Gramlich v. Wurst, 86 Penn. St. 74; 27 Am. Rep. 684, one endeavoring to save another who had fallen into a pit which was unfenced and left entirely unilluminated at night, himself fell in, and he was not allowed to recover on the ground that the pit was dug on private lands, the owner of which was under no necessity to provide exceptional safeguards for legitimate occupations performed thereon.

[32] Morris v. Lake Shore & Michigan Southern Ry. Co., 148 N. Y. 182; McManamee v. Missouri Pacific Ry. Co., 135 Mo. 440.

[33] Morris v. Lake Shore & Michigan Southern Ry. Co., 148 N. Y. 182.

[34] McManamee v. Missouri Pacific Ry. Co., 135 Mo. 440.

[35] Rexter v. Starin, 73 N. Y. 601; Wasmer v. Delaware, &c., R. Co., 80 N. Y. 212; 36 Am. Rep. 608. A woman left the house where she lived, and went 40 or 50 rods, to where there was a fire set by defendant's locomotive. In attempting to extinguish the fire she was fatally burned. The house where she lived was not then in danger, nor did she have any interest in the property which was on fire. It was held that the proximate cause of her injury was her own voluntary act, and there could be no recovery. Pike v. Grand Trunk Ry. Co., 39 Fed. Rep. 255.

have his action for the damages he sustains.[36] This is equivalent, it may be, to a rule that doing one's duty in a lawful manner is not contributory negligence, for in the Maine case just referred to, it appears that a detective, in search for smugglers, whose duty required him to go about upon a defective wharf in the night, without carrying a lantern, which would obviously defeat the purpose of his going, was injured by falling into the water through an opening in the wharf negligently left unguarded and unlighted by the defendants. It was held that, inasmuch as the detective was doing his duty, in a lawful manner, which was also the only practicable manner of doing it at that time, he might recover damages, whereas, it is plain that under ordinary circumstances, to wander about at night upon a dark wharf without a lantern, might be grossly negligent.[37] The opinion of Barrows, J., in this case, is a full and luminous presentation of the law in point. The question whether the plaintiff's conduct in all the cases referred to in this section was wanting in reasonable prudence and caution, in view of all the circumstances, is not one of law, but of fact. It should be submitted to the jury "as a question peculiarly for them to decide."[38] "The question," says Mr. Justice Barrows, in the very able opinion, to which I have already referred,[39] "are not of a character to be disposed of by a little neat logic. They are rather, as remarked by the court in Elliott v. Pray, 10 Allen, 384, 'questions which can be best determined by practical men

[36] Low v. Grand Trunk R. Co., 72 Me. 313; 39 Am. Rep. 313.

[37] Low v. Grand Trunk R. Co., 72 Me. 313; 39 Am. Rep. 331. An officer, for the purpose of making a lawful arrest, and at the request of the tenant of premises which the landlord was bound to keep in repair, entered them in the night time and stepped into an open well, of which there was no indication, the well being in the natural and obvious approach. The landlord was held liable. Learoyd v. Godfrey, 138 Mass. 315. But, though the plaintiff be innocent of any fault, there can, of course, be no recovery unless the defendant is chargeable with neglect of some legal duty. The owner of a city lot bounded by a street cut down by the city 38 feet below the grade of the lot, not being bound to guard the precipice, was held not responsible for the death of a policeman who came upon the lot in pursuit of an offender and fell into the street. Woods v. Lloyd (Penn.), 16 Atl. Rep. 43. See, also, Galligan v. Metacomet Mfg. Co., 143 Mass. 527.

[38] Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692.

[39] Low v. Grand Trunk, &c., R. Co., 72 Me. 313; 39 Am. Rep. 331.

on a view of all the facts and circumstances bearing on the issue.' "

§ **45. Plaintiff doing an illegal act.**— It is no defense to an action for negligence that the plaintiff was engaged in violating the law in a given particular at the time of the happening of the accident, unless the violation of law was a proximate and efficient cause of the injury.[40] Some mere collateral wrong-doing by the plaintiff, that has no tendency to occasion the injury, cannot, of course, avail the defendant through whose negligence the injury has been suffered. Thus, for example, driving on the wrong side of the road will not, as a matter of law, prevent a recovery in case of a collision. It is a circumstance to go to the jury on the question of the plaintiff's negligence.[41] So, also, one who places his wagon in the street for the purpose of loading it, in such a position as to violate a city ordinance, may, neverthe-

[40] Minerly v. Union Ferry Co., 9 N. Y. Supl. 104; 56 Hun, 113, where the pilot of a ferry boat was injured in a collision. It was held that his violation of a statute regulating speed and course merely placed the burden upon him of showing, not only that defendants were negligent, but that his violation of the statute in no way contributed to the injury. Spofford v. Harlow, 3 Allen, 176; Welch v. Wesson, 6 Gray, 305. In Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191, the court says:— "It is true generally that, while no person can maintain an action to which he must trace his title through his own breach of law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him and to which his conduct has not contributed." Hall v. Ripley, 119 Mass. 135; Morton v. Gloster, 46 Me. 520; Bigelow v. Reed, 51 Me. 325; Hamilton v. Goding, 55 Me. 428; Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274; Neanow v. Ullech, 46 Wis. 581; Klipper v. Coffey, 44 Md. 117, where the *donkey case* (10 Mee. & W. 546) is cited to sustain the proposition. Albert v. Bleecker St. R. Co., 2 Daly, 389; Griggs v. Fleckinstein, 14 Minn. 81; Davidson v. Portland, 69 Me. 116; 31 Am. Rep. 253. In Street v. Laumier, 34 Mo. 469, the defendant's horse and wagon, by the carelessness of defendant's servants, and without any fault of the plaintiff, ran against and injured the horse and wagon of the latter, which were standing in the street. The jury was charged to find for the plaintiff, provided this horse and wagon were "*properly*" in the street, and he showed no want of care. From this it might perhaps be doubted whether, if the plaintiff had been violating a law in allowing his vehicle to remain thus, the court would have arrived at the same conclusion.

[41] Spofford v. Harlow, 3 Allen, 176; Lyons v. Child, 61 N. H. 72; O'Neil v. Town of East Windsor, 63 Conn. 150.

less, recover from one who negligently runs into it,[42] and in Baker v. Portland,[43] the court says:— [The fact that the plaintiff] "was smoking a cigar in the streets, in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains."

§ 46. **Wilful negligence of the defendant.**—This rule is especially applicable in cases where the defendant's negligence is wilful or wanton. In those cases the plaintiff's collateral fault, or violation of law, is least of all a defense, as, for instance, where the parties were trotting their horses, in competition, on a highway where such high speed was forbidden by a municipal ordinance, and the defendant wilfully ran into the plaintiff's sleigh and caused him an injury, the plaintiff's unlawful act in one particular was held not to exempt the defendant from his obligation to respond in damages, for the injurious consequences of his own illegal misbehavior in another.[44]

§ 47. **When plaintiff acts in violation of law.**—But when the plaintiff is obliged to lay the foundation of his action in his own violation of law, he cannot recover.[45] And when his illegal act also contributes to produce the injury of which he complains, he has no action unless the defendant acted wantonly,[46] but when the defendant's conduct amounts to wilfulness, or a reckless disregard of another's rights, it seems to be the doctrine of the Massachusetts case just cited, that not even the unlawful

[42] The court should instruct the jury that, if the unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and he cannot recover. Newcomb v. Boston Protective Department, 146 Mass. 596; 16 N. E. Rep. 555.

[43] 58 Me. 199.

[44] Welch v. Wesson, 6 Gray, 505; Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191; Wallace v. Merrimack, &c., Nav. Co., 134 Mass. 95, and generally the cases cited *supra*.

[45] Way v. Foster, 1 Allen, 408; Smith v. Boston, &c., R. Co., 120 Mass. 490; 21 Am. Rep. 538; Bosworth v. Swansey, 10 Metc. 363; 43 Am. Dec. 441; Woodman v. Hubbard, 25 N. H. 67; Phalen v. Clark, 19 Conn. 421; 50 Am. Dec. 253; Simpson v. Bloss, 7 Taunt. 246.

[46] Bank v. Highland Street R. Co., 136 Mass. 485; Parker v. Nassau, 59 N. H. 402.

character of the plaintiff's act, in addition to the fact that it contributes to produce the injury, is sufficient to excuse the defendant. In Illinois, the illegal and fraudulent character of the act — as where one traveling upon a non-transferable free railroad pass, issued to another person, and passing himself off as such person, was injured by the negligence of the servants of a railway company — is of itself held sufficient to prevent a recovery for such injury, unless the negligence of the railway company was so gross as to amount to wilfulness.[47] So, also, where one is on a train "stealing a ride," or paying no fare through stealth or fraud, and is killed by the negligence of the company his representatives can recover no damages therefor.[48] The soundness of the conclusions reached by the court in these cases may be fairly questioned. The plaintiff's illegal act in riding upon a pass which did not belong to him, or in riding without paying fare, was in no possible way a cause of the injury he sustained. It was purely a collateral violation of law, and as such, upon principle, was no proper defense to the action for negligence.

§ 48. **A misapplication of the rule.**— The Supreme Court of Georgia, in reconstruction times, in a case in which their patriotism very far outran their judgment, reached the astonishing conclusion that an employee of a railway company, injured while the train on which he was employed was engaged in transporting troops and munitions of war for the Confederate States, could not recover damages against the company, if he was voluntarily so engaged for the purpose of making war upon the government of the United States.[49] The court applied the

[47] Toledo, &c., R. Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613. It is also there held that a passenger riding under a free ticket can only hold the company for negligence which must be of the degree of recklessness. In Wallace v. Merrimack, &c., Co., 134 Mass. 95, it was held that if a person sails for pleasure in his yacht on "the Lord's day," in violation of the Gen. Sts. C. 84, § 2, and if, while he is so sailing, his yacht is injured by being negligently run into by a steamboat, his unlawful act necessarily contributes to the injury, and he can maintain no action; but if the act of those in charge of the steamboat, in running against the plaintiff's yacht, was wanton and malicious, his right of action will no longer be barred.

[48] Toledo, &c., R. Co. v. Brooks, 81 Ill. 245; Chicago, &c., R. Co. v. Michie, 83 Ill. 427.

[49] Wallace v. Cannon, 38 Ga. 199.

maxim "*In pari delicto potior est conditio defendentis et possidentis*," but whether it proceeded upon the principle of this maxim, or upon any other principle, it was wholly absurd to charge the employee with legal responsibility. Even if the company was chargeable with fault, this man had not the remotest share in it. He was no more legally or morally responsible for the sort of freight the railway that employed him transported, than for the perturbations of Jove's satellites during the period of the civil war. His obliquity was as great in the one matter as in the other. But, for the purpose of the other view, granting never so much fault on his part in the matter pretended, it was wholly a collateral violation of law, which, as we have seen, is not a defense in an action of negligence — as far removed from being a cause of his injury as the east is from the west. Into such vagaries and juridical nonsense have the courts drifted in attempting refinements upon the elementary principles of the law of contributory negligence.[50] The rule that collateral violations of law shall not operate as a defense in an action brought to recover damages occasioned by the negligence of another, if it were thought possible to impute fault to this employee, applied to this case, would have given a correct result. And the other undoubted rule that a train-man is not a fellow-servant with the contracting freight agent, or superintendent of a railroad, or with a military officer of the Confederate government, applied to the case in hand, would also have given a proper result. If the servant had suffered by the master's neglect, without contributing to his own injury, he ought to have recovered, and, under a fair application of the reasonable rules of law in point, he would have recovered.

§ 49. When plaintiff and defendant are in pari delicto.— It must, to continue, be remembered that when the defendant's negligence is also a violation of law, that is to say, when both plaintiff and defendant are doing an unlawful act at the time of the catastrophe, or when the plaintiff's act is merely negligent and that of the defendant unlawful, the defendant's violation of law will not operate in favor of the plaintiff any more than that of the plaintiff will in favor of the defendant. In such a

[50] Martin v. Wallace, 40 Ga. 52; Cannon v. Rowland, 34 Ga. 422; 35 Ga. 105.

case, where the party injured has been guilty of contributory negligence he cannot recover on the ground that the defendant's negligence is a violation of law. Where, for example, the locomotive engineer fails to give proper signals, or those required by law, at a crossing, and one is injured in attempting to cross without looking up and down the track for a train, which is contributory negligence, the unlawful omission of the signals is not a sufficient ground for a recovery *non obstante.*[51]

[51] Atchison, &c., R. Co. v. Walz, 40 Kan. 433; 19 Pac. Rep. 787; Cullen v. Delaware & H. Canal Co., 113 N. Y. 667; 21 N. E. Rep. 716, Danforth, J., dissenting; Evans Brick Co. v. St. Louis, &c., Ry. Co., 17 Mo. App. 624; Maryland Central R. Co. v. Neubeur, 62 Md. 391; Williams v. Chicago, &c., Ry. Co., 64 Wis. 1; Taylor v. Missouri Pac. Ry. Co., 86 Mo. 457; Ivens v. Cincinnati, &c., Ry. Co., 103 Ind. 27; Baltimore, &c., R. Co. v. State, 69 Md. 551; 16 Atl. Rep. 212; Philadelphia, &c., R. Co. v. Stebbing, 62 Md. 504; Meeks v. Southern Pac. R. Co., 52 Cal. 602; Curry v. Chicago, &c., R. Co., 43 Wis. 665. The unlawful omission of the signals is negligence *per se.* Chicago, &c., R. Co. v. Hanley, 26 Ill. App. 351; Terre Haute, &c., R. Co. v. Voelker, 129 Ill. 540; 22 N. E. Rep. 20; Chicago, &c., R. Co. v. Boggs, 101 Ind. 522; but the law does not presume that the accident was caused thereby. Chicago, &c., R. Co. v. Hanley, 26 Ill. App. 351; Chicago, &c., R. Co. v. McKean, 40 Ill. 218. A man cannot cover up his eyes and ears and go upon a railroad track at the time a train approaches, and then hold a company liable because there is a law requiring it to ring a bell. Leduke v. St. Louis, &c., R. Co., 4 Mo. App. 485, 488; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. N. Y., &c., R. Co., 52 N. Y. 215; Hinckley v. Cape Cod R. Co., 120 Mass. 259; Harlan v. St. Louis, &c., R. Co., 64 Mo. 480; 65 Mo. 22; Rothe v. Milwaukee, &c., R. Co., 21 Wis. 256; Galena, &c., R. Co. v. Dill, 22 Ill. 264. See, also, Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Lake Shore, &c., R. Co. v. Berlink, 2 Brad. App. 427; and cases on duty to "look and listen," *infra,* § 181. The plaintiff recovers in the absence of contributory negligence. Gulf, &c., Ry. Co. v. Breitling (Tex.), 12 S. W. Rep. 1121; Bitner v. Utah Cent. Ry. Co., 4 Utah, 502; 11 Pac. Rep. 620; Cumming v. Brooklyn City R. Co., 38 Hun (N. Y.) 362. In Duffy v. Missouri Pac. Ry. Co., 19 Mo. App. 380, and Bergman v. St. Louis, &c., Ry. Co., 88 Mo. 678, the plaintiff recovered, though negligent himself, where the defendant's unlawful act was deemed to be *the* cause of the injury. In an action for death, caused by natural gas, while deceased was at work in defendant's mine, the failure of the defendant to employ the statutory safeguards against such accidents (2 Starr & C. St., c. 93, pars. 4-6) was held to be immaterial, unless it were shown that such safeguards would have prevented the accident. Coal Run Coal Co. v. Jones, 127 Ill. 379; 20 N. E. Rep. 89. See the following ad-

§ 50. Plaintiff a trespasser.— It is a general rule that when the defendant's negligence is wilful, contributory negligence is

ditional cases standing for the general proposition that mere collateral violations of law, on the part either of the plaintiff or defendant, will not, on the one hand, bar the plaintiff's right of action, nor, on the other, make the defendant liable to pay damages, as the text declares. Smith v. Smith, 2 Pick. 621; 13 Am. Dec. 464; Wallace v. Merrimack, &c., Navigation Co., 134 Mass. 95; 45 Am. Rep. 301. Plaintiff negligently permitting his cattle to come in contact with defendant's diseased cattle unlawfully in the State. Coyle v. Conway, 35 Mo. App. 490; Patee v. Adams, 37 Kan. 133; 14 Pac. Rep. 505. In the case last cited it was held that knowledge by defendant of the diseased condition of the animals was also essential to a recovery against him. Phila., &c., R. Co. v. Phila., &c., Towboat Co., 23 How. 309. Driving a sleigh without bells, in violation of a statute, does not make the driver liable, if not negligent, nor exempt a town from liability for injuries caused by collision upon a defective highway. Kidder v. Dunstable, 11 Gray, 342; Counter v. Couch, 8 Allen, 436; Kearns v. Snowden, 104 Mass. 63; Hall v. Corcoran, 107 Mass. 63. A boy of eleven, while loitering on a railroad track, was struck by a train which was going faster than the city ordinance permitted. He could not recover. Masser v. Chicago, &c., Ry. Co., 68 Iowa, 602; Wrinn v. Jones, 112 Iowa, 360; Damon v. Scituate, 119 Iowa, 66; Smith v. Conway, 121 Iowa, 216. Sutton v. Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534, where the plaintiff violated a statute by driving his cattle to market on Sunday, when they were injured by the breaking down of a defective bridge. Carroll v. Staten Island R. Co., 58 N. Y. 126; Huffman v. Union Ferry Co., 68 N. Y. 385; Mohney v. Cook, 26 Penn. St. 342. In a learned opinion by Bell, J., in Norris v. Litchfield, 35 N. H. 271, 277, the rule is well laid down as follows: — "As a general principle it seems to us wholly immaterial whether, in the abstract, the plaintiff was a wrong-doer or a trespasser, or was acting in violation of the law. For his wrong or trespass, he is answerable in damages, and he may be punishable for his violation of law: but his rights as to other persons, and as to other transactions, are not affected by that circumstance. A traveler may be traveling on a turnpike without payment of toll, or may be riding on a day when riding is forbidden, or with a speed forbidden by law, etc.; yet in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected. He is none the less entitled to recover, unless it appears that his negligence or fault has directely contributed to his damage." Gale v. Lisbon, 52 N. H. 174; Parker v. Nassau, 59 N. H. 402; Jennings v. Wayne, 63 Me. 468; Schmid v. Humphrey, 48 Iowa, 652; 30 Am. Rep. 414; Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Morrison v.

not a defense, and, accordingly, it is held that a mere technical trespass is not such an offense as to deprive the trespasser of his right to recover damage for an injury which he suffers through the wilful negligence of another.[52] The bare fact that one trespasses upon my land, does not place him so far beyond the pale of the law that I may, with impunity, inflict an injury upon him;[53] the owner of property is under no legal obligation to

Genl. Steam Nav. Co., 8 Exch. 731; Dimes v. Petley, 15 Q. B. 276; Aston v. Heaven, 2 Espin. 533; Chicago, &c., R. Co. v. McKean, 40 Ill. 218; St. Louis, &c., R. Co. v. Manly, 58 Ill. 300; Kepperly v. Ramsden, 83 Ill. 354; McClary v. Lowell, 44 Vt. 116; 8 Am. Rep. 366; Powhattan, &c., Co. v. Appomattox R. Co., 24 How. (U. S.) 247; Daley v. Norwich, &c., R. Co., 26 Conn. 591; Simmonson v. Stellenmerf, Edm. Sel. Cas. 194; Wharton on Negligence, §§ 330, 381*a*, 405, 955; Cooley on Torts, § 157. See, also, *infra*, § 185.

[52] Felton v. Aubrey, 43 U. S. App. 278; Hector Mining Co. v. Robertson, 22 Colo. 491.

[53] The court, in Needham v. San Francisco, &c., R. Co., 37 Cal. 409, says:—"A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if by so doing he can avoid injuring the person or property of the former, he is liable if he does not, if by reason thereof injury ensues." Sanders v. Reister, 1 Dakota, 151; Whirley v. Whiteman, 1 Head, 610; Terre Haute, &c., R. Co. v. Graham, 95 Ind. 286; 48 Am. Rep. 719. In Georgia it was held, through a peculiar provision of the Code, that if one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though the employees of the road may have been negligent. Southwestern R. Co. v. Hankerson, 61 Ga. 114; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Norris v. Litchfield, 35 N. H. 271; State v. Manchester, &c., R. Co., 52 N. H. 528; Mason v. Missouri Pac. R. Co., 27 Kan. 83; 41 Am. Rep. 405. Brown v. Lynn, 31 Penn. St. 510, which holds that a trespasser has a perfect right to presume that ordinary care will be used to protect his property from injury. Marble v. Ross, 124 Mass. 44; Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632; Chicago, &c., R. Co. v. Kellam, 92 Ill. 245; 34 Am. Rep. 128; Isabel v. Hannibal, &c., R. Co., 60 Mo. 475; Herring v. Wilmington, &c., R. Co., 10 Ired. (Law) 402; 51 Am. Dec. 395; Meeks v. Southern Pacific R. Co., 56 Cal. 513; 38 Am. Rep. 67; Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366; Baltimore, &c., R. Co. v. State, 33 Md. 542; Weymire v. Wolfe, 52 Iowa, 533; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 279; Little Rock, &c., R. Co. v. Pankhurst, 36 Ark. 371;

keep it in a safe condition for trespassers.[54] When, however, the circumstances are such as to imply an invitation to go upon the

Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; Daley v. Norwich, &c., R. Co., 26 Am. Dec. 591; Isbell v. New York, &c., R. Co., 27 Conn. 393. In this case it was held that where, by mismanagement of a railroad company, cattle on the track are injured, their owner may recover, notwithstanding the fact that the animals were trespassing. To preclude an action, the owner must have been guilty of actual negligence, and not of a mere technical wrong. Shearman & Redfield on Negligence (5th ed.), §§ 97, 98; Thompson on Negligence, 303, 1162; Wharton on Negligence, § 344 *et seq.*

[54] Hargreaves v. Deacon, 25 Mich. 1; Kohn v. Lovett, 44 Ga. 251; Roulston v. Clark, 3 E. D. Smith, 366. Thus, where one is injured by falling through a trap-door in a portion of a factory exclusively used by workmen, he not having the slightest allurement to enter, no action can be maintained. Zoebisch v. Tarbell, 10 Allen, 385. Frost v. Grand Trunk R. Co., 10 Allen, 387; Morgan v. City of Hallowell, 57 Me. 377; Lary v. Cleveland, &c., R. Co., 78 Ind. 323; 41 Am. Rep. 572; Parker v. Portland Publishing Co., 69 Me. 173; 31 Am. Rep. 262; Gramlich v. Wurst, 86 Penn. St. 74; Severy v. Nickerson, 120 Mass. 306; 21 Am. Rep. 514; Pierce v. Whitcomb, 48 Vt. 127; 21 Am. Rep. 120; Illinois, &c., R. Co. v. Godfrey, 71 Ill. 500; 22 Am. Rep. 112. The old case of Blyth v. Topham, Cro. Jac. 158 (cited in Comyn's Digest, Action upon the Case for a Nuisance, C.), held that an action would not lie for digging a pit in a common, by means of which a *stray mare* tumbled in and perished. Hardcastle v. The South Yorkshire Ry. Co., 4 Hurl. & N. 67; 28 L. J. (Exch.) 139; Goutret v. Egerton, L. R. 2 C. P. 371; 36 L. J. (C. P.) 191; 15 Week. Rep. 638; 16 L. T. (N. S.) 17; Stone v. Jackson, 16 C. B. 199; 32 Eng. Law & Eq. 349; Balch v. Smith, 7 Hurl. & N. 736; 8 Jur. (N. S.) 197; 31 L. J. (Exch.) 201; 10 Week. Rep. 387; 6 L. T. (N. S.) 158; Hounsell v. Smyth, 7 C. B. (N. S.) 731; 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227. Not even though the trespasser is an infant. Frost v. Eastern R. Co., 64 N. H. 220; 9 Atl. Rep. 790. But see Turn-table cases, &c., *infra*, § 205 *et seq.*, where defendant is held responsible for objects alluring children. McDonald v. Union Pac. Ry. Co., 35 Fed. Rep. 38, is a strong case. Defendant company, in operating its coal mine, sank a shaft, and threw out a pile of slack, on its own ground, which caught fire, and smouldered a long time, until it sank to the surface of the ground, on the top nothing appearing but lifeless ashes, but there being live coals underneath. This was close to a town of seven hundred inhabitants, was not fenced in, and no notice was posted to warn persons of the danger. Plaintiff, a boy twelve years of age, and a stranger in the town, being threatened by some miners, and fleeing from them, ran across the slack, supposing it to be nothing but ashes, and was severely burned. It was held that defend-

property, he who enters is no longer a trespasser, and the owner is bound to exercise ordinary care and prudence toward him. The invitation or license, express or implied, creates this duty.[55]

ant had a right to put the slack on its own ground, and that plaintiff was a mere trespasser. See, also, Woods v. Lloyd (Penn.), 16 Atl. Rep. 43; Galligan v. Metacomet Manuf. Co., 143 Mass. 527. In an action for injuries received in the manufactory of the defendants, the general allegation that plaintiff was lawfully on the premises was held sufficient to show that he was not a trespasser, but not that he was there with greater right than that of a mere licensee. Matthews v. Bonsee, 51 N. J. Law, 30; Gwynn v. Duffield, 66 Iowa, 708; Jewson v. Gath, 1 C. & E. 564.

55 In Graves v. Thomas, 96 Ind. 361; 48 Am. Rep. 727, where the public had used a path across a city lot for eight years, the owner was held liable to the plaintiff, who fell into an unguarded excavation near the path, on a dark night. In Campbell v. Boyd, 88 N. C. 129; 39 Am. Rep. 503, a private way was opened by the defendant for his own convenience, and a bridge built over a creek which ran across it, and the public used the same with his knowledge and permission. The plaintiff sustained injury caused by the breaking of the bridge, which, though apparently in good condition, the defendant knew to be unsafe. Held, that he was liable to the plaintiff in damages. See, also, Hooker v. Chicago, &c., R. Co., 76 Wis. 542. In Cusick v. Adams, 115 N. Y. 55, under like circumstances, it was held that the defendant owed no duty to the plaintiff in regard to the bridge. In this case, however, the danger was patent. Even a person invited cannot hold the owner liable if the latter is ignorant of the defect. Eisenberg v. Missouri Pac. Ry. Co., 33 Mo. App. 85. The owner or occupier of a dock is liable for damages to a person who makes use of it by his invitation, for an injury caused by the unsafe condition of the dock, which he permits to exist, the person himself exercising due care. Pennsylvania R. Co. v. Atha, 22 Fed. Rep. 920. One who negligently permits the timbers of his wharf to become rotten so that they give way, is liable if a person rightly there is injured by the fall. Albert v. State, 66 Md. 325; Fitzpatrick v. Garrison, &c., Ferry Co., 1 N. Y. Supl. 794. The visitor must exercise ordinary care himself. Caniff v. Blanchard Nav. Co., 66 Mich. 638; 33 N. W. Rep. 744. Sweeny v. Old Colony, &c., R. Co., 10 Allen, 368. Here a railroad company was held liable to a person having occasion to cross the track on a crossing made by the company expressly to afford means of passing between two public roads, because having built the crossing and placed a flagman there for that purpose, and the flagman having assured the party injured he could cross in safety, there was not merely a permission, but a distinct invitation to cross. "A licensee can only maintain an action against his licensor when the danger through which he has sustained hurt was of a *latent* character, which the licensor knew of

So it is said that the owner, in such a case, is bound to take the same care of one who enters his house by invitation, that he takes of himself and the other members of his household, and that he must not expose him to hidden dangers of which he is himself aware, especially if the danger is in nature of a trap.[56]

and the licensee did not." Shirley's Leading Cases, 276. Campbell v. Boyd, 88 N. C. 129; 43 Am. Rep. 740; Buesching v. St. Louis Gas Light Co., 73 Mo. 219; 39 Am. Rep. 503; Hayward v. Miller, 94 Ill. 349; 34 Am. Rep. 229; McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 555, and note; Campbell v. Portland Sugar Co., 62 Me. 552; 16 Am. Rep. 503; McKone v. Michigan, &c., R. Co., 51 Mich. 601; 47 Am. Rep. 596; Davis v. Chicago, &c., R. Co., 58 Wis. 646; 46 Am. Rep. 667; Bennett v. Railroad, 102 U. S. 577; Barry v. New York, &c., R. Co., 92 N. Y. 289. The owner of premises is under no liability to a licensee unless something in the nature of a trap or concealed danger exists, for the licensee must take the premises as he finds them. He must take them as they are, save as above mentioned, for better and for worse. Tolhausen v. Davis, 57 L. J. (Q. B.) 392. In Southcote v. Stanley, 1 Hurl. & N. 247; 25 L. J. (Exch.) 339, where a visitor was injured in the house of his host by the falling of a glass on him, and brought action declaring that the accident occurred "by and through the mere carelessness, negligence, default and improper conduct" of the host, the court, by Bramwell, B., made a distinction between acts of commission and omission on the part of the defendant, holding that in the former he would be held liable, but not in the latter. So that, for example, if he had omitted to air his visitor's sheets, whereby the latter caught cold, he could not be held; and as the declaration in the case at bar merely alleges default in not doing something, that is an act of omission, the court gave judgment for the defendant. We doubt, however, whether the distinction is a sound one.

[56] Nicholson v. Lancashire, &c., Ry. Co., 34 L. J. (Exch.) 84; Corby v. Hill, 4 C. B. (N. S.) 556; s. c. 4 Jur. (N. S.) 512; 27 L. J. (C. P.) 318; Axford v. Prior, C. P. 14 W. R. 611; Paddock v. Northeastern Ry. Co., 18 L. T. (N. S.) 60; Smith v. London & St. Katherines Dock Co., L. R. 3 C. P. 326; Chapman v. Rothwell, El., Bl. & El. 168; Holmes v. Northeastern Ry. Co., L. R. 4 Exch. 254; Davis v. Central Congregational Society of Jamaica Plain, 129 Mass. 367. Indermaur v. Dames, L. R. 1 C. P. 274; L. R. 2 C. P. 311, is one of the chief cases on this point. A journeyman gas-fitter, whose master had been employed to work on defendant's premises, and had sent the journeyman by appointment, was held to be included under the protection of the contract, and having been injured by falling through a shaft, he was allowed to recover. The decision went entirely on the ground that he was there on lawful business. Campbell on Negligence, § 32; Wharton on Negligence, § 349;

§ 51. Invitation upon or license to go upon dangerous premises.— An invitation, in the technical sense of the word, will be inferred where there is a common interest or mutual advantage; as, for instance, there is an implied invitation to the public generally to enter business houses for the purpose of transacting business.[57] In such a case the law imposes upon the owner, or proprietor, the duty of exercising ordinary care. "The owner, or occupant of land," says Mr. Justice Gray, in Carlton v. Franconia Iron Co.,[58] is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of."[59] The courts draw a distinction between an invitation and

Thompson on Negligence, 303. Compare these cases with Pierce v. Whitcomb, 48 Vt. 127. Here the defendant, simply to accommodate the plaintiff, consented to sell him some oats, and took him to the granary to procure them. The granary was very dark, and while the plaintiff was walking around he fell through a shaft and was severely injured. The court held that in allowing the plaintiff to go into the granary, the defendant undoubtedly guaranteed that the means of access were reasonably safe, and if the plaintiff, in the actual transaction of the one piece of business which brought him there, had slipped into a pitfall, the case would have been very different. Since, however, he had been led to a *safe* place, and instead of remaining there had, in the moment when the defendant had gone to find a measure, wandered about from curiosity or other motive, he was himself devoid of ordinary care, and hence was contributorily negligent.

[57] See generally the cases last cited.

[58] 99 Mass. 216.

[59] "Where a person is upon premises by the invitation or permission of the occupier on lawful business in which both he and the occupier have an interest, there is a duty towards such person cast upon the occupier to keep the premises in a reasonably secure condition." Shirley's Leading Cases, 278. This duty extends to all parts of the premises, and their appurtenances, to which the customer has need of access in the prosecution of the business. Ball's Leading Cases, 292, where the whole subject is fully discussed. One who occupies a building for business purposes is liable for its reasonably safe condition to all who enter it in the course of the ordinary business transactions there. Welch v. McAllister, 15 Mo. App. 492. The owner of a building who puts an elevator into it for the use of his tenants, and of those having business with them, is bound to use

a mere license as affecting the rule in consideration. While an invitation, express or implied, imposes the duty of ordinary care upon a person in control of premises, a license, which is inferred where the object is the mere pleasure or benefit of the person enjoying it, imposes no such duty. Graves, J., in Hargreaves

ordinary care in keeping it in good condition for customary use. Ritterman v. Ropes, 51 N. Y. Super. Ct. 25; O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. Rep. 269; Huey v. Gahlenbeck, 121 Penn. St. 238; 15 Atl. Rep. 520; Engel v. Smith (Mich.), 46 N. W. Rep. 21; Clopp v. Mear (Penn.), 19 Atl. Rep. 504; 25 W. N. C. 571; Selinas v. Vermont State Agr. Soc., 60 Vt. 249; 15 Atl. Rep. 117; Toomey v. Sanborn, 146 Mass. 28; 14 N. E. Rep. 921; Atlanta Cotton Seed Oil-Mills v. Coffey, 80 Ga. 145; 4 S. E. Rep. 759; Tousey v. Roberts, 21 N. E. Rep. 399; 114 N. Y. 312; Egan v. Berkshire Apartment Ass'n, 10 N. Y. Supl. 116; Jucht v. Behrens, 7 N. Y. Supl. 195; O'Callaghan v. Bode, 84 Cal. 489; Clarke v. R. I. Electric Lighting Co., 16 R. I. 463; 17 Atl. Rep. 59; Trask v. Shotwell, 41 Minn. 66; 42 N. W. Rep. 699; Larken v. O'Neill, 1 N. Y. Supl. 232; O'Brien v. Tatum, 84 Ala. 186; 4 So. Rep. 158; Turner v. Klekr, 27 Ill. App. 391; Hutchins v. Priestley Express Wagon, &c., Co., 61 Mich. 252; 28 N. W. Rep. 85; Bedell v. Berkey, 76 Mich. 435; 43 N. W. Rep. 308; Johnson v. Wilcox, 135 Penn. St. 217; 19 Atl. Rep. 939; Gaffney v. Brown, 150 Mass. 479; 23 N. E. Rep. 233; Hotel Ass'n v. Walters, 23 Neb. 280; 36 N. W. Rep. 561; McRickard v. Flint, 13 Daly (N. Y.) 541; Bond v. Smith, 113 N. Y. 378; 21 N. E. Rep. 128; Atkinson v. Abraham, 45 Hun, 238; Fisher v. Cook, 125 Ill. 280; 17 N. E. Rep. 763; McRickard v. Flint, 114 N. Y. 222; 21 N. E. Rep. 153; Patterson v. Hemenway, 148 Mass. 94; 19 N. E. Rep. 15; Baltimore & Ohio R. Co. v. Rose, 65 Md. 485; Crogan v. Schiele, 53 Conn. 186; 55 Am. Rep. 88; Schmidt v. Bauer, 80 Cal. 565; 22 Pac. Rep. 256; Engel v. Smith, 82 Mich. 1; 46 N. W. Rep. 21; Gilbert v. Nagle, 118 Mass. 278; Lorne v. Hotel Co., 116 Mass. 67; Freer v. Cameron, 4 Rich. (Law) 228; 55 Am. Dec. 663; Ackert v. Lansing, 48 How. Pr. 374; 59 N. Y. 646; Camp v. Wood, 76 N. Y. 92; 32 Am. Rep. 282; Pastene v. Adams, 49 Cal. 87. In Haywood v. Merrill, 94 Ill. 349; 34 Am. Rep. 229, and note, the plaintiff being a guest in a hotel, thinking to open the door of his room, really opened an elevator door, and as it was dark, he stepped in, and fell down the shaft. Held, that it was the duty of hotelkeepers to exercise ordinary care in the protection of their guests, and that the defendant ought to have secured the door so as to make the occurrence of such accidents in the highest degree improbable. Pierce v. Whitcomb, 48 Vt. 127; 21 Am. Rep. 120; Totten v. Phipps, 52 N. Y. 354; Luddington v. Miller, 4 Jones & Sp. 1; Ryan v. Thompson, 2 Jones & Sp. 133; Nave v. Flack, 90 Ind. 205; White v. France, 2 C. P. Div. 308; Chapman v. Rothwell, El., Bl.

v. Deacon,[60] after considering the question of the duty on the part of an owner of property toward trespassers, idlers and bare licensees, says:— "We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity, or motives of private convenience, in no way connected with business, or other relations with the occupant." This is the doctrine of both the English and the American cases.[61]

& El. 168; Indermaur v. Dames, L. R. 1 C. P. 274; L. R. 2 C. P. 311. The liability of the owner or proprietor of a place open to the public, to persons coming there to transact business, for injuries inflicted by dangerous animals or caused by defects in the premises, etc., is discussed, and the English and American decisions are collected, by J. F. Kelly, in an article in 29 Amer. Law Reg. (N. S.) 24, note.

[60] 25 Mich. 1.

[61] Campbell on Negligence, § 32. The owner of premises has a right to suppose that persons driving in and out on business will use the ordinary, well-defined ways. and if they depart therefrom they become mere licensees and cannot recover for injuries received on land not substantially adjacent to such ways. Armstrong v. Medbury, 67 Mich. 250; 34 N. W. Rep. 566. Plaintiff went to defendant's oil-mill on business of his own, and asking to see an employee, was directed to the oil room. In trying to find him in another room, he stepped upon a pile of seed, and his foot sank into an ordinary seed conveyor under the floor and was injured. It was held that the defendant was not liable, and that a charge submitting to the jury whether the plaintiff entered the mill on the defendant's invitation was erroneous. Galveston Oil Co. v. Morton, 70 Tex. 400; 7 S. W. Rep. 756; Matthews v. Bonsee, 51 N. J. Law, 30; 16 Atl. Rep. 195, is to the same point. Evansville, &c., R. Co. v. Griffin, 100 Ind. 221; 50 Am. Rep. 783; Reardon v. Thompson, 149 Mass. 267; 21 N. E. Rep. 369; Lamore v. Crown Point Iron Co., 101 N. Y. 391; 54 Am. Rep. 718; Sullivau v. Waters, Ir. C. L. R. Co., 460; Balch v. Smith, 7 Hurl. & N. 736; Gautret v. Egerton, L. R. 2 C. P. 271. In Lygo v. Newbold, 24 L. & Eq. 507; 9 Exch. 302, a woman whose goods were in charge of a freight carrier, was permitted by his cartman, while on the way, to get up and ride with him on the load. The cart breaking down, and an injury occurring both to her person and her goods, it was held she could not recover for the personal injury, because she had no right upon the cart beyond the driver's permission, which was no contract, he being employed for carriage of goods only. The act was merely permissive and of his favor, and hence no recovery could be had. But see Fitzpatrick v. Garrison, &c., Ferry Co., 1 N. Y. Supl. 794, where defendants who were engaged in a business attracting people to a public place, which the public had long been accustomed to use, were held lia-

§ 51a. Children as trespassers — Liability of land-owner — Dangerous attractions.— In some of the American cases it is held that though a child is a trespasser, the land-owner may be held liable, when the conditions of the premises, or when structures upon the same, are attractive, and, at the same time, dangerous to children, the theory being that he was by implication invited them to enter, or as having allured them into danger, and is therefore, to be held to the same measure of responsibility as if he had expressly invited them to come upon his lands. The leading case upon this subject is Railroad Company v. Stout,[62] where the doctrine was applied to the case of a child playing upon an unlocked turn-table. This decision was followed in a number of the States in a series of decisions known as the "turn-table cases."[63] But the same principle has been applied where the injury was produced by other structures or conditions, as, for example, where it was caused by a gate;[64] where it was caused by an excavation;[65] where the child was scalded in a pool of hot water;[66] where the child was drowned in a deep pit filled with water and floating materials;[67] where the dangerous ob-

ble for an accident occurring through the use of machinery so defective as to be dangerous, though plaintiff, without negligence, was at the place solely to gratify his curiosity. Consult, also, cases cited *supra*, § 50.

[62] 17 Wall. 657.

[63] See *infra*, §§ 204-210. "All of these cases practically, and some of them expressly, treat the plaintiff as a technical trespasser; and they establish the principle that such a trespasser may recover, although there be no wilful act or gross negligence on the part of the defendant. But these cases are *sui generis*. They have for their foundation the assumption that a defendant land-owner must know that children will follow their childish instincts and inclinations, and that they are without capacity to clearly discriminate between things that are dangerous and things that are not dangerous; and therefore, if he leave upon his premises a dangerous piece of machinery unguarded and fully exposed, and in a position where it will probably be seen by children, and of a character that would naturally attract and entice children, he must anticipate that children will go around and upon it; and he is, therefore, bound to use ordinary care to protect these unconscious trespassers from being unnecessarily injured by such dangerous machinery." O'Leary v. Brooks Elevator Co. (N. D.) 75 N. W. Rep. 919, per Bartholomew, J.

[64] Birge v. Gardner, 19 Conn. 506.

[65] Mackey v. City of Vicksburg, 64 Miss. 777; 2 So. Rep. 178.

[66] Car Co. v. Cooper, 60 Ark. 545; 31 S. W. Rep. 154.

[67] City of Pekin v. McMahon, 154 Ill. 141; 39 N. E. Rep. 484. Unguarded premises supplied with dangerous attractions are re-

ject was a signal torpedo; [68] where it was a dynamite cartridge,[69] and where it was a lumber pile.[70] Under this line of decisions, the question whether or not the dangerous premises were so attractive to children as to suggest the probability of an accident, and thus rendered the owner liable, is a question for the jury.[71] Other courts, however, have repudiated this entire doctrine, and the trend of the most recent decisions is against it.[72]

garded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technical trespassers. (Id.)

[68] Harriman v. Railway Co., 45 Ohio St. 11.

[69] Powers v. Harlow, 53 Mich. 507; 19 N. W. Rep. 237. But there was also a question of license in this case.

[70] Bronson's Admr. v. Labrot, 81 Ky. 638.

[71] See cases above cited.

[72] Walsh v. Fitchburg R. Co., 145 N. Y. 301; 39 N. E. Rep. 1068; Frost v. Eastern, &c., R. Co., 64 N. H. 220; 9 Atl. Rep. 790; Daniels v. Railroad Co., 154 Mass. 349; 28 N. E. Rep. 283; Gay v. Essex Electric Street Ry. Co., 159 Mass. 238; McGuiness v. Butler, 159 Mass. 233; Turess v. New York, Susquehanna & Western R. Co. (N. J.), 40 Atl. Rep. 614. In the late case of D., L. & W. R. Co. v. Reich, 40 Atl. Rep. 682, in the Court of Errors and Appeals of New Jersey, it was said by Gummere, J.:—"Nor am I able to appreciate the force of the reasoning upon which the conclusion is based that a land-owner who puts upon his premises a structure which is attractive, and also dangerous, to children, is to be regarded as having by implication invited them to enter, or as having "allured" them into danger, and is, therefore, to be held to the same measure of responsibility as if he had expressly invited them to come upon his lands. No one, I presume, will contend that a land-owner, who, in the beneficial user of his premises, places thereon something which attracts children into danger, really puts it there with the intention of extending an invitation to them, or of luring them into jeopardy. On the contrary, it will be admitted that the entry is ordinarily against the desire of the land-owner, and that, if his permission was asked, it would be refused. But the argument is that the intent, although it does not exist in fact, nevertheless exists in law, because every man is presumed to intend the natural consequences of his acts. The fallacy of this argument is clearly shown in an interesting and instructive article on the liability of land-owners to children entering without permission, by Hon. Jeremiah Smith, a former justice of the Supreme Court of New Hampshire, published in the Harvard Law Review in January and February, 1898. The author says:—"The so-called presumption that every man intends the probable consequence of his acts is not a rule of law further or otherwise than as it is a rule of common sense; in other words, the 'presumption' is, at most, only a *prima facie* presumption, and may be

§ **52. A trespass as per se contributory negligence.**— We must remember, however, that when the plaintiff's trespass contributes to produce the injury he sustains, the general rule as to contributory negligence applies to prevent his recovering damages. Contributory negligence may take the form of a trespass as well as any other form, and while the mere fact that one is a trespasser will not alone prevent a recovery, it may appear that going upon the premises was such a want of ordinary care under the circumstances as to constitute contributory negligence. The case of Marble v. Ross [73] suggests this distinction. The defendant kept a vicious stag in his pasture, and the plaintiff, trespassing there, was attacked by the stag, and injured. Here it is plain that the matter of defense was not the trespass, but the contributory negligence involved in the trespass. It was an act

strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man in ten thousand desires, and there is another assignable reason for the act, and one, moreover, by which men are generally influenced, and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to zero." If the land-owner is to be held responsible for injuries resulting from an entry by a child upon his premises, merely because he has placed there something which presents a temptation to the child that it cannot (or, rather, does not) resist, although the entry is not only without his consent, but against his desire, why, in principle, is he not equally responsible for injuries received by an adult trespasser, who yields to the temptation presented by a dangerous attraction which is placed upon the land, particularly if such trespasser be so constituted mentally as not to appreciate the impropriety of his entry, or to understand the danger which he is incurring?' The viciousness of the reasoning which fixes liability upon the land-owner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As was said by Holmes, J., in Holbrook v. Aldrich (168 Mass. 16; 46 N. E. Rep. 115):—"Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen.' "

[73] 124 Mass. 44.

harmless enough to walk through the pasture, but the stag was known to be somewhat vicious, and it was careless to go within his reach. The plaintiff had no remedy, not because he was a trespasser, but because his trespass was a negligent act, contributing to occasion the injury.

§ **53. The same subject continued.**— And, *a fortiori*, there is the same rule when the plaintiff inflicts the injury, or brings the disaster upon himself, by meddling or trespassing with dangerous tools, or machinery, or other property, inadvertently exposed upon the defendant's premises.[74] Accordingly, it is held, in a carefully considered case in South Carolina,[75] that a railroad company is not liable for the death of one who, while walking on its track without right, intermeddled with a torpedo which had been placed there as a danger signal, and was killed by its explosion. And in the old case of Bush v. Brainard,[76] where the defendant, having made maple sugar in his unfenced woodland, left some of the syrup in a kettle, under an unin-closed shed, and the plaintiff's cow, running at large in the wood, came by night and drank of it and died, there being no evidence of any town by-law permitting cattle to run at large, nor of the defendant's consent that the plaintiff's cattle, or cattle generally, might run on his premises, it was held that the plain-

[74] Bush v. Brainard, 1 Cowen, 78; 13 Am. Dec. 513; Munger v. Tonawanda R. Co., 4 N. Y. 349; 53 Am. Dec. 384; Carter v. Columbia, &c., R. Co., 19 S. C. 20; 45 Am. Rep. 754; Everhart v. Terre Haute, &c., R. Co., 78 Ind. 292; 41 Am. Rep. 567; Galena, &c., R. Co. v. Jacobs, 20 Ill. 478; Lygo v. Newbold, 9 Exch. 302.

[75] Carter v. Columbia, &c., R. Co., 19 S. C. 20; 45 Am. Rep. 567. But see Harriman v. Pittsburgh, &c., R. Co., 45 Ohio St. 11; 12 N. E. Rep. 451, where the facts were as follows:—A train of cars, passing over some signal torpedoes, left one unexploded, which was picked up by a boy nine years old, at a point on the track which he and other children, in common with the general public, had long been accustomed to use as a crossing, with the knowledge and without the disapproval of the company. He carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it. It exploded, and injured the plaintiff, a boy ten years of age. The court held that the act of the boy who picked up the torpedo was only a contributory condition, which the company's servants should have anticipated as a probable consequence of their negligence in leaving the torpedo where they did, and that that negligence was the direct cause of the injury suffered by the plaintiff.

[76] 1 Cowen, 78; 13 Am. Dec. 513.

tiff had no right of action. This rule, in its application to the case of an infant trespasser, is somewhat modified.[77]

§ 54. Plaintiff's prior negligence in connection with defendant's subsequent negligence.— It is sometimes said to be the rule that a plaintiff may recover, notwithstanding the fact that his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him,[78] or, as Judge Thompson puts it:[79]— "perhaps a better expression of this rule is that, although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the injury upon him, through a failure to exercise ordinary care, the plaintiff may recover damages."[80] This is but another attempt to make sense out of the rule laid down in the case of Davies v. Mann,[81] and to make it square with the recognized and unquestioned rules of law which obtain upon the subject of contributory negligence. As it is first formulated above it is equivalent, for practical purposes, to the rule that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause or a mere condition of it, the action will lie. This, as has been shown,[82] is a correct rule, and it is correctly expressed. As used in this sense "prior" and "subsequent" are very nearly, and often exactly, equivalent to proximate and remote; "prior negligence" will usually be found substantially the same as negligence that is regarded as a remote cause, and "subsequent

[77] See *infra*, §§ 140, 204, 205.

[78] Shearman & Redfield on Negligence (5th ed.), § 99.

[79] Thompson on Negligence, 1157, note.

[80] Hector Mining Co. v. Robertson, 22 Colo. 491, 494; Denver & Berkeley Park Rapid Transit Co. v. Dwyer, 20 Colo. 132; Cullen v. Baltimore & Potomac R. R. Co., 8 App. D. C. 69; Barker v. Savage, 45 N. Y. 191, 194; Brown v. Lynn, 31 Penn. St. 510; Northern, &c., R. Co. v. Price, 29 Md. 420; Locke v. First Div., &c., R. Co., 15 Minn. 350; Nelson v. Atlantic, &c., R. Co., 68 Mo. 593; O'Keefe v. Chicago, &c., R. Co., 32 Iowa, 467; Morris v. Chicago, &c., R. Co., 45 Iowa, 29; Ball's Leading Cases, 289. Compare Lannen v. Albany Gas Light Co., 44 N. Y. 459; affirming 46 Barb. 264, and placing the decision not so much on the ground that the defendant failed to exercise due care after becoming aware of the plaintiff's negligence, but rather on the ground that the latter was really a remote cause of the accident.

[81] 10 M. & W. 546.

[82] § 27, *supra*.

negligence" means, ordinarily, in the judge's opinion, the negligence that did the mischief, which is more usually known as negligence which is a proximate cause.

§ 55. Judge Thompson's position criticised.— On the other hand, the author ventures to suggest that the rule, as stated by Judge Thompson, is only an indifferent way of saying that, when the defendant's negligence is wilful, the plaintiff's contributory negligence is not a defense. When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me and "inflicts" the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not wilful negligence. The author believes, as he has already suggested,[83] that every case in the reports which assumes to rest upon the rule that the prior negligence of the plaintiff is not a defense to the subsequent negligence of the defendant, where a correct conclusion has been reached, will be found to turn upon one or the other of these elementary propositions. When the plaintiff in these cases is held entitled to recover, it will appear either that the defendant's negligence was wilful, or that it was the proximate cause of the injury. If this be true, nothing is gained by stating the rule in this way. It begets confusion in expression and in thinking. And, moreover, as an abstract proposition of law, it is open to the criticism that, whether we express it in one way or the other, and either with or without Judge Thompson's discovery clause, it ignores the principle upon which the law of contributory negligence has been made to rest, and proceeds upon the theory of punishment. The tendency of it is to unsettle and confuse established principles. The culmination of it is "comparative negligence."

§ 56. When the plaintiff's negligence precedes the defendant's in point of time.— The courts have usually adopted this form of expressing the law in cases where the negligence of the plaintiff preceded that of the defendant in point of time, and it has more generally been applied where the defendant's negligence is the proximate cause of the injury.[84] When the negligent acts

[83] § 27 *et seq.*, *supra*.

[84] The rule is frequently resorted to where the plaintiff is negligently upon a railroad track, and is injured by defendant's want of ordinary care after he is discov-

or omissions of the parties to the action were contemporaneous — or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff

ered. Lay v. Richmond, &c., R. Co., 106 N. C. 404; 11 S. E. Rep. 412, was such a case; there the plaintiff recovered, though he was a trespasser. See, also, Houston, &c., R. Co. v. Carson, 66 Tex. 345; Hayes v. Gainesville St. Ry. Co., 70 Tex. 602; 8 S. W. Rep. 491; Wooster v. Chicago, &c., R. Co., 74 Iowa, 593; 38 N. W. Rep. 425; Kelly v. Union Ry. & T. Co., 95 Mo. 279; 8 S. W. Rep. 420; Baltimore, &c., R. Co. v. Kean, 65 Md. 394; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Cleveland, &c., R. Co. v. Elliott, 28 Ohio St. 340; Johnson v. Hudson River R. Co., 5 Duer, 27; Button v. Hudson River R. Co., 18 N. Y. 248; Austin v. N. J. Steamboat Co., 43 N. Y. 75; Healy v. Dry Dock, &c., R. Co., 46 N. Y. Super. Ct. 473; Kansas, &c., R. Co. v. Cranmer, 4 Colo. 524; Doggett v. Richmond, &c., R. Co., 78 N. C. 305; Gunter v. Wicker, 85 N. C. 310; Needham v. San Francisco, &c., R. Co., 37 Cal. 409. Gothard v. Alabama, &c., R. Co., 67 Ala. 114, puts the rule as follows:—"Although one negligently exposes himself to peril, yet, if he uses proper diligence in escaping the danger when it becomes apparent, and the defendant fails to use all the proper means in his power to avert the danger, the defendant is liable, and the original negligence is no defense to the action." The court, however, also distinctly states that the one point to be determined is whether the plaintiff did or did not proximately cause the accident. Zimmerman v. Hannibal, &c., R. Co., 71 Mo. 476; Swigert v. Hannibal, &c., R. Co., 75 Mo. 475; Trow v. Vermont, &c., R. Co., 24 Vt. 487; Wright v. Brown, 4 Ind. 95; 58 Am. Dec. 622; Cummins v. Presley, 4 Harr. (Del.) 315; Baltimore, &c., R. Co. v. Trainor, 33 Md. 542; Baltimore, &c., R. Co. v. McDonnell, 43 Md. 534; Baltimore, &c., R. Co. v. Mulligan, 45 Md. 486; Mississippi, &c., R. Co. v. Mason, 51 Miss. 234; Johnson v. Canal, &c., R. Co., 27 La. Ann. 53; Isbell v. New York, &c., R. Co., 27 Conn. 393; Byram v. McGuire, 3 Head, 530; Underwood v. Waldron, 33 Mich. 232; O'Rourke v. Chicago, &c., R. Co., 44 Iowa, 526; Morris v. Chicago, &c., R. Co., 45 Iowa, 29; Illinois, &c., R. Co. v. Hoffman, 67 Ill. 287; Chicago, &c., R. Co. v. Donahue, 75 Ill. 106; Ohio, &c., R. Co. v. Stratton, 78 Ill. 88. Georgia, &c., R. Co. v. Neely, 50 Ga. 540, where this principle can be seen in the form of comparative negligence. Lane v. Atlantic Works, 107 Mass. 104; Britton v. Cummington, 107 Mass. 347; Hibbard v. Thompson, 109 Mass. 288; Tuff v. Warman, 2 C. B. (N. S.) 740; 5 C. B. (N. S.) 573; Scott v. Dublin, &c., R. Co., 11 Ir. C. L. 377; Radley v. London, &c., R. Co., 1 App. Cas. 754; L. R. 9 Exch. 71; 43 L. J. (Exch.) 73; Field on Damages, 161; Shearman & Redfield on Negligence (5th ed.), §§ 99, 483; Thompson on Negligence, 1157; Wharton on Negligence, § 335 *et seq.*

cannot recover damages. This is hardly more than a reiteration of the general rule of contributory negligence, but it is the form in which the rule is sometimes stated.[85] Having now considered the legal effect of the plaintiff's negligence, both when, in point of time, it is prior to that of the defendant, and when it is contemporaneous therewith, we proceed to a discussion of the consequences of that negligence when it is subsequent to the negligent wrong-doing of the defendant.

§ 57. Plaintiff's negligence after the catastrophe.— In the preceding sections an attempt was made to show that, when the defendant's negligence appears to have been subsequent to that of the plaintiff, so that the rule that the plaintiff's prior negligence is not a defense to the subsequent neglect, or wrong-doing of the defendant, is applied, if a correct conclusion is reached, it will be found, in the last analysis, either that the defendant's negligence was the proximate cause of the injury, or that his negligence was wilful. It has perhaps been somewhat overlooked, both by the text-writers and the courts, that the converse of this proposition is also true. The question being whose neg-

[85] Pennsylvania R. Co. v. Aspell, 23 Penn. St. 147; 62 Am. Dec. 323; Railroad Co. v. Norton, 24 Penn. St. 469; Simpson v. Hand, 6 Wharton (Penn.), 311; 36 Am. Dec. 231; Beatty v. Gilmore, 16 Penn. St. 463; 55 Am. Dec. 514; Pennsylvania R. Co. v. Zebe, 33 Penn. St. 318; Heil v. Glanding, 42 Penn. St. 493; Stiles v. Geesey, 71 Penn. St. 439; Cook v. Champlain, &c., R. Co., 1 Denio, 91; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson River R. Co., 24 N. Y. 432; Hance v. Cayuga, &c., R. Co., 26 N. Y. 428; Ring v. City of Cohoes, 77 N. Y. 83; 33 Am. Rep. 574; Allen v. Hancock, 16 Vt. 230; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Wood v. Jones, 34 La. Ann. 1086; Worcester v. Essex Merrimac Bridge Corp., 7 Gray, 457; Heland v. Lowell, 3 Allen, 407; Timmons v. Ohio, &c., R. Co., 6 Ohio St. 105; Larkin v. Taylor, 5 Kan. 433. So the same idea is often expressed as follows:— that when there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained. Stucke v. Milwaukee, &c., R. Co., 9 Wis. 202; Haley v. Chicago, &c., R. Co., 21 Iowa, 25; Reynolds v. Hindman, 32 Iowa, 149; Northern Central R. Co. v. Price, 29 Md. 420; Northern Central R. Co. v. Gies, 31 Iowa, 357; Needham v. San Francisco, &c., R. Co., 37 Cal. 423; Straus v. Kansas, &c., R. Co., 75 Mo. 185; Crandall v. Goodrich Trans. Co., 11 Biss. 516; 16 Fed. Rep. 75; Burrows v. The Marsh Gas & Coke Co., L. R. 5 Exch. 67; L. R. 7 Exch. 96.

ligence was the proximate cause of the injury of which the plaintiff complains, it will occasionally appear that the plaintiff's negligent act, or omission to act, *after the defendant's negligence*, was the efficient cause of the mischief. Whenever it can be shown in evidence that the plaintiff, after the defendant's negligent act or omission, and with knowledge, actual or constructive, of such negligence and its probable consequences, refused or omitted to exercise ordinary care under the circumstances to prevent an injury from that cause to himself or his property, then, if he suffers, his own negligence is the proximate and efficient cause of the injury, and, upon familiar grounds, his right of action is gone. The issue, upon the determination of which the plaintiff's case rests, is, what was the proximate cause, and when his own negligence, being, in point of time, either prior to that of the defendant, or contemporaneous with it, or subsequent to it, turns out to have been the proximate cause, his right to recover is barred.

§ 58. The same subject continued.— It is wholly immaterial *when* the plaintiff's negligence operated to produce the injury. If it was the proximate cause he has no cause of action, and that his negligence may as well be subsequent to that of the defendant as any other way, may well be illustrated by reference to the reported cases. In Illinois, &c., R. Co. v. McClelland,[86] it appeared that a son of the plaintiff saw a fire in some stubble near a fence separating the plaintiff's land from a railway track, while on his way homeward, but that instead of stopping and trying to put the fire out, he went on, and, upon returning to the place some time afterward, found the fire burning so hotly and extending so far as to be beyond control. The court held this an act of negligence, chargeable to the plaintiff, and sufficient to prevent his recovery. Here the negligence of the plaintiff in failing to stamp out a fire negligently kindled by sparks from the defendant's locomotive, after the probability that the fire would spread and burn up his fence had been brought to his knowledge, was the proximate cause of the injury he sustained. And again in Toledo, &c., R. Co. v. Pindar,[87] where the plaintiff's house was negligently set on fire by a passing locomotive on the defendant's railway, and the plaintiff, although he had ample time and opportunity after the house began to burn up, to get out some money he had in the house, but forgot it, and

[86] 42 Ill. 355.

[87] 53 Ill. 447; 5 Am. Rep. 57.

suffered it to be burned, it was held that the plaintiff's failure to secure the money was the proximate cause of its loss, and that therefore he could not recover.[88] It is unquestionably a correct rule, and, at least, in view of the precedents, not a wholly incorrect way of expressing it, that the subsequent negligence of the plaintiff will be a defense to the prior negligence of the defendant whenever the plaintiff, by the exercise of ordinary care under the circumstances, after the discovery of the negligent act of the defendant, could have escaped the injury.

§ 59. This statement of the rule examined.— Perhaps this is reading Judge Thompson's rendition of the rule in Davies v. Mann [89] backwards, but, however that may be, it states a correct rule, in a way which, in view of the fact that many cases

[88] An unnecessary delay of ten or fifteen minutes in making an effort to put out the fire is not contributory negligence as a matter of law. Mills v. Chicago, &c., Ry. Co., 76 Wis. 422; 45 N. W. Rep. 225. Where plaintiff saw a fire, kindled by a locomotive, burning in some dry grass upon defendant's right of way near his own hay-field, and was in a position to put it out, but made no effort to do so, his negligence was fatal. Eaton v. Oregon Ry. & Nav. Co., 22 Or. 497; 24 Pac. Rep. 415. See, also, Washburn v. Tracy, 2 D. Chipman (Vt.) 128; 15 Am. Dec. 661; Haverly v. State Line, &c., R. Co., 135 Penn. St. 50; 19 Atl. Rep. 1013; 26 W. N. C. 321; Lilley v. Fletcher, 81 Ala. 234; 1 So. Rep. 273. In McNarra v. Chicago, &c., R. Co., 41 Wis. 69, however, a fire having originated thirty or forty rods from plaintiff's land, and the only evidence bearing upon plaintiff's negligence being that he saw smoke rising from defendant's track for two or three days — the last time being eight days before his property burned,— and took no measures to have the fire extinguished: Held, that this would not sustain a finding of contributory negligence. Snyder v. Pittsburgh, &c., R. Co., 11 W. Va. 15; Secord v. St. Paul, &c., R. Co., 5 McCrary, 515. In Krum v. Anthony, 115 Penn. St. 431; 8 Atl. Rep. 598, the owner of a horse, which was killed by falling into a pit on adjoining land, was held guilty of contributory negligence, if he put the horse out to pasture, knowing that the fence which it was the adjoining owner's duty to maintain, was down in places. Carey v. Chicago, &c., R. Co., 61 Wis. 71, to the same effect. *Contra*, Eddy v. Kinney, 60 Vt. 554; 15 Atl. Rep. 198, under R. L. Vt., § 3184, making adjoining owner liable for damages caused by reason of insufficient fence. See, also, Chicago, &c., R. Co. v. Sims, 17 Neb. 691; Donovan v. Hannibal, &c., R. Co., 89 Mo. 147, under statutes requiring railroads to fence. 1 Sedgwick on Damages (8th ed.), p. 295 *et seq.*

[89] Thompson on Negligence, 1155, §§ 7 and 8.

in the reports contain the reverse proposition, more or less exactly put, will emphasize a phase of the subject which should not be overlooked. The careful reader will not fail to have noted that the author deprecates this way of expressing the rule, and has attempted to show that the real issue is, not whose negligence came first or last, but whose negligence, however it came, was the proximate cause. When the subsequent negligence of the plaintiff contributes, not to cause, but to aggravate the injury, it will not, as has been hitherto suggested,[90] avail the defendant as a defense, for the obvious reason that, howsoever much it may have increased the damage, it did not cause the injury, and the defendant's negligence did cause it, which is the ground of his chargeability.[91] How far such negligence on the part of a plaintiff will count in mitigation of damages is considered hereafter.[92]

§ 60. Negligence of the decedent under Lord Campbell's act.— In every State in the Union there is a statute, modeled more or less exactly after the English statute, known as Lord Campbell's act,[93] under which actions are brought by the personal representatives of deceased persons to recover damages for injuries which have resulted in death. These statutes uniformly provide that no action is maintainable by the representatives in cases where the deceased himself could not have maintained the action if death had not ensued. All the rules of contributory negligence, therefore, applicable to any individual case, had it been brought by the deceased in his lifetime, apply in full force when the action is brought by his personal representatives after his death. The contributory negligence of the dead person is as completely a bar to the action brought for the benefit of his next of kin, by his representative, as it would have been had he lived

[90] § 34, *supra*.

[91] Gould v. McKenna, 86 Penn. St. 297; 27 Am. Rep. 705. Thus, in Stebbins v. Central R. Co., 54 Vt. 464; 41 Am. Rep. 855, it was held that damage caused by fire through the negligence of one party, but increased through the negligence of the party suffering the loss, may be recovered up to the time when the contributory negligence began to affect the result. Secord v. St. Paul, &c., R. Co., 5 McCrary, 515; Sills v. Brown, 9 Car. & P. 601; Greenland v. Chaplin, 5 Exch. 243; Shearman & Redfield on Negligence (5th ed.), § 95, and note; Wharton on Negligence, § 868 *et seq.*

[92] § 69, *infra*.

[93] 9 and 10 Vict., chap. 93.

to bring the action himself for his own benefit. A very considerable proportion of all the cases in which the question of contributory negligence is involved are those in which the action has been brought to recover damages for injuries which resulted in death. Accordingly to consider the authorities in detail under this section would be to go over again each title of the whole subject *seriatim*.[94] This would be fruitless, and the cita-

[94] The case of Hubgh v. New Orleans, &c., R. Co., 6 La. Ann. 495; 54 Am. Dec. 565, held that there was absolutely no property right in a husband or father, and that an action for damages caused by the homicide of a free human being could not be maintained. This was, of course, before the adoption of Lord Campbell's act. The case presents, however, a very learned and interesting argument to uphold its conclusion. Bailey's Conflict of Judicial Decisions, 1. See, also, Holland v. Lynn, &c., R. Co., 144 Mass. 425; 11 N. E. Rep. 674; Gunn v. Cambridge R. Co., 144 Mass. 430; Scheffler v. Minneapolis, &c., Ry. Co., 32 Minn. 125; Womack v. Central R. & B. Co., 80 Ga. 132; 5 S. E. Rep. 63; Kentucky Cent. R. Co. v. Wainwright's Adm'r (Ky.), 13 S. W. Rep. 438. The mother of an illegitimate child cannot maintain an action under a statute giving such right to the "parents," &c., of the deceased. Harkins v. Philadelphia, &c., R. Co., 15 Phila. (Penn.) 286. A four or five months' fœtus, surviving but a few minutes after delivery, is not a "person" for whose death an action will lie. Dietrich v. Northampton, 138 Mass. 14; 52 Am. Rep. 242. In Rhode Island, it is held that no such action can be maintained where the defendant is only charged with passive neglect or a mere omission of duty. Bradbury v. Furlung, 13 R. I. 15; 43 Am. Rep. 1. A wilful injury is not one caused by "neglect," even though the defendant is a common carrier, and the act was committed by its servants. Winnegar's Admr. v. Central Passenger Ry. Co., 85 Ky. 547; 4 S. W. Rep. 237. As to what constitutes "wilful neglect" under the Kentucky statute, see Derby's Adm'r v. Kentucky Cent. R. Co. (Ky.), 4 S. W. Rep. 303; Reinder's Adm'r v. Blick & Philips Coal Co. (Ky.), 13 S. W. Rep. 719. A person actively aiding and abetting the principal actor is liable. Gray v. McDonald, 28 Mo. App. 477. In Massachusetts contributory negligence is not a defense to an action under Mass. Pub. St. Ch. 112, § 212, against a railroad company for the death of a passenger. Merrill v. Eastern R. Co., 139 Mass. 252; McKimble v. Boston, &c., R. Co., 139 Mass. 542. But generally the ordinary rules applicable to actions for injuries not resulting in death operate in a suit under the statute. Berry v. Northeastern R. Co., 72 Ga. 137; Spiva v. Osage Coal & Mining Co., 88 Mo. 68; Missouri Pac. Ry. Co. v. Cassidy (Kan.), 24 Pac. Rep. 88; Cleary v. Philadelphia, &c., R. Co., 8 Penn. Co. Ct. Rep. 96; Hunter v. Cooperstown, &c., R. Co., 112 N. Y. 371; 19 N. E. Rep. 820; Texas, &c., R. Co.

tions below, selected to illustrate the application of the rules of law in point to many special instances, are believed to be fully

v. Berry, 67 Tex. 238; Fisher v. Golladay, 38 Mo. App. 531. Contributory negligence is no defense, however, if the defendant's act was wilful. Kain v. Larkin, 9 N. Y. Supl. 89; 56 Hun, 79; Missouri Pac. Ry. Co. v. Brown, 75 Tex. 267; 12 S. W. Rep. 1117; Reading Iron Works v. Devine, 109 Penn. St. 246; Texas, &c., Ry. Co. v. Orr, 46 Ark. 182. Features of the law of contributory negligence, or departures from the rule, peculiar to the jurisdiction in which the cause of action arises have full force in suits under the statute. In Augusta, &c., R. Co. v. Killian, 79 Ga. 234; 4 S. E. Rep. 165; and Chesapeake, &c., R. Co. v. Foster, 88 Tenn. 671; 13 S. W. Rep. 694, the rule of comparative negligence in its "mitigated" form was a factor. See Rule in Georgia and in Tennessee, *infra*, §§ 88, 93. On a libel in admiralty to recover on a State statute, the rule of contributory negligence prescribed by the statute controlled instead of the rule in the admiralty. The A. W. Thompson, 39 Fed. Rep. 115. In a suit under Comp. Laws Oregon, § 371, for a death caused by a collision by mutual fault of both boats, the owners were held liable in *solido* for the damages. Holland v. Brown, 35 Fed. Rep. 43.

Limitation of action.— In Sherman v. Western Stage Co., 24 Iowa, 515, it was held that the statute of limitations began to run from the time of the accident, not from the time of the appointment of an administrator. Rutter v. Missouri Pac. Ry. Co., 81 Mo. 169; Taylor v. Cranberry Iron & Coal Co., 94 N. C. 525.

Pleading.— The complaint must show that the injury gave a cause of action in the State where the accident occurred. Hamilton v. Hannibal, &c., R. Co., 39 Kan. 56; 18 Pac. Rep. 57.

Averments of title to sue, &c.— Burlington, &c., R. Co. v. Crockett, 17 Neb. 570; Bell v. Central R. Co., 73 Ga. 520; Warner v. Western N. C. R. Co., 94 N. C. 250.

Allegations of negligence, &c.— Missouri Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. Rep. 857; Louisville, &c., Ry. Co. v. Sandford, 117 Ind. 265; 19 N. E. Rep. 770; Owen v. Railroad Co., 87 Ky. 626; Henderson's Admr. v. Kentucky, &c., R. Co., 86 Ky. 389; 5 S. W. Rep. 875; Albert v. State, 66 Md. 325.

Evidence.—Where the negligence of the defendant is affirmatively shown, and there is no proof of the conduct of the deceased, the jury are at liberty to infer ordinary diligence on his part, taking into consideration his character and habits, as proved, and the natural instinct of self-preservation. Gay v. Winter, 34 Cal. 153. Proof of death is not sufficient without evidence connecting it with the accident. Providence & S. S. S. Co. v. Clare, 127 U. S. 45; 8 S. Ct. Rep. 1094; Sorenson v. Northern Pac. R. Co., 36 Fed. Rep. 166.

Damages.—A nominal verdict for the plaintiff in such a case is repugnant, absurd, and perverse. Springett v. Ball, 4 Fost. & Fin. 472. Exemplary damages may be

sufficient to instruct the student or gratify the curiosity of the general reader, while the practitioner will look, in addition, for his authorities, as the exigencies of his case require, under the proper heads elsewhere.

recovered for gross negligence, though death was instantaneous. Kansas City, &c., R. Co. v. Daughtry, 88 Tenn. 721; 13 S. W. Rep. 698, following Haley v. Railroad Co., 7 Baxt. 242; Corliss v. Worcester, &c., R. Co., 63 N. H. 404; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; 18 N. E. Rep. 108; Scheffler v. Minneapolis, &c., Ry. Co., 32 Minn. 518;. Demarest v. Little, 47 N. J. L. 28. Fifteen thousand dollars damages for the death by negligence of a young and robust skilled workman was held not so excessive as to require a reversal of the verdict. East Line, &c., Ry. Co. v. Smith, 65 Tex. 167; Batchelor v. Fortescue, 11 L. R. (Q. B. Div.) 474; Armstrong v. Southeastern Ry. Co., 11 Jur. 758; Tucker v. Chaplin, 2 Car. & K. 730; Thorogood v. Bryan, 8 C. B. 115; 18 L. J. (C. P.) 336; Marshall v. Stewart, 33 Eng. Law & Eq. 1; Hutchinson v. York, &c., Ry. Co., 6 Eng. Rail. Cas. 580; Smith v. Steele, L. R. 10 Q. B. 125; 44 L. J. (Q. B.) 60; Wigmore v. Jay, 5 Exch. 354; 19 L. J. (Exch.) 300; Dynen v. Leach, 26 L. J. (Exch.) 221; Carey v. Berkshire R. Co., 1 Cush. 475; 48 Am. Dec. 616, and Mr. Freeman's learned note, pp. 619 to 641; Knight v. Ponchartrain R. Co., 23 La. Ann. 462; Telfer v. Northern, &c., R. Co., 30 N. J. Law, 188; Paulmier v. Erie Ry. Co., 34 N. J. Law, 151; Willetts v. Buffalo, &c., R. Co., 14 Barb. 585, where the deceased was a lunatic; Elliott v. St. Louis, &c., R. Co., 67 Mo. 272; State v. Manchester, &c., R. Co., 52 N. H. 528; Dennick v. Railroad Co., 103 U. S. 11; Scheffer v. Washington, &c., R. Co., 105 U. S. 249; Indianapolis, &c., R. Co. v. Stout, 53 Ind. 143; Bancroft v. Boston, &c., R. Co., 97 Mass. 275; Sauter v. New York, &c., R. Co., 66 N. Y. 50; 23 Am. Rep. 18; Louisville, &c., R. Co. v. Collins, 2 Duv. 114; Packet Co. v. McCue, 17 Wall. 508; Toledo, &c., R. Co. v. Moore, 77 Ill. 217; Schmidt v. Chicago, &c., R. Co., 83 Ill. 405; Chicago, &c., R. Co. v. Triplett, 38 Ill. 482; Kansas, &c., R. Co. v. Salmon, 11 Kan. 83; Cumberland, &c., R. Co. v. Fazenbaker, 37 Md. 156; Pennsylvania R. Co. v. Zebe, 33 Penn. St. 318; Hill v. Louisville, &c., R. Co., 9 Heisk. 823; McLean v. Burbank, 11 Minn. 277; Nickerson v. Harriman, 38 Me. 277; Atlanta, &c., R. Co. v. Ayers, 53 Ga. 12; Nashville, &c., R. Co. v. Smith, 6 Heisk. 174; Thompson on Negligence, 1279, 1294, at § 92; Shearman & Redfield on Negligence (5th ed.), § 65; Cooley on Torts, 264; Addison on Torts, 503.

CHAPTER IV.

THE CONDUCT OF THE DEFENDANT AS AFFECTING THE MATTER OF CONTRIBUTORY NEGLIGENCE.

§ 61. Gross negligence of the defendant.
62. Distinction between gross negligence and wilful negligence.
63. Defendant's gross negligence.
64. Wilful negligence of the defendant.
65. Actions for assault and battery.
66. Application of this rule in Pennsylvania and Kentucky.
67. When the defendant, by his acts or omissions, throws the plaintiff off his guard.
68. This rule illustrated.
69. Mitigation and apportionment of damages.
70. Application of this doctrine.
71. The rule criticised.

§ 61. Gross negligence of the defendant.—"Gross neglect," said Chancellor Kent, "is the want of that care which every man of common sense under the circumstances takes of his own property."[1] However much this definition may be obnoxious to criticism in other respects, it defines gross negligence in such a way as to mark clearly the distinction between that grade of fault and wilful negligence, with which it has sometimes been rather strangely confounded. We find the term "gross negligence" occasionally used in the reports in such a way as to be, for the most part, equivalent to *wilful* negligence. In St. Louis, &c., R. Co. v. Todd,[2] gross negligence is defined as "amounting to wilful injury," while, at the other extreme, there is a class of cases holding that there is no juridical difference between gross negligence and negligence merely.[3] Baron Rolfe also calls "gross" a "vituperative epithet," and intimates that he sees no difference between negligence simply and negligence with gross prefixed.[4] It should seem, however, at that extreme, not

[1] 2 Com. 560.

[2] 36 Ill. 409.

[3] Hinton v. Dibbin, 2 Q. B. 661; Austin v. Manchester, &c., R. Co., 10 C. B. 454, 474; Wells v. New York, &c., R. Co., 24 N. Y. 181; Perkins v. New York, &c., R. Co., 24 N. Y. 196; Smith v. New York, &c., R. Co., 24 N. Y. 222; New World v. King, 16 How. (U. S.) 474.

[4] Wilson v. Brett, 11 Mee. & W. 113. See, also, Grill v. Genl., &c., Colller Co., L. R. 1 C. P. 612.

hard to see the essential distinction between ordinary negligence and gross negligence, but it is with the confusion and misunderstanding as to the line of demarcation proper to be observed between the terms gross negligence and wilful negligence that we have now especially to do.

§ 62. **Distinction between gross negligence and wilful negligence.**— The distinction between these two grades of fault is suggested in a famous New York decision,[5] in which Beardsley, J., says:— "Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief."[6] Notwithstanding the confusion in the use of these terms in the earlier cases, there is, it is believed, a somewhat settled and determined meaning for each of them as they are used by the judges at present. By negligence is meant ordinary negligence, a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence, that which is mere inadvertence in the superlative degree.[7] It is a convenient designation of a real thing, and in this sense gross is merely intensive and not "vituperative." By wilful negligence is meant not strictly *negligence* at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of the will in a particular direction, there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured in preventing the injury,[8] in reckless disregard of the consequences as affecting the life or property of another.[9] Such conduct is not negligent in any proper sense, and the term "wilful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer. It is, however, the name which the courts have fastened

[5] Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239.

[6] See, also, in point, Hansford's Adm'r v. Payne, 11 Bush, 380, where it is said that "wilful" is not to be taken at all as synonymous with "gross." An apothecary's clerk, in filling a prescription, delivered a poison instead of a harmless drug. While this was *gross* negligence, yet it is very distinct from being *wilful*.

[7] "Gross negligence is not tantamount to a wilful act or omission, but it signifies a thoughtless disregard of consequences." Gulf, &c., R. Co. v. Levy (Sup. Ct. Texas), 19 Am. Law Rev. 480.

[8] Kentucky Cent. R. Co. v. Gastineau's Adm'r. 83 Ky. 119.

[9] Gulf, &c., R. Co. v. Levy (Sup. Ct. Texas), 19 Am. Law Rev. 480.

upon a fault of that character, and by which it is most usually designated in the reports.

§ 63. Defendant's gross negligence.— Recognizing these several grades of negligence, and distinguishing them as I have proposed, we come to a line of cases which hold that when the defendant's negligence, either *in faciendo* or *in non faciendo*, amounts to gross negligence, the contributory negligence of the plaintiff will not prevent a recovery.[10] Of this rule, as an abstract proposition of law, it may be said that it is unsound. An examination of the cases cited, and others that announce the same rule, will show that they, for the most part, fall into one of two classes. Either the "gross negligence" that they refer to is in reality *wilful* negligence, or the doctrine of comparative negligence is discovered. The older judges had a fashion of using the expression "gross or wilful negligence," as though

[10] Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Augusta, &c., R. Co. v. Elmurry, 24 Ga. 75, where the plaintiff was allowed to recover the value of an old negro woman, because of the gross negligence of the defendant company in killing her, although it was proved that she was negligent herself. Macon, &c., R. Co. v. Davis, 27 Ga. 113; Kansas, &c., R. Co. v. Pointer, 14 Kan. 37; Louisville, &c., R. Co. v. Collins, 2 Duv. 114. In Louisville, &c., R. Co. v. Robinson, 4 Bush, 507, the startling (!) identity of gross negligence and wilfulness is well brought out. "Gross negligence," the court holds, "is either an intentional, or such a reckless disregard of security and right, as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which, in some respects, is *quasi criminal*." After such a definition, it is no wonder that the plaintiff was allowed to recover. Hartfield v. Roper, 21 Wend. 615; 34 Am. Dec. 273; McGrath v. Hudson River R. Co., 32 Barb. 155; 19 How. Pr. 224; Rathbun v. Payne, 19 Wend. 399; Chapman v. New Haven, &c., R. Co., 19 N. Y. 341; Button v. Hudson River R. Co., 18 N. Y. 248; Galena, &c., R. Co. v. Jacobs, 20 Ill. 478; Chicago, &c., R. Co. v. Gretzner, 46 Ill. 75; Ohio, &c., R. Co. v. Porter, 92 Ill. 437; Stacke v. Milwaukee, &c., R. Co., 9 Wis. 202; Evansville, &c., R. Co. v. Lowdermilk, 15 Ind. 120; Lafayette, &c., R. Co. v. Adams, 20 Ind. 76, is more careful in laying down the rule. It is there said that when the defendant's negligence is *so* gross as to imply willingness to inflict the injury, the plaintiff may recover, though he be negligent himself. Whirley v. Whiteman, 1 Head, 610. See, also, White v. Wabash, &c., Ry. Co., 34 Mo. App. 57, and Kelly v. Missouri P. Ry. Co., 101 Mo. 67; 13 S. W. Rep. 806.

the two were in substance the same,[11] and in many of the earlier cases, where this or some equivalent form of expression is found, it is plain that that grade of negligent wrong-doing is referred to which is considered in the succeeding section, and that what is there called "gross, or wilful," means simply wilful negligence. In the later cases, the distinction between these two essentially different grades of fault is more generally recognized, and, as a consequence, we read in the recent reports less and less about gross negligence, when wilful negligence is meant. Except in those jurisdictions where the doctrine of comparative negligence obtains, it is not at present usual to announce the rule in this way, *i. e.*, that contributory negligence is no defense when the negligence of the defendant is gross, for the reason, as we have seen, that it either states the rule wrong, or states it right in a wrong way.[12]

§ 64. Wilful negligence of the defendant.—When the wrong-doing of the defendant is merely negligence, the contributory negligence of the plaintiff may, as is well understood, operate as a defense, but when the defendant's conduct is wilful, it is no longer negligence, and when the injury sustained by the plaintiff is the result of the wanton and wilful act of the defendant, the question of the plaintiff's contributory negligence as a defense cannot arise. In order to constitute *contributory* negligence on the part of the plaintiff, there must be *negligence* on the part of the defendant.[13] It is accordingly the settled rule that when the defendant's conduct amounts to wilfulness, and when the mischief is occasioned by his intentional and wanton wrong-doing, the plaintiff's negligence is no defense.[14] Thus, in

[11] Hartfield v. Roper, 21 Wend. 615; 34 Am. Dec. 273; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; and Evansville, &c., R. Co. v. Lowdermilk, 15 Ind. 120.

[12] There is no middle ground between the negligent doing or omission of an act causing injury to another and the wilful injury of the same, wherein the injured party may recover, regardless of his own negligence because of the gross negligence of the party inflicting the injury. Pennsylvania Co. v. Myers, 136 Ind. 242.

[13] Rutter v. Foy, 46 Iowa, 132; Steinmetz v. Kelly, 72 Ind. 442; 37 Am. Rep. 170.

[14] Wabash R. R. Co. v. Speer, 156 Ill. 244; Central R. & B. Co. v. Newman, 94 Ga. 560. In a late case in Missouri, where plaintiff was struck by a train at a city crossing, it was held proper to charge the jury that if defendant's negligence, which contributed directly to cause the injury,

a late case in Illinois, it was said:— "If the injury to the plaintiff was caused by the needless and reckless, wilful or wanton, sounding of the whistle, her negligence in approaching the crossing and driving so close to the track as to cause her team

occurred after the danger in which plaintiff had placed himself by his own negligence was, or by the exercise of reasonable care might have been, discovered by defendant in time to avert the injury, then defendant was liable, however gross the negligence of plaintiff may have been. White v. Wabash W. Ry. Co., 34 Mo. App. 57. And it was said in Kellny v. Missouri P. Ry. Co., 101 Mo. 67; 13 S. W. Rep. 806, that recovery is granted in such a case on the ground that the defendant is estopped by its own recklessness from asserting the plaintiff's contributory negligence. Battishill v. Humphreys (Mich.), 38 N. W. Rep. 581; and Palmer v. Chicago, &c., R. Co., 112 Ind. 250; 14 N. E. Rep. 70, were also cases of recklessness in running trains. Hartfield v. Roper, 21 Wend. 615; 34 Am. Dec. 273; Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239; Williams v. Michigan, &c., R. Co., 2 Mich. 259; 55 Am. Dec. 59; Chicago, &c., R. Co. v. Smith, 46 Mich. 504. When the injury is wilful, as contributory negligence is no defense, a point in relation thereto is, of course, not available on motion for non-suit. Martin v. Wood, 5 N. Y. Supl. 274; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; Cincinnati, &c., R. Co. v. Waterson, 4 Ohio St. 424; Pittsburgh, &c.. R. Co. v. Smith, 26 Ohio St. 124; Brownell v. Flagler, 5 Hill, 282; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; Vandegrift v. Rediker, 22 N. J. Law, 185; New Jersey Express Co. v. Nichols, 32 N. J. Law, 166; 33 N. J. Law, 434; Tanuer v. Louisville, &c., R. Co., 60 Ala. 621, where it is held that to avoid the defense of contributory negligence it is not necessary that the wrongful act of the defendant should be "wanton *and* intentional," as erroneously stated, in the case of Government, &c., R. Co. v. Hanlon, 53 Ala. 70, for that defense is overcome if the injury done be wanton, reckless or intentional. Gothard v. Alabama, &c., R. Co., 67 Ala. 114; Banks v. Highland St. R. Co., 136 Mass. 485; Morrissey v. Eastern, &c., R. Co., 126 Mass. 377; 30 Am. Rep. 686; Johnson v. Boston, &c., R. Co., 125 Mass. 75; Wynn v. Allard, 5 Watts & S. 524; Bunting v. Central, &c., R. Co., 6 Nev. 277; Holstine v. Oregon, &c., R. Co., 8 Ore. 163; Maumus v. Champion, 40 Cal. 121; Carroll v. Minnesota, &c., R. Co., 13 Minn. 30; Griggs v. Fleckenstein, 14 Minn. 81; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. Rep. 185, and the note; Town of Salem v. Goller, 76 Ind. 291. Criminal negligence, as the term is used in the Nebraska statute, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and the wilful indifference to the injury liable to follow. C., B. & Q. R. Co. v. Hague, 48 Neb. 97; C., B. & Q. R. Co. v. Hyatt, 48 Neb. 161; Omaha & R. V. R. Co. v. Chollette, 33 Neb. 143.

to be frightened by the cars in no way affects her right to recover." [15]

§ 65. Actions for assault and battery.— So it is held that contributory negligence is no defense to an action for an assault and battery,[16] for the reason that the person assaulted is under no obligation to exercise any care to avoid the assault by retreating or otherwise, and because, moreover, his want of care can in no just sense be said to contribute to the injury inflicted upon him. An intentional assault inflicted upon one is an invasion of his right of personal security, for which there is a redress by an action at law, and he cannot be deprived of this redress on the ground that he was negligent and took no care to avoid such an invasion of his rights. Moreover, aptly said Adams, J.: [17]— "There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional, the latter is unintentional." [18] This reasoning applies with equal force to any other intentional injury inflicted upon a plaintiff, and the rule that when the defendant's conduct is of this character the plaintiff's negligence is not a defense, is sustained not only by precedent, but upon the soundest principles of legal right reason.

§ 66. Application of this rule in Pennsylvania and Kentucky.— In Pennsylvania the courts have materially limited the application of this principle in actions for injuries sustained by persons while unlawfully upon the track of a railway company, by taking an extreme ground, somewhat beyond that which is taken in other jurisdictions, as to the right of the company to a clear track. In such cases the rule in Pennsylvania seems to be that

[15] Wabash R. Co. v. Speer, 156 Ill. 244, 251-252; 40 N. E. Rep. 835.

[16] The use of unnecessary force in ejecting a person from a train makes a case within this rule. Chicago, &c., R. Co. v. Bills, 118 Ind. 221; 20 N. E. Rep. 775; Kain v. Larkin, 9 N. Y. Supl. 89; 56 Hun, 79; Steinmetz v. Kelly, 72 Ind. 442; 37 Am. Rep. 170; Ruter v. Foy, 46 Iowa, 132.

[17] Ruter v. Foy, 46 Iowa, 132.

[18] See, also, Chiles v. Drake, 2 Metc. (Ky.) 146; Spring's Adm'r v. Glenn, 12 Bush, 172, where, under a statute of Kentucky, it is held that if the defendant intentionally killed the plaintiff's intestate there could be no action, but if the latter was killed by the wilful neglect of the former, damages could be recovered.

the trespasser acts wholly at his peril; that the railroad company hardly owes him the duty of even slight care, and that, if he is injured from the ordinary prosecution of the company's lawful business, he must blame his own rashness and folly, and not expect the courts to assist him except in cases of the most wanton injury.[19] In Kentucky, on the contrary, the courts have gone to the other extreme, and under a statute[20] providing for the recovery of punitive damages in case of loss of life "by the wilful neglect of another person," railway corporations, in cases where persons are injured in their employ, or in being exposed to danger upon their tracks or elsewhere, through the negligence of the company, are held to a somewhat unusual degree of care, and there is a tendency to construe many acts and omissions "wilful" that perhaps in other jurisdictions might not be so severely regarded.[21]

§ 67. When the defendant by his acts or omissions throws the plaintiff off his guard.— When the defendant, by his own negligent or wrongful acts, or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of

[19] Railroad Co. v. Norton, 22 Penn. St. 465. This extreme view is not taken, however, when the trespasser is an infant. Philadelphia, &c., R. Co. v. Spearen, 47 Penn. St. 300, 304; Philadelphia, &c., R. Co. v. Hummell, 44 Penn. St. 375; Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366. See, also, § 198 *et seq.*, *infra*, where the Pennsylvania rule upon this subject is more fully considered.

[20] Genl. Stat. of Ky., 1873, chap. 57, § 3, or 2 Stanton's Ky. Rev. Stat. 510, § 3.

[21] Board of Internal Improvements v. Scearce, 2 Duv. 576, holding that it is the duty of a turnpike company to have bridges wherever the safety of travel requires. *Wilful* neglect of this duty means a knowledge by the company of the insufficiency of its bridge for that end, and a voluntary failure to remedy the defect; and a palpable and perilous defect, discoverable by ordinary vigilance, might authorize the presumption of such knowledge and neglect. Lexington v. Lewis' Adm'x, 10 Bush, 677; Claxton v. Lexington, &c., R. Co., 13 Bush, 636. See, also, Louisville, &c., R. Co. v. Collins, 2 Duv. 114. Kentucky, &c., R. Co. v. Gastineau's Adm'r, 83 Ky. 119, defining wilful neglect to be an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury. Jones' Adm'r v. Louisville, &c., R. Co., 82 Ky. 610; Louisville, &c., R. Co. v. Brooks' Adm'r, 83 Ky. 129.

safety induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, in a way and to an extent which, but for the defendant's inducement, might be imputed to the plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent, for the purpose of a defense to the action. The defendant by his own negligent conduct, which has occasioned the conduct of the plaintiff, is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or in other words, he is not to be allowed, first, to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action brought against him for the mischief that has been the result. The defendant must not take advantage of his own wrong in such a way as that. When, for an example, a traveler, upon approaching a railway crossing at a point where the view is obstructed, stops and listens for the customary signal, and, hearing nothing, drives upon the track and is immediately run over by a passing train and injured, the railway company will not be allowed to make the defense that the plaintiff was negligent in relying upon the fact that there was no whistle blown or bell rung at the crossing, as evidence that no train was near. The plaintiff in such a case, having been lulled into a feeling of security by the defendant's negligent failure to make the required signal, and having suffered an injury thereby, may have his action.[22]

[22] So, too, where his horse is frightened on approaching the crossing under like circumstances. Chicago, &c., R. Co. v. McGaha, 19 Ill. App. 342; Ransom v. Chicago, &c., Ry. Co., 62 Wis. 178; 51 Am. Rep. 718; Pennsylvania R. Co. v. Ogier, 35 Penn. St. 60. Johnson, J., in Newson v. New York, &c., R. Co., 29 N. Y. 390, stated the rule thus:—"The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." See, also, Towler v. Baltimore, &c., R. Co., 18 W. Va. 579; Philadelphia, &c., R. Co. v. Hogan, 47 Penn. St. 244; Ernst v. Hudson River R. Co., 35 N. Y. 28. The fact that the party killed by the collision was partially deaf, will not excuse the continuous sounding of the whistle from the point required by a statute. He was at least entitled to such warning of the approach of danger as the law designs to give those having full possession of their faculties. Chicago, &c., R. Co. v. Triplett, 38 Ill. 482.

§ 68. This rule illustrated.— So, where the plaintiff acts in obedience to the directions, or assurances, of the defendant, or his servants, upon whom he has a right to rely, in doing the act deemed negligent, unless the danger was a patent one, if he is injured in so doing he may recover, as when a passenger does as the conductor tells him to do in jumping from a train in motion, or in otherwise exposing himself.[23] In these cases the defendant

[23] A stranger using a ferry at night was directed by a watchman thereon to go a certain way. In following the direction, he drove upon a track and was injured by a train backing down. It was held that the proprietors of the ferry were liable. Magoric v. Little, 23 Blatchf. 399; 25 Fed. Rep. 627. Bellman v. New York, &c., R. Co., 42 Hun (N. Y.) 130; Griffith v. Missouri Pac. Ry. Co., 98 Mo. 168; 11 S. W. Rep. 559; Dickson v. Railroad Co., 80 Ga. 212; New York, &c., Ry. Co. v. Doane, 115 Ind. 435; 17 N. E. Rep. 913. Where the directions of the conductor of a train are within the scope of his agency, a passenger, in alighting from the train in obedience to them, cannot be held guilty of contributory negligence, although he may receive an injury, unless obedience to such directions exposes him to an obvious risk which a prudent man would not incur. Cincinnati, &c., R. Co. v. Carper, 112 Ind. 26; 13 N. E. Rep. 122; St. Louis, &c., Ry. Co. v. Person, 49 Ark. 182; 4 S. W. Rep. 755; Jones v. Chicago, &c., R. Co., 42 Minn. 183; 43 N. W. Rep. 1114; Smith v. Central R. & B. Co. (Ga.), 5 S. E. Rep. 772; Toledo, &c., R. Co. v. Kid. 29 Ill. App. 353; Baltimore, &c., R. Co. v. Leapley, 65 Md. 571; Weiler v. Manhattan Ry. Co., 6 N. Y. Supl. 320; 53 Hun, 372. It is not negligent for a passenger in an elevated railway car to leave his seat, and go towards the door, which at the time is held open by one of the trainmen, as the train approaches the station. Colwell v. Manhattan Ry. Co., 10 N. Y. Supl. 636; McGee v. Missouri Pac. Ry. Co., 92 Mo. 208; 4 S. W. Rep. 739; Louisville, &c., R. Co. v. Kelly, 92 Ind. 371; 47 Am. Rep. 149; Filer v. New York, &c., R. Co., 49 N. Y. 471; 10 Am. Rep. 327; and 59 Am. Rep. 351; Pool v. Chicago, &c., R. Co., 53 Wis. 659; 56 Wis. 227; St. Louis, &c., R. Co. v. Cantrell, 37 Ark. 519; 40 Am. Rep. 105; Towler v. Baltimore, &c., R. Co., 18 W. Va. 579. See, also, Pennsylvania R. Co. v. Aspell, 23 Penn. St. 147; 62 Am. Dec. 323; Philadelphia, &c., R. Co. v. Boyer, 97 Penn. St. 91. Ordinarily the questions of negligence and contributory negligence are for the jury. Jones v. Chicago, &c., R. Co., 42 Minn. 183; 43 N. W Rep. 1114; Wilburn v. St. Louis, &c., Ry. Co. 36 Mo. App. 203; Philadelphia, &c., R. Co. v. Edelstein (Penn.), 16 Atl. Rep. 847; 23 W. N. C. 342; St. Louis, &c., Ry. Co. v. Person, 49 Ark. 182; Kansas, &c., R. Co. v. Dorough, 72 Tex. 108; 10 S. W. Rep. 711; McGee v. Missouri P. Ry. Co., 92 Mo. 208. The following cases, in which the plaintiff failed to recover, serve rather to define than to impair the rule as stated in the

having induced the plaintiff to act in a certain way cannot, when injury results, set up that act as negligence in defense. If the plaintiff exercises ordinary care and prudence under the circumstances in relying upon the defendant's inducement, or in obeying defendant's orders and directions, he may have his action. And to prevent a recovery the danger must have been so obvious that a reasonable man would not have obeyed the servant, nor accepted his invitation.[24]

§ 69. Mitigation and apportionment of damages.— As a general rule, contributory negligence is never looked to in mitigation of damages, and whenever it is a defense at all it is a complete

text. In Hunter v. Cooperstown, &c., R. Co., 112 N. Y. 371; 19 N. E. Rep. 820, where the plaintiff's decedent attempted, by direction of the conductor, to board a train running about six miles an hour past a station at which it was advertised to stop, and the depot platform was uneven, it was held (Danforth, J., dissenting) that the plaintiff should be non-suited. In Stewart v. Boston, &c., R. Co., 146 Mass. 605; 16 N. E. Rep. 466, the plaintiff, who was on a wrong train through his own fault, was told by the conductor that, by taking a rear car, he could stop at a convenient station beyond. In going to the rear an ordinary lurch of the train threw the plaintiff off the platform. It was held that the information given by the conductor was not such a command or direction as would support an action against the company. The words, "Jump off quick, if you are going to," used by a conductor to a passenger who had resolved to get off a train after it had pulled out of a station, were held not to be such an authoritative command as would justify an action against the railroad company for injuries received. Vimont v. Chicago, &c., Ry. Co., 71 Iowa, 58; 32 N. W. Rep. 100. See, also, Bardwell v. Mobile, &c., R. Co., 63 Miss. 574; St. Louis, &c., Ry. Co. v. Rosenberry, 45 Ark. 256. Directions to a passenger, who has entered the wrong train by mistake, as to where he shall go, and how he shall go, to secure passage on the right train, are not within the line of the conductor's duty and do not bind the company. Cincinnati, &c., R. Co. v. Carper, 112 Ind. 26; 13 N. E. Rep. 122. See, also, Hickey v. Boston, &c., R. Co., 14 Allen, 429, where a passenger who, in conformity with a custom followed by the express permission of the conductor, and without objection from the superintendent and directors, rode on the platform of a car on its approach to a station, and was injured, he was not allowed to recover. Ample places of security being provided for passengers, it was held that a mere license given the plaintiff to occupy an exposed position would not excuse his negligence.

[24] Baltimore & Ohio R. Co. v. Myers, 18 U. S. App. 569, 581-582.

defense to the action. When both parties have been guilty of negligence, it is said that "the law has no scales to determine, in such cases, whose wrong-doing weighed most in the compound that occasioned the mischief." [25] And, to the same effect, Pollock, C. B., in Greenland v. Chaplin,[26] says:— "The man who is guilty of a wrong, who thereby produces mischief to another, has no right to say 'part of that mischief would not have arisen if you had not yourself been guilty of some negligence.'" But, while this is the usual rule, it is otherwise when, as we have seen,[27] the negligence of the plaintiff contributed not to cause, but merely to aggravate the injury, and in those cases the defendant, to catch the phrase of Baron Pollock, may say, "part of that mischief would not have arisen if you had not yourself aggravated the injury which my negligence caused," and whenever the injury produced by the plaintiff's negligence is capable of a distinct separation and apportionment from that produced by the defendant, such an apportionment must be made, and the defendant held liable only for such a part of the total damage as his negligence produced.[28] Thus, when a liability for mal-

[25] Railroad Co. v. Norton, 24 Penn. St. 469.

[26] 5 Exch. 243.

[27] §§ 34 and 59.

[28] Owens v. Baltimore, &c., R. Co., 35 Fed. Rep. 715; Nitro Phosphate Co. v. Docks Co., 9 L. R. (Ch. Div.) 503; Sills v. Brown, 9 Car. & P. 601; Thomas v. Kenyon, 1 Daly, 132; Hunt v. Lowell Gas Co., 1 Allen, 343. Thus, where the defendants, by their imperfect manner of laying gas pipes, contaminated the well water of the plaintiff, the latter was allowed to recover for the inconvenience suffered because of the nuisance, but not for injury caused by allowing his horse to drink the water after he knew of its corruption. Sherman v. Fall River Iron Co., 2 Allen, 524; Chase v. N. Y., &c., R. Co., 24 Barb. 273. Defendant obstructed the plaintiff's drain, and the latter could have indemnified himself for $25, but, by delaying to repair, the damages amounted to $100. It was held that he could recover only $25. Lloyd v. Lloyd, 60 Vt. 288; 13 Atl. Rep. 638; McClenehan v. Omaha, &c., R. Co., 25 Neb. 523; 41 N. W. Rep. 350; Wright v. Illinois, &c., Tel. Co., 20 Iowa. 195; Gould v. McKenna, 86 Penn. St. 297; 27 Am. Rep. 705. Where one has been personally injured by the negligence of another, without fault on his own part, and employs a reputable physician, his recovery of actual damages may not be diminished by the physician's mistake or neglect. Loeser v. Humphrey, 41 Ohio St. 378; 52 Am. Rep. 86; Pullman Palace Car Co. v. Bluhm, 109 Ill. 20; 50 Am. Rep. 601; Radman v. Haberstro, 1 N. Y. Supl. 561. See, also, Texas, &c., Ry. Co. v. Orr, 46 Ark. 182. It would therefore be error, in such a case, to charge the jury that if

practice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, while it does not discharge the liability, goes in mitigation of damages.[29]

§ 70. **Applications of this doctrine.**—This is well illustrated by the facts in the case of Gould v. McKenna.[30] The defendant had so constructed and maintained the roof of his building that the water flowed therefrom upon the wall of the plaintiff's adjoining building, and, penetrating it, damaged his goods. As a defense to the action the defendant plead the openness and looseness of the plaintiff's wall, and charged that the condition of the wall made a case of contributory negligence on the part of the plaintiff. It appeared in evidence that the improper construction of the defendant's roof was the cause of the injury, but that the bad condition of the plaintiff's wall had materially aggravated it. The water ran down into the plaintiff's store because the defendant had built his roof as he had, but the leak was much worse than it would have been had there been no cracks and chinks in the plaintiff's wall. The court held that these two causes of injury were separable and independent; that the defendant was liable for so much of the damage as was due to the improper construction of his roof, but not for that which was due to the open condition of the wall, and that it was the duty of the jury to apportion the loss according to the actual injury of the defendant, by separating it, as well as they could upon the evidence, from the loss arising from the openness of the wall; that although there might be a practical difficulty in separating the damage from each independent cause, still that difficulty constituted no reason for declining to undertake it, and that it did not change the nature of the tortious act of the defendant nor relieve him from liability, for the reason that a negligence which has no operation in causing the injury, but which merely adds to the damage resulting, cannot be a bar to

the plaintiff neglected to do what a prudent man would have done when he learned of the injury, it would defeat his right of recovery for the previous as well as subsequent damages. Stebbins v. Central, &c., R. Co., 54 Vt. 464; 41 Am. Rep. 855; Matthews v. Warner, 29 Gratt. 570; 26 Am. Rep. 396; Secord v. St. Paul, &c., R. Co., 5 McCrary, 515; Hibbard v. Thompson, 109 Mass. 286.

[29] DuBois v. Decker, 130 N. Y. 325.

[30] 86 Penn. St. 297; s. c. 27 Am. Rep. 705.

the action, although it will detract from the damages as a whole.[31]

§ 71. **The rule criticised.**— Perhaps it is safe to remark that this is rather a dangerous doctrine. There is an obvious misapplication of it in the case of Wright v. Illinois, &c., Telegraph Co.,[32] to which Judge Thompson has called attention.[33] In Tennessee the courts make an application of it which is very like the rule in Illinois and in Kansas. If not exactly, it is almost comparative negligence.[34] And in Georgia this doctrine has been adopted in connection with the rule in Davies v. Mann,[35] and applied and elaborated in such a way as to make the rule in that State, at least in the judgment of so discriminating a jurist as Dr. Wharton, also equivalent to the rule of comparative negligence.[36] But, however it may have been misapplied, and notwithstanding its tendency toward the doctrine of comparative negligence, the rule as stated in the two last preceding sections, and as illustrated in the case of Gould v. McKenna,[37] and applied in the cases generally cited above in its support, has a sound basis in the logic of the law, and subserves the ends of substantial justice.

[31] See, also, in this connection, the learned and exhaustive case of Fay v. Parker, 53 N. H. 342; 16 Am. Rep. 270.

[32] 20 Iowa, 195, 215.

[33] Thompson on Negligence, 1163.

[34] Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347; Nashville, &c., R. Co. v. Smith, 6 Heisk. 174; Whirley v. Whiteman, 1 Head, 619; Dush v. Fitzhugh, 2 Lea, 307. This need not be discussed here, as the "Tennessee rule" is fully considered in the following chapter, *q. v.*

[35] 10 M. & W. 545.

[36] Wharton on Negligence, § 334; Macon, &c., R. Co. v. Davis, 18 Ga. 686; Augusta, &c., R. Co. v. McElmurry, 24 Ga. 75; Macon, &c., R. Co. v. Johnson, 38 Ga. 409; Hendricks v. Western, &c., R. Co., 52 Ga. 467; Atlanta, &c., R. Co. v. Ayers, 53 Ga. 12. See, also, the discussion of the "Georgia rule" in the succeeding chapter.

[37] 86 Penn. St. 297; 27 Am. Rep. 705.

CHAPTER V.

COMPARATIVE NEGLIGENCE.

§ 72. Comparative negligence.
73. The theory of the rule of comparative negligence.
74. The degrees of negligence the measure of the comparison.
75. The extent to which the rule prevails.
76. This modification of the general rule repudiated.
77. The same subject continued.
78. The former rule in Illinois.
79. Galena & Chicago Union Railroad Company v. Jacobs.
80. Other Illinois cases.
81. This rule attributed to Chief Justice Breese.
82. Further criticism of this rule.
83. The same subject continued.
84. This rule not a rule of contributory negligence.
85. A comparison of relative degrees of negligence.
§ 85a. Rule of comparative negligence now obsolete in Illinois.
86. The rule in Kansas.
87. A confusion of the degrees of negligence with proximateness and remoteness.
88. The rule in Georgia.
89. Macon, &c., Railroad Company v. Davis.
90. The later Georgia cases.
91. The confusion in these cases pointed out.
92. Summary statement of the Georgia rule.
93. The rule in Tennessee.
94. Whirley v. Whiteman.
95. The defense of this rule.
96. The rule in Kentucky.
97. The Kentucky statute.
98. Louisville, &c., Railroad Company v. Collins.
99. The position of the Kentucky courts stated.

§ 72. Comparative negligence.—Instead of the general rules of law concerning contributory negligence, which, as we have seen, prevail in England and in most of the States of the Union, an exceptional doctrine — known as the rule of comparative negligence — obtains in several jurisdictions in this country. When an injury results to one of two parties from the mutual and concurring negligence of both of them, the one who suffers the injury can, according to the prevalent doctrine, recover nothing from the other by way of compensation or damages; the contributory negligence of the injured party is a defense and a complete defense to the action, because "the law has no scales to determine, in such cases, whose wrong-doing weighed

most in the compound that occasioned the mischief."[1] The common law refuses either to apportion the damages as best it may, giving to each man according to his deserts, as far as they can be ascertained, or to divide the damages equally between the parties in fault, as in the *rusticum judicium* of the admiralty, and "the reason why, in cases of mutual, concurring negligence, neither party can maintain an action against the other," said Mr. Justice Strong,[2] "is not that the wrong of the one is set off against the wrong of the other; it is, that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault."

§ 73. The theory of the rule of comparative negligence.— Upon considerations of public policy and general convenience the common law has steadily refused either to enforce contribution between tort feasors, or to parcel out the damages between the parties in cases of injury from mutual and concurring neglect. In those jurisdictions, however, where the doctrine of comparative negligence obtains, the courts have proceeded upon an exactly contrary theory. They assume it to be at once possible and judicious to compare the negligence of the plaintiff with the negligence of the defendant, in these actions, for the purpose of determining where the ultimate liability for the injury shall rest, and if, upon such a comparison, judicially instituted, the negligence of the plaintiff appears to have been slight, while that of the defendant was gross — the plaintiff may have his action. This is something more than a modification of the usual rule. Under its operation contributory negligence is no longer a defense. It completely ignores the principle of compensation in awarding the damages, and proceeds upon the theory of punishment. It contradicts the rule it assumes to qualify. The rule is that contributory negligence is a defense. The qualification is that it is not a defense. Reduced to a canon it amounts to this:— Slight negligence on the part of a plaintiff, although never so much contributory negligence, is not a defense to gross negligence on the part of the defendant.[3]

[1] Railroad Co. v. Norton, 24 Penn. St. 469. See, for a collection of cases on comparative negligence, Bailey's Conflict of Judicial Decisions, p. 247.

[2] Heil v. Glanding, 42 Penn. St. 499.

[3] Galena, &c., R. Co. v. Jacobs, 20 Ill. 478; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Chicago,

§ 74. The degrees of negligence the measure of the comparison.— The term "gross negligence," as used in this rule, must be understood to mean, not negligence merely, on the one hand, as some English authorities suggest,[4] nor wilful negligence on the other hand, but that absence of slight care which is mere inadvertence in a very high degree. It means nonfeasance or misfeasance in the extreme, but not malfeasance. The rule in question recognizes the three degrees of negligence with their reciprocal grades of carefulness,[5] and it implies a comparison of the negligence of the plaintiff with that of the defendant — *by these degrees.* It is not the rule that a mere preponderance of negligence on the part of the defendant will warrant a recovery,[6] nor that the plaintiff may have his action, unless he was guilty of more carelessness,[7] or greater negligence,[8] than the defendant. The comparison to be instituted is not precisely like that made by a book-keeper of the two sides of his accounts, and the rule is not meant to regard slight differences in the relative amounts of negligence, of plaintiff

&c., R. Co. v. Clark, 108 Ill. 113; Pacific, &c., R. Co. v. Houts, 12 Kan. 328; Central, &c., R. Co. v. Gleason, 69 Ga. 200.

[4] Hinton v. Dibbin, 2 Q. B. 646, 661 (by Denham, C. J.); Wilson v. Brett, 11 Mee. & W. 113 (by Baron Rolfe). It would only be a source of confusion to introduce the expression gross negligence, instead of the equivalent, a want of due care. Grill v. General, &c., Collier Co., L. R. 1 C. P. 600, 612.

[5] Chicago, &c., R. Co. v. Johnson, 113 Ill. 512, where the court holds that in applying the rule that the plaintiff may recover, notwithstanding his contributory negligence, when his negligence is but slight and that of the defendant gross, it must be understood the terms "slight" and "gross" are used in their legal sense, and express the extremes of negligence, of which there are no degrees.

[6] Indianapolis, &c., R. Co. v. Evans, 88 Ill. 63, holding it to be error to instruct the jury that the plaintiff may recover unless his negligence, contributing to the injury, was *equal* to or greater than that of the defendant. Chicago, &c., R. Co. v. Dimick, 96 Ill. 42.

[7] There must be more than a mere preponderance against the defendant, to recover. Chicago, &c., R. Co. v. Dunn, 61 Ill. 385. But compare Illinois, &c., R. Co. v. Middlesworth, 43 Ill. 64, which holds that if the defendant has been guilty of negligence *more gross* than the plaintiff the latter can recover.

[8] Illinois, &c., R. Co. v. Maffit, 67 Ill. 431; Joliet v. Seward, 86 Ill. 402. But see Macon, &c., R. Co. v. Davis, 27 Ga. 113, 119, stating that "he who is guilty of the greater negligence, or wrong, must be considered the original aggressor, and accountable accordingly."

and defendant. There is no attempt to balance to a cent, or, in other words, using the figure of Mr. Justice Woodward in a case already cited,[9] the scales are not graduated to fractions of a degree, and unless there is a difference in favor of the plaintiff of at least one whole degree the rule cannot apply. "The rule of this court is," says Scholfield, J., in Rockford, Rock Island & St. Louis R. Co. v. Delaney,[10] "that the *relative degrees of negligence*, in cases of this kind, is matter of comparison, and that the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant gross in comparison with each other; and, consequently, if the intestate's negligence was not slight, and that of the defendant gross in comparison with each other, there can be no recovery."

§ **75. The extent to which the rule prevails.**— The doctrine of comparative negligence had its origin, as it seems from a consideration of the first case in which it is distinctly declared,[11] in a misunderstanding of the effect of previous decisions, and also in an attempt to reconcile the rule laid down in the English case of Davies v. Mann,[12] with the generally established doctrines of the law of contributory negligence. It prevailed to its full extent in but a single State of the Union. In Illinois, where it originated, it was, until lately, the established rule, and in Georgia, Kansas and Tennessee, and possibly elsewhere — jurisdictions where it has not been explicitly repudiated, as it has been in a majority of the States, the courts have either followed the former Illinois rule, or proceeded independently upon a parallel theory to a greater or less extent. In each of these States we find a rule upon the subject of contributory negligence *sui generis*, and, in each, savoring somewhat of the rule of comparative negligence. This chapter is written to set out and illustrate the law in these jurisdictions *seriatim*, so far as it is in any material particular anomalous.

§ **76. This modification of the general rule repudiated.**— The doctrine of comparative negligence, being so entirely at variance with the accepted rules of law concerning contributory neg-

[9] Railroad Co. v. Norton, 24 Penn. St. 465.

[10] 82 Ill. 196; 25 Am. Rep. 308.

[11] Galena, &c., R. Co. v. Jacobs, 20 Ill. 478.

[12] 10 Mee. & W. 546.

ligence, has very naturally provoked much sharp criticism,[13] and the courts of other States very occasionally repudiate it with emphasis. The Court of Appeals of New York in an early case — when the rule of comparative negligence had just been announced — said: — "The question presented to the court or the jury is never one of comparative negligence, as between the parties, nor does very great negligence on the part of a defendant so operate to strike a balance as to give a judgment to a plaintiff whose own negligence contributed in any degree to the injury. * * * The law says to the defendant:— If you have by simple negligence caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the plaintiff: — Although, so far as the defendant's acts are concerned, the case is made out, yet you cannot prevail if you have by your simple negligence helped to bring about the injury.[14]

§ 77. **The same subject continued.**— So, the Supreme Court of Indiana, has observed: — "We agree with counsel that the doctrine of comparative negligence is unsound. We have no doubt that the rule is that, in actions to recover for injuries caused by negligence, the contributory negligence of the plaintiff will defeat the action, although it is much less in degree than that of the defendant."[15] And in O'Keefe v. Chicago, &c., R. Co.,[16] it is said by the Supreme Court of Iowa: — "This court recognizes and applies the doctrine of 'contributory negligence,' and not the doctrine of 'comparative negligence.' The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other States, and also in the Federal courts."[17] The former Illinois doctrine is also

[13] Judge Thompson says it is a rule "not likely to be adopted in any other State where it does not now prevail, unless by legislation." Thompson on Negligence, 1168, § 16. And the author remembers, when a law student, to have heard Prof. Theodore W. Dwight, in his lectures in the Columbia College Law School, criticise this doctrine with some severity. Perhaps his judgment upon such a point was not inferior to that of any contemporary critic.

[14] Wilds v. Hudson River R. Co., 24 N. Y. 432.

[15] Pennsylvania Co. v. Roney, 89 Ind. 453; 46 Am. Rep. 173.

[16] 32 Iowa, 467.

[17] See, also, Artz v. Chicago, &c., R. Co., 38 Iowa, 293, reversing the decision of the lower court, where the jury had been instructed to give the plaintiff damages unless he *materially* contributed to the injury.

expressly denied in New Jersey,[18] Alabama,[19] Wisconsin,[20] Missiouri,[21] Michigan,[22] Kansas,[23] Texas,[24] Massachusetts,[25] Pennsylvania,[26] Colorado,[27] and Kentucky.[28]

[18] If the plaintiff's negligence contributes, the comparative degrees of his and the defendant's negligence will not be considered. Pennsylvania R. Co. v. Righter, 42 N. J. Law, 180. In the trial of cases of this kind, where it appears that both parties were in fault, the prime consideration is, whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately, that is, directly, contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was wilful or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of both parties, or to determine the comparative degree of the negligence of each. Menger v. Laur, 55 N. J. Law, 205, 216.

[19] Gothard v. Alabama, &c., R. Co., 67 Ala. 114.

[20] The slightest negligence, if proximate or contributing to the injury, prevents recovery. Potter v. Chicago, &c., R. Co., 21 Wis. 372; 22 Wis. 615; Cunningham v. Lyness, 22 Wis. 245.

[21] Hurt v. St. Louis, &c., Ry. Co., 94 Mo. 255; 7 S. W. Rep. 1.

[22] Matta v. Chicago, &c., R. Co., 69 Mich. 109; 32 Am. & Eng. R. Cas. 71.

[23] Kansas, &c., R. Co. v. Peavy, 29 Kan. 170, 180, where the court says:—"While it is settled in this State that a party may recover for injuries done to him or his property, even if his negligence is slight, nevertheless this court has not adopted what is generally called the rule of comparative negligence." This case is partially reported in 44 Am. Rep. 630, omitting this point. Vide *infra*, § 86.

[24] Houston, &c., R. Co. v. Gorbett, 49 Tex. 573, 580, upholding the charge given to the jury in the lower court on the ground that "the law of contributory uegligence was clearly given, and there was nothing to mislead into the erroneous doctrine of comparative negligence."

[25] Marble v. Ross, 124 Mass. 44.

[26] Railroad Co. v. Norton, 24 Penn. St. 469; Heil v. Glanding, 42 Penn. St. 499; Stiles v. Geesey, 71 Penn. St. 439; Potter v. Warner, 91 Penn. St. 362; 36 Am. Rep. 668.

[27] Denver Tramway Co. v. Reld, 22 Colo. 349; 45 Pac. Rep. 378.

[28] Digby v. Kenton Iron Works, 8 Bush, 166; Village of Culbertson v. Holliday, 50 Neb. 229; 69 N. W. Rep. 853.

§ 78. **The former rule in Illinois.**— In the earlier cases in the Illinois reports the doctrine of contributory negligence is plainly declared. It was the unquestioned rule in that State[29] as in all other jurisdictions where the English common law prevails, until, in the case of the Galena & Chicago Union R. Co. v. Jacobs,[30] Mr. Justice Breese worked out the theory of comparative negligence. There is no hint of it in any earlier case in the Illinois reports. To this early decision, and to this judge, is, therefore, properly ascribed the origin of the doctrine. It is put forward as a qualification of the rule that contributory negligence is a defense, but it contradicts entirely the rule it assumes to qualify, and proceeds upon a theory the very opposite of that which justifies the original doctrine. It ignores the principle of compensation, and proceeds upon the theory of punishment. It gives damages to the plaintiff not because he has suffered an injury, but it makes the defendant pay damages because he is very much more to blame than the plaintiff. It gives damages to the plaintiff for an injury which he helped to inflict upon himself, because he was not very much in fault, and makes the defendant pay damages for an injury for which he is only partially responsible, because he behaved decidedly worse, upon the whole, than the plaintiff did.

§ 79. **Galena & Chicago Union Railroad Company v. Jacobs.**— But let the cases speak for themselves: — In Galena, &c., R. Co. v. Jacobs,[31] the case in which the doctrine of comparative negligence was first announced, the court, "after reviewing a number of decisions, *none of which announced such a rule as that in question*,"[32] says: — "It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties, for all care, or negligence, is, at best, but relative; the absence of the highest possible degree of care showing the presence of some negligence, slight as it

[29] Aurora, &c., R. Co. v. Grimes, 13 Ill. 585; Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323, where it was distinctly laid down that the plaintiff, in order to recover, must show that he was without fault in producing the injury. Chicago, &c., R. Co. v. Sweeney, 52 Ill. 330.

[30] 20 Ill. 478.

[31] 20 Ill. 478.

[32] Thompson on Negligence, 1169, note.

may be. The true doctrine, therefore, we think, is that, in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff, that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover," and the conclusion of the whole matter is found in these words: — "We say, then, that, in this, or in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."[33] The rule as thus conveniently formulated has never since been challenged in that State, and a long line of subsequent decisions reiterate this anomalous doctrine without addition or abatement.[34]

[33] The Jacobs Case (20 Ill. 478), at page 496.

[34] Chicago, &c., R. Co. v. Warner, 123 Ill. 38; 14 N. E. Rep. 206; St. Louis, &c., R. Co. v. Faitz, 23 Ill. App. 498; Chicago, &c., R. Co. v. Kuster, 22 Ill. App. 188; Chicago, &c., R. Co. v. Fietsam 123 Ill. 518; 15 N. E. Rep. 169; Fisher v. Cook, 125 Ill. 280; 17 N. E. Rep. 763; Christian v. Erwin, 125 Ill. 619; 17 N. E. Rep. 707; Lake Shore, &c., R. Co. v. O'Conner, 115 Ill. 254; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; Chicago, &c., R. Co. v. Dillon, 17 Ill. App. 355; Wabash, &c., Ry. Co. v. Wallace, 110 Ill. 114; Chicago, &c., Ry. Co. v. Mason, 27 Ill. App. 450. Where an instruction properly exacted ordinary care of the plaintiff and the court then stated that "some" negligence, in comparison with which the defendant's was gross, would not bar recovery, it was held not to be fatal, though the word "slight" would have been better. Willard v. Swanson, 126 Ill. 381; 18 N. E. Rep. 548; Village of Jefferson v. Chapman. 127 Ill. 438; 20 N. E. Rep. 33; Chicago, &c., R. Co. v. Dewey, 26 Ill. 255; Chicago, &c., R. Co. v. Hazzard, 26 Ill. 373; Bass v. Chicago, &c., R. Co., 28 Ill. 9; St. Louis, &c., R. Co. v. Todd, 36 Ill. 409. "Slight negligence of the plaintiff in some degree contributing to the injury, does not bar recovery." Coursen v. Ely, 37 Ill. 338; Illinois, &c., R. Co. v. Simmons, 38 Ill. 242; Chicago, &c., R. Co. v. Hogarth, 38 Ill. 370; Chicago, &c., R. Co. v. Triplett, 38 Ill. 482; Great Western R. Co. v. Haworth, 39 Ill. 346; Chicago, &c., R. Co. v. McKean, 40 Ill. 218; Ohio, &c., R. Co. v. Eaves, 42 Ill. 288; Illinois, &c., R. Co. v. Mills, 42 Ill. 407; Illinois, &c., R. Co. v. Middlesworth, 43 Ill. 64; 40 Ill. 494. In Ortmayer v. Johnson, 45 Ill. 469, the rule is stated that in actions for negligence the plaintiff, to recover, must show that the injury sustained resulted from the negligence of the defendant, and not from any default on his part which materially contributed to it; or, if not wholly free from fault himself, that his negligence was slight in comparison with that of the defendant. Chi-

§ 80. Other Illinois cases.— In Chicago & Northwestern R. Co. v. Sweeny,[35] we find the following detailed re-assertion

cago, &c., R. Co. v. Gretzner, 46 Ill. 74; Ohio, &c., R. Co. v. Shanefelt, 47 Ill. 497; Illinois, &c., R. Co. v. Frazier, 47 Ill. 505; Chicago, &c., R. Co. v. Payne, 49 Ill. 499; 59 Ill. 534; Illinois, &c., R. Co. v. Nunn, 51 Ill. 78; Illinois, &c., R. Co. v. Pondrom, 51 Ill. 333; 2 Am. Rep. 306; Illinois, &c., R. Co. v. Sweeny, 52 Ill. 325; Illinois, &c., R. Co. v. Fears, 53 Ill. 115; Toledo, &c., R. Co. v. Pindar, 53 Ill. 447; 5 Am. Rep. 57; Kerr v. Forgue, 54 Ill. 482; 5 Am. Rep. 146; Chicago, &c., R. Co. v. Simonson, 54 Ill. 504; 5 Am. Rep. 155; Illinois, &c., R. Co. v. Baches, 55 Ill. 379, holding that although the deceased was guilty of negligence contributing to the injury, yet, if the defendants were guilty of a higher degree of negligence, with which, when compared, that of the deceased was greatly disproportionate or slight, the plaintiff might still recover. But if the negligence of the deceased was equal to that of the defendants, a recovery cannot be had. Brown v. Hard, 56 Ill. 317; Chicago, &c., R. Co. v. Gregory, 58 Ill. 272; St. Louis, &c., R. Co. v. Manly, 58 Ill. 300; Chicago, &c., R. Co. v. Lee, 60 Ill. 501; 68 Ill. 566; 87 Ill. 454; Chicago, &c., R. Co. v. Dunn, 61 Ill. 385; 52 Ill. 451; Indianapolis, &c., R. Co. v. Stables, 62 Ill. 313; Chicago, &c., R. Co. v. Murray, 62 Ill. 326; 71 Ill. 601; Chicago, &c., R. Co. v. Sullivan, 63 Ill. 293; Chicago, &c., R. Co. v. Van Patten, 64 Ill. 510; 74 Ill. 91; Toledo, &c., R. Co. v. Spencer, 66 Ill. 528; Illinois, &c., R. Co. v. Maffit, 67 Ill. 431; Pittsburgh, &c., R. Co. v. Kuntson, 69 Ill. 103; Illinois, &c., R. Co. v. Benton, 69 Ill. 174; Chicago, &c., R. Co. v. Clark, 70 Ill. 276; Illinois, &c., R. Co. v. Cragin, 71 Ill. 177; Toledo, &c., R. Co. v. McGinnis, 71 Ill. 346. Where, however, the party injured was a trespasser, or was enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, the party complaining must have used extraordinary diligence to enable him to recover. Illinois, &c., R. Co. v. Godfrey, 71 Ill. 500; 22 Am. Rep. 112; Chicago, &c., R. Co. v. Mock, 72 Ill. 141; Illinois, &c., R. Co. v. Hall, 72 Ill. 222; Rockford, &c., R. Co. v. Hillmer, 72 Ill. 235; Illinois, &c., R. Co. v. Hammer, 72 Ill. 347; 85 Ill. 526; Grandtower Manfg. Co. v. Hawkins, 72 Ill. 386; Hund v. Geier, 72 Ill. 393; Rockford, &c., R. Co. v. Irish, 72 Ill. 404; Illinois, &c., R. Co. v. Goddard, 72 Ill. 567; Rockford, &c., R. Co. v. Rafferty, 73 Ill. 58; Fairbank v. Haentzsche, 73 Ill. 236; Chicago, &c., R. Co. v. Cross, 73 Ill. 394; Chicago, &c., R. Co. v. Donahue, 75 Ill. 106; Toledo, &c., R. Co. v. O'Connor, 77 Ill. 391; Chicago, &c., R. Co. v. Hatch, 79 Ill. 137; Kewanee v. Depew, 80 Ill. 119; Sterling Bridge Co. v. Pearl, 80 Ill. 251. In Litchfield Coal Co. v. Taylor, 81 Ill. 590, the court would seem to lean towards the discarded rule. It is there held, that when the injury was not wanton or wilful, it is an essential element to a recovery that the party injured must have exercised ordinary

of the rule of comparative negligence, by the same judge who delivered the opinion in the first case in which the doctrine is announced:[36] — "As some misapprehension seems to exist in respect to the extent this court has gone in discussing the doctrine of comparative negligence, it may not be amiss to review the several cases on that subject. But for that purpose it is not necessary to go back of the case of Galena & Chicago Union R. Co. v. Jacobs, 20 Ill. 478, as in that case all the previous decisions were reviewed and commented upon. Jacobs case was the first case announcing the doctrine of comparative negligence, the received rule prior thereto having been if there was any negligence on the part of the plaintiff he could not recover. The English cases on this point were cited and commented on." Then follows a statement of the rule in the Jacobs case, that part of the opinion in that case which I have quoted above being repeated *in ipsissimis verbis* and re-announced as the correct rule.[37]

care, but where the injury has been wilfully inflicted, an action may be maintained, although the party injured may not have been free from negligence. Viewed in the light of St. Louis R. Co. v. Todd, 36 Ill. 409, however, where gross negligence is defined as "amounting to wilful injury," the case is, in reality, seen to be but an iteration of the Illinois doctrine in deceptive disguise. Rockford, &c., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 308; City of Chicago v. Hesing, 83 Ill. 204; 25 Am. Rep. 378; Schmidt v. Chicago, &c., R. Co., 83 Ill. 405; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Foster v. Chicago, &c., R. Co., 84 Ill. 164; Quinn v. Donovan, 85 Ill. 194; Grayville v. Whitaker, 85 Ill. 439; Joliet v. Seward, 86 Ill. 402; Indianapolis, &c., R. Co. v. Evans, 88 Ill. 63; Toledo, &c., R. Co. v. Grable, 88 Ill. 441; Wabash, &c., R. Co. v. Henks, 91 Ill. 406. Ohio, &c., R. Co. v. Porter, 92 Ill. 437, holding that to instruct a jury not to find for the plaintiff unless they "believe from the evidence that the injury complained of was caused by the negligence of defendant, and the plaintiff was without fault," is stronger than the law will justify, as ignoring the doctrine of comparative negligence. Hayward v. Miller, 94 Ill. 349; 34 Am. Rep. 229; Stratton v. Central Street Ry. Co., 95 Ill. 25; Chicago, &c., R. Co. v. Dimick, 96 Ill. 42; Chicago, &c., R. Co. v. Johnson, 103 Ill. 512; City of Chicago v. Stearns, 105 Ill. 554; Chicago, &c., R. Co. v. Clark, 108 Ill. 113; Chicago, &c., R. Co. v. Langley, 2 Bradw. 505; North Chicago, &c., Mills v. Monka, 4 Ill. 664; Chicago, &c., R. Co. v. Lewis, 5 Ill. 242; Grover v. Gray, 9 Ill. 329.

[35] 52 Ill. 330.

[36] Breese, J., in Galena, &c., R. Co. v. Jacobs, 20 Ill. 478.

[37] The learned judge continues: —"Following this case" (meaning the Jacobs case) "was the

§ 81. This rule attributed to Chief Justice Breese.— This is the doctrine as the late Chief Justice Breese, the father of the rule in question, understood it. It is not a rule of contributory negligence at all, but a law under which men are fined for gross negligence, the fine being paid over to the plaintiff, if he, on his part, has been guilty of only slight negligence. It had its origin apparently from a misunderstanding, on the part of the judge who first declared the rule, as to the effect of previous decisions. He seems to have thought that he found his rule in the earlier English and American cases that he cites. "Although these cases," said he,[38] "do not distinctly avow these doctrines in terms, there is a view of it, very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in Raisin v. Mitchell, 9 Car. & P. 613, and Lynch v. Nurdin, 1 Q. B. 29.". This language indicates very plainly that the learned chief justice misunderstood the effect of these decisions, and that he founded his theory upon this misapprehension. It is the essentially unanimous judgment of common law judges and lawyers throughout every jurisdiction where that law obtains, that these cases are not the smallest authority for such a doctrine as the Illinois Supreme Court maintained. The mistake is, it is believed, in confound-

case of the Chicago, Burlington and Quincy R. Co. v. Dewey, 26 Ibid. 255, where it was said, it was not enough to show a railroad company guilty of negligence, but it must appear that the injured party was not also negligent and blamable. Each party must employ all reasonable means to foresee and prevent injury, and if the negligence of one party is only slight, and that of the other appears gross, a recovery may be had. In the case of the same railroad company against Hazzard, Ibid. 373, the ruling in Jacobs' case was commented upon and approved. The next case in the order of time, having reference to injury to persons, is that of the Chicago, Burlington and Quincy R. Co. v. Triplett's Admr., 38 Ibid. 482, in which it was again said although the plaintiff may have himself been guilty of some degree of negligence, yet if it be but slight, in comparison with that of the defendant, it should be no bar to his recovery. No inflexible rule can be laid down. Each case must depend upon its own circumstances, and the question of comparative negligence must be left to the jury, under the supervision of the court. * * * The rule is the same in actions against railroad companies for injuries to personal property."

[38] Galena, &c., R. Co. v. Jacobs, 20 Ill. 478, 496.

ing the two most essential elements which must concur to render negligence contributory negligence, (*a*) a want of ordinary care on the part of the plaintiff, and (*b*) a proximate connection between such want of care and the injury complained of. The rule that the plaintiff may have his action whenever his negligence is merely the remote cause of the mischief, while that of the defendant is the proximate cause, is, in the rule of comparative negligence, rewritten so as to make it that the plaintiff may recover when his own negligence is slight and that of the defendant gross. This confuses two essentially different things, and in such a way as to destroy the rule upon which only a refinement is attempted. Either contributory negligence in its juridical sense is, or it is not, a defense. If it is a defense, as the general rule declares, then there is no room for such a theory as that of Mr. Justice Breese; if it is not a defense the whole theory upon which our law in this behalf has been made to rest falls to the ground.

§ 82. Further criticism of this rule.— Under the former Illinois rule the question of proximateness and remoteness as regards the cause of the injury does not arise. The question is not whose negligence was the proximate cause, but was the negligence of one party slight and that of the other gross. It will be conceded without argument; *first*, that this is a much easier question to answer than that; that juries can far more readily compare one man's conduct with another's, than they can determine so metaphysical a question as that of causation; that it makes the question concrete instead of abstract, and brings it nearer to the common sense of the average juror; and, *second*, that correct conclusions can be reached perhaps as often under this rule as under the other, that while the reason and the reasoning will be wrong the result attained may be correct. We catch a glimpse of the process by which this rule has been worked out in the *dictum* of Mr. Justice Valentine, in his opinion in Union Pacific R. Co. v. Rollins:[39] — "An act that may be grossly negligent if it proximately contributes to the injury may be reasonably careful if it only remotely contributes thereto." Whether the act was gross negligence or slight negligence, or ordinary negligence, is one thing, to be determined upon a consideration both of the intrinsic character

[39] 5 Kan. 167, 182.

of the act itself, and of the circumstances under which it was performed, and whether or not it was the proximate cause of an injury is another thing, to be determined upon a consideration of the law of cause and effect.

§ 83. **The same subject continued.**— While it may be said in favor of this rule that it is a convenient one for the jury, and that under its operation a correct result is frequently reached, it may also be suggested that it is rather a poor reason for having one's rule wrong, that it gives the right answer about as often as the true rule.[40] By reading the Illinois cases attentively it will be found that, very frequently, when the plaintiff has had a judgment under the rule of comparative negligence, if a correct result was reached, what the judges called the "gross negligence" of the defendant was, in truth, nothing more than negligence merely that was the proximate cause of the injury, while what they call the "slight negligence" of the plaintiff was negligence merely that was only a remote cause, or condition of the injury. "But if such negligence was only slight, *or the remote cause of the injury*," says the Supreme Court of Kansas,[41] in announcing the rule of comparative negligence, "the plaintiff may still recover, *notwithstanding such slight negligence or remote cause.*" Sometimes also the "gross negligence" of the defendant is wilful negligence, and then, upon familiar grounds, the plaintiff should have his action. In both these classes of cases a correct conclusion is reached under the rule of comparative negligence, no more and no less a correct conclusion, however, than would have been reached by the application of the general rules of contributory negligence, and *quoad hoc* the rule applied was not in reality a rule of *comparative* negligence at all. It was a true application of the established rules of law in point. But in the third and remaining class of cases there is a real application of this anomalous doctrine, and the result is rank injustice. I mean that class of cases where the negligence of the plaintiff, though what the court is pleased to denominate his "slight negligence," is a proximate cause of the injury he suffers. In these cases, under the rule of comparative negligence, the plaintiff recovers, or rather the defendant is compelled to pay

40 *Cf.* Wharton on Negligence, § 335.

41 Sawyer v. Sauer, 10 Kan. 466.

damages to the plaintiff, for an injury which the plaintiff's own negligence has materially assisted in producing. This is comparative negligence, pure and simple, and, without the admixture of the wholesome exceptional rules of contributory negligence as in the two preceding classes of cases, it is a rule which, Judge Thompson might well say, "is not likely to be adopted in any other State * * * unless by legislation."[42]

§ 84. This rule not a rule of contributory negligence.— In order to a fair statement of this rule, it must be emphasized that the plaintiff can recover, when he has himself been guilty of contributory negligence, only when his negligence is slight, and the defendant's is gross, in comparison with each other. The rule is that gross negligence is ground for an action in spite of slight negligence, or that slight negligence is not a defense when the defendant's negligence is gross.[43] In some of the earlier cases the judges tripped a little in stating the doctrine, making it equivalent to a rule that a mere preponderance of negligence on the part of the defendant was sufficient to warrant a recovery. It was said that "he who is guilty of *the greater negligence* or wrong, must be considered the original aggressor, and accountable accordingly,"[44] and that unless the defendant has been guilty of negligence *more gross* than the plaintiff there can be no recovery.[45] But that this is an entire misconception of the doctrine is expressly declared in many later cases.[46]

[42] Thompson on Negligence, 1168, § 16. But compare Bequette v. People's Transportation Co., 2 Or. 200, and Holstine v. Or., &c., R. Co., 8 Or. 163, wherein there is a suggestion that this rule finds some favor in at least one State on the Pacific coast. It should be remarked, however, that in these two cases the term "slight negligence," used by the court as not barring the plaintiff's right to recover, really meant negligence which was a remote cause of the injury.

[43] See generally the cases cited above.

[44] Macon, &c., R. Co. v. Davis, 27 Ga. 113, 119. See the same case 13 Ga. 68 (where the decision was based on correct grounds), and 18 Ga. 679.

[45] Illinois, &c., R. Co. v. Middlesworth, 43 Ill. 64. See, also, St. Louis, &c., Co. v. Todd, 36 Ill. 414.

[46] Chicago, &c., R. Co. v. Dunn, 61 Ill. 385; Chicago, &c., R. Co. v. Van Patten, 64 Ill. 510, holding that to announce the doctrine of comparative negligence in such wise is not sufficiently accurate. It is an incorrect statement of the rule to say that although the plaintiff was himself guilty of gross negligence, in neglecting to

§ 85. A comparison of relative degrees of negligence.— The rule seems to have been that the relative degrees of negligence were to be compared, and that the plaintiff might recover, although guilty of contributory negligence, provided his negligence was slight and that of the defendant gross in comparison with each other, and consequently that, whenever it appeared that the plaintiff's negligence was not slight and the defendant's gross in comparison with each other, there could be no recovery.[47] That the plaintiff's negligence was slight was not alone sufficient. It must also appear, at the same time, in order to the action, that the defendant's negligence was gross,[48] and whenever the plaintiff's negligence was of a higher degree, his right of action was gone. If it was equivalent to a want of ordinary care, even though the defendant's negligence was gross, the plaintiff could not recover,[49] which is the same as to say, that ordinary negligence, or any higher degree than slight negligence, was a de-

observe the ordinary precautions expected from a prudent man, yet if the defendant was guilty of a higher degree of gross negligence the plaintiff might recover. Illinois, &c., R. Co. v. Maffit, 67 Ill. 431; Chicago, &c., R. Co. v. Lee, 68 Ill. 576; Illinois, &c., R. Co. v. Benton, 69 Ill. 174; Chicago, &c., R. Co. v. Mock, 72 Ill. 141; Illinois, &c., R. Co v. Hammer, 72 Ill. 347; Illinois, &c., R. Co. v. Goddard, 72 Ill. 567; Chicago, &c., R. Co. v. Donahue, 75 Ill. 106; Chicago, &c., R. Co. v. Hatch, 79 Ill. 137; Joliet v. Seward, 86 Ill. 402; Indianapolis, &c., R. Co. v. Evans, 88 Ill. 63. It is not sufficient, for plaintiff's recovery, that defendant may have been guilty of a greater degree of negligence in respect to the producing of the injury. Toledo, &c., R. Co. v. Grable, 88 Ill. 441; Chicago, &c., R. Co. v. Dimick, 96 Ill. 42; Earlville v. Carter, 2 Bradw. 34; Wabash, &c., R. Co. v. Jones, 5 Ill. 607.

[47] Parmelee v. Farro, 22 Ill. App. 467; Rockford, &c., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 308.

[48] Winchester v. Case, 5 Bradw. 486, 489, where the Court says:— "Slight negligence on the part of the person injured can be excused only by the gross or wanton negligence, or the wilful acts of the person causing the injury." Rockford, &c., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 308.

[49] Chicago, &c., R. Co. v. Rogers, 17 Ill. App. 638; Garfield Manuf. Co. v. McLean, 18 Ill. App. 447. Even an infant must exercise ordinary care. Quincy, &c., Ry. Co. v. Gruse, 26 Ill. App. 397; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Earlville v. Carter, 6 Bradw. 421. An instruction purporting to give the doctrine should not omit the requirement of ordinary care by the plaintiff. Willard v. Swanson, 126 Ill. 381; 18 N. E. Rep. 548; Chicago, &c., R. Co. v. Fletsam, 123 Ill. 518; 15 N. E. Rep. 619; Tomle v. Hampton, 129 Ill. 379; 21 N. E. Rep. 800.

fense to an action even for gross negligence, under this rule. When the plaintiff's negligence was gross there could be no recovery, unless that of the person inflicting the injury was wilful or criminal.[50] "Under this rule," says Judge Thompson,[51] "the negligence of both parties may combine to produce the injury, the negligence of the person injured may operate as a factor in producing the injury, but it is excluded as a factor in measuring the damages. The plaintiff's negligence, or that of the person on account of whose injury he sues, helps in some degree to produce the injury, but the defendant must bear all the damages."

§ **85a. Rule of comparative negligence now obsolete in Illinois.**—In the late decisions of the Supreme Court of Illinois, it is declared that the rule of comparative negligence has become obsolete in that court; and that the general rule that the person injured must have been in the exercise of ordinary care is now the law of that State.[52]

§ **86. The rule in Kansas.**— The Supreme Court of Kansas has adopted a rule upon the question of contributory negligence which differs essentially from the general rule, and which for practical purposes is equivalent to the Illinois rule of comparative negligence. The Kansas rule was first announced by Valentine, J., in the early case of Union Pacific Ry. Co. v. Rollins.[52a] In the opinion in this case there is an elaborate consideration of the whole question, and the result reached is that it is not necessary in order to enable a plaintiff to recover, even for injuries to his property, that he be himself entirely free from negligence; that if his negligence is slight, or the remote cause of his injury, while that of the defendant is gross, or the proximate cause, the plaintiff may have his action; that whether or

[50] Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510.

[51] Thompson on Negligence, 1171.

[52] Cicero & Proviso St. Ry. Co. v. Meixner, 160 Ill. 320, 328; 43 N. E. Rep. 823; City of Lanark v. Dougherty, 153 Ill. 163, 165-166; 38 N. E. Rep. 892; Lake Shore, &c., Ry. Co. v. Hessions, 150 Ill. 546, 556; 37 N. E. Rep. 905; C., C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 334-335; 36 N. E. Rep. 965; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; 3 N. E. Rep. 456.

[52a] 5 Kan. 167.

not there has been negligence, in a given case, and its nature and degree if found, are questions of fact for the jury; but that to determine what degree of care and diligence on the one hand, and of negligence on the other, will entitle the plaintiff to a verdict, is a question of law for the court. In the later cases the rule in Union Pacific Ry. Co. v. Rollins, as set out above, prevails.[53]

§ 87. A confusion of the degrees of negligence with proximateness and remoteness.— The doctrine is formulated in such a way in several of the cases cited as to suggest the conclusion that "slight negligence," as used in what we may call the Kansas rule, is synonymous with negligence which is but a remote cause, and that "gross negligence" means hardly more than negligence which is a proximate cause. In the leading case it is said: — "An act that may be grossly negligent if it proximately contributes to the injury, may be reasonably careful if it only remotely contributes thereto."[54] And in a later case we find the following gloss upon this statement of the law: — "If the jury believe from the evidence that the plaintiff's negligence contributed to the injury complained of" [by which must have been meant that if the plaintiff's negligence appeared to them to have been a proximate cause of the

[53] Wichita, &c., R. Co. v. Davis, 37 Kan. 743; 16 Pac. Rep. 78. In Chicago, &c., Ry. Co. v. Brown (Kan.), 24 Pac. Rep. 497, an instruction holding a railway company liable to an injured employee if guilty of "any" negligence and permitting a recovery, though the employee was guilty of slight negligence, was held to be erroneous. Caulkins v. Matthews, 5 Kan. 191; Sawyer v. Sauer, 10 Kan. 466; Pacific, &c., R. Co. v. Houts, 12 Kan. 328. In Kansas, &c., R. Co. v. Pointer, 14 Kan. 37, the jury found that the defendant was guilty of gross negligence, immediately causing the injury; they also found that the plaintiff was guilty of negligence contributing to the injury. It was held that it was apparent from the other findings, and the instructions of the court, that they intended only such slight negligence as was consistent with a right to recover compensation. Kansas, &c., R. Co. v. Fitzsimmons, 18 Kan. 34; 22 Kan. 668, and 31 Am. Rep. 203; Central, &c., R. Co. v. Henigh, 23 Kan. 347; Mason v. Missouri, &c., R. Co., 27 Kan. 83; 41 Am. Rep. 405. Compare Kansas, &c., R. Co. v. Peavy, 29 Kan. 169, where the doctrine of comparative negligence is expressly denied to be the law in the State. See, also, A. T. & S. F. R. Co. v. Henry, 57 Kan. 154; 45 Pac. Rep. 576.

[54] Union Pacific Ry. Co. v. Rollins, 5 Kan. 167, at page 182.

injury] "he cannot recover. But if such negligence was only slight, or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause."[55] Such statements as this, it has been attempted in the preceding section to show, involve a confusion of ideas. There is a mistaking of causation for negligence. In one of the later cases[56] it is denied that the rule of comparative negligence obtains in this State. But it is submitted, after a somewhat extended reading of the Kansas decisions, that the distinction, if any there be, between the rule as declared in Illinois and the rule taught by these cases, is exceedingly minute, and one which, in practice, it will be found at once impracticable and impossible to bring out.

§ 88. **The rule in Georgia.**— The Georgia rule upon this subject differs, on the one hand, from the general rule of contributory negligence, and on the other hand from the exceptional rule of comparative negligence. Under the general rule, the negligence of the plaintiff, if contributory in the juridical sense, is a defense. Under the exceptional rule, the slight negligence of the plaintiff, though contributory, is not a defense when the negligence of the defendant is gross, and under the rule as declared by the Supreme Court of Georgia, the slight negligence of the plaintiff, though contributory, is not a defense when the negligence of the defendant is gross, but it goes in mitigation of damages. Both Dr. Wharton[57] and the Supreme Court of Iowa[58] state that the rule of comparative negligence obtains in Georgia; but perhaps this rule is more correctly described as a rule in mitigation of damages, than as a rule of comparative negligence. Although the rule implies a comparison of the negligence of one party with the negligence of the other, in order to fix the ultimate liability, yet this comparison is not the most characteristic feature of the rule. In addition to the comparison, and as the distinguishing element in the Georgia rule, the negligence of the plaintiff, when not so great as to bar a

55 Sawyer v. Sauer, 10 Kan. 466.

56 Kansas, &c., R. Co. v. Peavy, 29 Kan. 169. "It was settled in the case of Kansas Pac. R. Co. v. Peavy that the doctrine of comparative negligence does not obtain in this State." Johnson, J., in Howard v. Kansas City, &c., R. Co., 41 Kan. 403.

57 Wharton on Negligence, § 334.

58 O'Keefe v. Chicago, &c., R. Co., 32 Iowa, 467.

recovery, under an application of the general rule, is looked to in mitigation of damages.

§ 89. **Macon, &c., Railroad Company v. Davis.**— The rule in question may be said to have had its inception in the case of Macon, &c., R. Co. v. Davis.[59] This is the first important case in the Georgia reports in which the general question of the effect of contributory negligence is considered. It proceeds upon the theory that the rule of contributory negligence as laid down in the English case of Butterfield v. Forrester,[60] that if the injury results in whole or in part from the misconduct of the plaintiff, he cannot recover, had been so modified by later decisions, especially by the doctrine in Davies v. Mann,[61] as to be equivalent to a rule that, in cases where the negligence of both parties concurred to occasion the mischief, the plaintiff may nevertheless recover if the defendant, by the exercise of ordinary care under the circumstances, could have avoided the infliction of the injury. This pernicious and pestiferous doctrine, which is the same thing as a rule that when two are to blame, one shall be held responsible and the other discharged and exonerated, seems to have imposed upon the court in rather a peculiar way. When the case under consideration[62] was first decided, it was decided right, under a true application of the general rule of law in point.[63] At the rehearing the court attempts to apply the supposed modification of that rule by the later case of Davies v. Mann, and says: — "We approve of this modification of the principle, and think it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendants could not, in the exercise of reasonable diligence, have prevented the collision.[64] But when the case came up again, upon a second rehearing, the court seems to have begun to lose faith in the Davies v. Mann "modification," which at the first rehearing they had expounded and approved, and, after beating about for some middle ground,

[59] 27 Ga. 113; 18 Ga. 679; 13 Ga. 68.

[60] 11 East, 60.

[61] 10 Mee. & W. 546.

[62] Macon, &c., R. Co. v. Davis, 27 Ga. 113; 18 Ga. 679, and 13 Ga. 68.

[63] *Cf:* Brannon v. May, 17 Ga. 136. Here it was asserted in clear-cut terms that to maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

[64] Macon, &c., R. Co. v. Davis, 18 Ga. 679, 686.

reached the conclusion, upon which the case finally rested, that "he who is guilty of the greater negligence, or wrong, must be considered the original aggressor, and accountable accordingly."[65] Starting out with the rule in Butterfield v. Forrester,[66] which declares the received rule of contributory negligence, the court attempts to apply, in connection therewith, the rule in Davies v. Mann,[67] and the result is the rule of comparative negligence, in so extreme a form, that it has been found necessary, even where that rule obtains, to reduce it to less objectionable shape.

§ 90. **The later Georgia cases.**— While the case of Macon, &c., R. Co. v. Davis[68] was in process of decision, two other cases were decided which should be noticed here. In another case growing out of the same accident[69] which had occasioned the case of Macon, &c., R. Co. v. Davis, the court, by Lumpkin, J., lays down with much clearness the rule that contributory negligence is a defense, fortifying that position by the citation of many authorities, both English and American, and following the earlier case of Brannon v. May,[70] in which the general rule is correctly declared. Confronted with the later case of Macon, &c., R. Co. v. Davis, which had just been decided on the rehearing,[71] in which the doctrine in Davies v. Mann is approved and declared, the learned judge attempts very ingeniously to reconcile the two cases. He says: — "Is there any conflict between Brannon v. May and Macon, &c., R. Co. v. Davis? We do not perceive it; the two may, and do, well stand together;" and then enters into an extended argument to establish his proposition, standing firmly to the ground taken, but endeavoring to reconcile it with the modification. Upon a rehearing in this case, Benning, J., in a dissenting opinion, argues at length that the damages should suffer a reduction in proportion to the fault of the plaintiff.[72] Then followed, in point of time, the final

[65] Macon, &c., R. Co. v. Davis, 27 Ga. 113, 119.

[66] 11 East, 60.

[67] 10 Mee. & W. 546.

[68] 27 Ga. 113.

[69] Macon, &c., R. Co. v. Winn, 19 Ga. 440; 26 Ga. 250.

[70] 17 Ga. 136.

[71] 18 Ga. 679.

[72] The Winn case, 26 Ga. 250. The ground on which Lumpkin, J., had put his decision was that the parties injured had used all ordinary care. But Benning, J., concluding from the evidence that the parties injured were somewhat negligent, argued that recovery should only be had for the part of the loss resulting from the negligence of the defendant.

decision in the case of Macon, &c., R. Co. v. Davis,[73] in which the doctrine of comparative negligence is broadly announced, and, in the same year, the case of Flanders v. Meath,[74] in which it is held that when both parties are in fault the plaintiff may have his action, but that, inasmuch as the defendant was only *slightly* the most in fault, the damages awarded should be *small.*

§ 91. The confusion in these cases pointed out.— This is comparative negligence and mitigation of damages at once. But before this, and before the announcement of the final rule in Macon, &c., R. Co. v. Davis,[75] in the case of Augusta, &c., R. Co. v. McElmurry,[76] when in the court below the counsel for the defendant requested the court to charge the jury that the plaintiff's own freedom from contributory negligence was an essential element in his case, according to the rule in Brannon v. May,[77] and the court refused, but charged "that the defendants are bound for reasonable care and diligence in running their cars, and a departure from the rules of running is a want of such care and diligence; that when the plaintiff is *chiefly in fault*, he cannot maintain an action; where the parties are *equally in fault* he cannot maintain an action; but that, though the plaintiff be *somewhat in fault*, yet, if the defendants have been guilty of gross negligence, he may maintain an action." The court above held a refusal to give the instruction asked not error, and that the instruction given was a correct enunciation of the established rule in that State, which was "that although the plaintiff be somewhat in fault, yet, if the defendant be grossly negligent, and thereby occasioned, or did not prevent, the mischief, the action may be maintained." This is comparative negligence pure and simple, without the modification

[73] 27 Ga. 113. But compare Railroad Co. v. Newman, 94 Ga. 560; 21 S. E. Rep. 219.

[74] 27 Ga. 358. In the late case of Dempsey v. City of Rome (Ga.), 27 S. E. Rep. 668, it was held that although a charge to the effect that if a physical injury to the plaintiff resulted from the mutual negligence of both parties, and if the plaintiff contributed "three-fourths or one-third or some other amount to the injury," his recovery would be reduced by the amount of his default, was incorrect, yet, where the only complaint made of such charge is that it was erroneous because "any contributory negligence on the part of the plaintiff would defeat a recovery," the giving of such charge is not cause for a new trial.

[75] 27 Ga. 113.

[76] 24 Ga. 75.

[77] 17 Ga. 136.

as to mitigation of damages, and it is substantially followed in a comparatively recent case.[78] We find, however, in Atlanta, &c., R. Co. v. Ayers,[79] the rule thus laid down: — "If it appears that both parties were guilty of negligence, and that the person injured could not by ordinary care and diligence have avoided the consequences to himself of the negligence of the company, or its agents, he may recover, but the jury shall lessen the damages in proportion to the negligence and want of ordinary care of the injured person."

§ 92. Summary statement of the Georgia rule.— Taking the decisions in point as a whole, from first to last, it may be said that the rule in Georgia is not settled. There is a tendency toward the rule of comparative negligence,[80] and it is certainly usual, in cases where the plaintiff's negligence is not regarded sufficient to prevent entirely a recovery, to direct the jury to look to it in mitigation of damages as has already appeared. But even this is not a universal rule. It is the usage rather than the rule. The latest cases take now one view and now the other,[81] and we must hear further from the Supreme Court before

[78] Rome v. Dodd, 58 Ga. 238, where it is declared that while the plaintiff may, in some way, have contributed to the injury, yet that will not prevent his recovery if, by ordinary care, he could have avoided the consequences to himself of the defendant's negligence.

[79] 53 Ga. 12.

[80] *E. g.* Augusta, &c., R. Co. v. McElmurry, 24 Ga. 75, where this rule is explicitly set forth. Code Ga., § 2972, provides that defendant is not relieved in an action for damages caused by his negligence because plaintiff in some way contributed to the injury. It was held, that a charge that no recovery could be had if the person injured was in any way at fault would not cause reversal, where plaintiff sought to recover the full damages, and made no request to the court to give this principle in his charge, and alleged and insisted to the end that the person injured was in no way at fault. Hill v. Callahan, 82 Ga. 109; 8 S. E. Rep. 730. In Central, &c., R. Co. v. Smith, 78 Ga. 694; 3 S. E. Rep. 397, the rule contained in Code Ga., § 3034, that in actions against railroad companies, for negligent injuries to person or property, if the complainant and defendant are both in fault, the complainant may recover, but his damages shall be diminished in proportion to his default, was held to have no application where the complainant is guilty of gross negligence.

[81] Thus, Central, &c., R. Co. v. Gleason, 69 Ga. 200, and Atlanta, &c., R. Co. v. Wyly, 65 Ga. 120, uphold the principle of apportioning damages. In Thompson v. Central, &c., R. Co., 54 Ga. 509, the doctrine of comparative neg-

there can be formulated anything exactly and explicitly as the Georgia rule.

§ 93. **The rule in Tennesseee.**— In Tennessee the contributory negligence of a plaintiff is not a defense precisely to the same extent that it is in the other States of the Union in general. As, between the doctrine of comparative negligence and the generally accepted rules of contributory negligence, the Supreme Court of Tennessee has not taken, it is believed, a doubtful position. Comparative negligence is not the rule of that court, and to state it broadly, the court maintains, in general, the rule that when a plaintiff's own negligence is the proximate cause of the injury of which he complains, he cannot recover.[82] But, whenever the negligence of the plaintiff is slight, or merely the absence of a superior degree of care or diligence, such negligence being not sufficient to bar the action, may be looked to in mitigation of damages.[83] In this respect the rule in Tennes-

ligence would seem to govern. In Campbell v. Atlanta, &c., R. Co., 53 Ga. 488; 56 Ga. 586, it was held that for an employee of a railroad to recover for injuries, it must be shown that he was entirely without fault. This decision is based on a provision in the Georgia Code, covering the case. Hendricks v. Western, &c., R. Co., 52 Ga. 467, citing Macon, &c., R. Co. v. Johnson, 38 Ga. 408, holds not only that the contributory negligence of the injured party would reduce the amount of recovery, but also that if the injured party could have avoided the consequence to himself, caused by the negligence of the defendant, by the exercise of ordinary diligence on his part, there was no right to any recovery. And in Georgia, &c., R. Co. v. Neely, 56 Ga. 540, the court remarks that a locomotive and a mule may well pass over the same ground, so that they pass at different times. If, however, they contend for the same place at the same instant, and a collision ensues, with damage to either, the diligence of their respective owners may be challenged and compared. In two respects the comparison will influence the pecuniary consequences of the collision; it will decide whether any compensation is due to the owner of the injured property, and if any, whether it should be full or only partial.

[82] Jackson v. Nashville, &c., R. Co., 13 Lea, 491; 49 Am. Rep. 663; Nashville, &c., R. Co. v. Wheless, 10 Lea, 741; 43 Am. Rep. 317; Whirley v. Whiteman, 1 Head, 610.

[83] Dush v. Fitzhugh, 2 Lea, 307; Railroad Co. v. Walker, 11 Heisk. 383. Sneed, J., would seem to make the statement too broad when he says, in Hill v. Louisville, &c., R. Co., 9 Heisk. 823, 826:—"It has been frequently adjudged by this court that contributory negligence on the part of the party injured, may be considered by the jury in mitigation

see is the same as in Georgia. In both these States the negligence of the plaintiff when slight is not a defense. In Georgia this is a modification of the rule of comparative negligence, but in Tennessee it is rather a qualification of the general rule as to contributory negligence.

§ **94. Whirley v. Whiteman.**— This case, decided in 1858, is regarded as the leading case in point.[84] It has been sometimes misunderstood to announce the doctrine of comparative negligence. But a careful reading of the opinion will show that such an impression is a pure misunderstanding. The court says: — " When a party brings an injury upon himself, or contributes to it, the mere want of a superior degree of care or diligence, cannot be set up as a bar to the plaintiff's claim for redress; and, although the plaintiff may himself have been guilty of negligence, yet, unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he will be entitled to recover." This is but to say that a mere want of great care on the part of the plaintiff is not sufficient to constitute contributory negligence, or that the measure of the plaintiff's diligence is the standard of ordinary care, which, as we have seen,[85] is the general rule. But in subsequent cases it has been held that the failure to exercise extraordinary care on the part of the plaintiff, while not a defense to the action, may be looked to in mitigation of damages,[86] and there is a noticeable tendency to extend this rule so as to include cases where the plaintiff's negligence is something more than a want of slight care — especially where the negligence of plaintiff and defendant is highly disproportionate.[87]

of damages." Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347; Smith v. Nashville, &c., R. Co., 6 Heisk. 174.

[84] 1 Head, 610.

[85] § 19, *supra*.

[86] See, particularly, Louisville, &c., R. Co. v. Carroll, 6 Heisk. 347, in which the court was of the opinion that the *dicta* and decisions holding it a bar to recovery of the plaintiff in *any* degree contributed to the injury, are not supported by sound authority. It was therefore held that even if the plaintiff might have escaped injury by the exercise of ordinary care, yet if the defendant was guilty of gross negligence, which was the more direct cause of the injury, the plaintiff could still recover, though his want of care would mitigate the damages. See, also, generally, the latter cases cited above.

[87] Dush v. Fitzhugh, 2 Lea, 307, holding that the chief inquiry in cases of contributory negligence must always be,—" Whose conduct or neglect *more immediately*

§ 95. **The defense of this rule.**— Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages, in those cases which frequently arise, wherein, on the one hand, a real injury has been suffered by the plaintiff, by reason of the culpable negligence of the defendant, and yet where, on the other hand, the plaintiff's conduct was such as, to some extent, to contribute to the injury, but yet in so small a degree that, to impose upon him the entire loss, seems not to take a just account of the defendant's negligence. In those cases which may be denominated "hard cases" the Georgia and Tennessee rule in mitigation of damages, without necessarily sacrificing the principle upon which the law as to contributory negligence rests, is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule as laid down in Davies v. Mann[88] would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties.

§ 96. **The rule in Kentucky.**— A consideration of the rule upon the subject in Kentucky is included in this chapter, not because the rule of comparative negligence obtains in this State to any extent or in any sense, nor because the Court of Appeals at Frankfort is unsound to any degree upon the general doctrines of the law of contributory negligence, but because citations are occasionally made from the Kentucky reports by text-writers, and by the courts of other States, to this effect, and in such a way and with such a gloss as to give currency to the impression that the Kentucky decisions are obnoxious to this

produced the wrong or injury done?" A criterion, we should say, very dangerously near to that on which the doctrine of pure comparative negligence is pivoted. In East Tennessee, &c., Ry. Co. v. Hull, 88 Tenn. 33; 12 S. W. Rep. 419, a charge, drawing the attention of the jury to the comparative negligence of the plaintiff and defendant, and directing them to find for plaintiff if they found the injury was caused by the greater negligence of defendant, was held to be error. But that case signifies nothing, for such a statement of the rule would also be pronounced erroneous in Illinois and probably in Georgia. See, also, §§ 84, 91, 96, herein.

[88] 10 Mee. & W. 546.

criticism. So far is this from being the truth that it may safely be asserted that nowhere is the generally accepted doctrine upon this subject more positively declared, or more firmly and consistently adhered to, than in Kentucky. "When the defense is contributory negligence," says the Court of Appeals in the comparatively recent case of Kentucky Central R. Co. v. Thomas' Administrators,[89] "the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have occurred. In the first case, the plaintiff would be entitled to recover; in the latter, he would not." This is the doctrine in both the earlier and the later cases.[90]

§ 97. The Kentucky statute.— As supplementary to the common law rules in point, or, perhaps, rather as declarative of a common law rule, there is a statute in Kentucky[91] which provides for the recovery of punitive damages in certain cases, where death results from the "wilful negligence" of the defendant. In cases that have arisen under this statute, it has been held conformably to the common law rule, that the contributory negligence of the plaintiff, in such a case, is not a defense to the action,[92] and some of these cases, in which the

89 79 Ky. 160; s. c. 42 Am. Rep. 208.

90 Louisville, &c., R. Co. v. Filhern's Admx., 6 Bush, 574; City of Covington v. Bryant, 7 Bush, 248; Digby v. Kenton Iron Works, 8 Bush, 166. In Jacobs' Admr. v. Louisville, &c., R. Co., 10 Bush, 263, the rule is laid down that if the plaintiff failed to use that degree of care and skill which may reasonably be expected from one in like situation, and by such failure proximately co-operated in causing the death, no recovery can be had, unless the defendant might, by the exercise of ordinary care, have nevertheless prevented the injury. This rule, it is further held, is only subject to modification in cases of wilful neglect. Jones' Admr. v. Louisville, &c., R. Co., 82 Ky. 610.

91 2 Stanton's Ky. Stat. 510, § 3; Genl. Stat. of Ky. chap. 57, § 3, passed March 10, 1854.

92 But it is said that "if the injury received by the deceased was caused wholly by his own negligence it necessarily results that his life was not lost by the wilful neglect of the defendant, and the action cannot be maintained." Jones' Admr. v. Louisville, &c., R. Co., 82 Ky. 610; Ramsey v. Louisville, &c., R. Co. (Ct. of App. Ky. 1885), not reported.

court has been perhaps a little inexact in expressing the rule, have been cited as authority for the rule of comparative negligence.[93]

§ 98. Louisville, &c., Railroad Company v. Collins.— This misapprehension seems to have arisen principally from some expressions of Chief Justice Robertson in his opinion in the case of Louisville, &c., R. Co. v. Collins.[94] This was an action brought by a common laborer for injuries sustained by reason of the negligence of the defendant's engineer, whose orders it was the plaintiff's duty to obey. It was not an action under the statute of 1854, hitherto referred to, since the injuries did not result in death.[95] In delivering the opinion of the court the Chief Justice said: — "But had the appellee [plaintiff] been guilty of negligence, nevertheless, the injury might have been avoided by the proper care of the engineer, and is, therefore, attributable to his gross negligence. In such a case both principle and preponderating authority seem to decide that such a remediable fault of the person injured should not exonerate the wrong-doers from legal liability for the damage which, without

[93] *E. g.* Dr. Wharton cites Louisville, &c., R. Co. v. Sicklings, 5 Bush. 1; Louisville, &c., R. Co. v. Mahoney, 7 Bush, 235; Wharton on Negligence, § 335, note. Mr. Freeman, in his learned annotation of the case of Casey v. Berkshire R. Co., 48 Am. Dec. 616, cites (page 637) the case of Jacobs v. Louisville, &c., R. Co., 10 Bush, 263, in connection with some cases from the Illinois reports, as an authority for the proposition,— "Except where the effect of slight contributory negligence is held to be overcome by evidence of the defendant's gross or wanton negligence, *as is the rule in some States*," which should seem to be equivalent to the statement that the rules in Illinois and Kentucky are, in this respect, the same. Judge Thompson also discusses an "innovation" that he discovers in the Kentucky reported cases, under the title of comparative negligence. Thompson on Negligence, 1022, § 26. And, while perhaps he makes the impression that this rule prevails in Kentucky, he does not say so. In another connection, however, he gives the Court of Appeals a "character" as to the anomalous doctrine. Thompson on Negligence, 1003.

[94] 2 Duv. 114.

[95] Upon the question "Who is a fellow-servant?" this case laid down the eminently just and reasonable rule which was many years later adopted by the Supreme Court of the United States in Chicago, Milwaukee & St. Paul R. Co. v. Ross, 112 U. S. 377. See the chapter on Master and Servant, *infra*.

gross negligence, he could have prevented."[96] And, in a later case, in reaffirming this doctrine, the same judge speaks of "the extraordinary or gross negligence" passed upon in the Collins case, and then proceeds to a definition of it in these terms: — "Gross neglect is either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the *magna culpa* of the civil law, which in some respects is *quasi*-criminal."[97] Inasmuch as this is what his honor meant by gross negligence, the opinion in the case of Collins gives no shadow of just ground for the impression that that case teaches the doctrine of comparative negligence. That case, therefore, upon this point, teaches that wilful negligence is not to be defended by a plea of slight negligence, which is called in the opinion "the remediable fault of the person injured," and this is but the unquestioned rule of the common law.[98]

§ 99. The position of the Kentucky courts stated.— In order that the position of the court may not be misunderstood, immediately following the definition of gross negligence just quoted, the learned judge says: — "But if the party complaining of hurt by his own negligence contributed to it, he cannot recover damages from the company unless its co-operating agent, charged with gross" [*i. e.* according to his definition, wilful and intentional] "neglect, could have avoided the impending damage, by the observance of ordinary diligence, notwithstanding the neglect of the complaining party."[99] It may be conceded that this is rather a clumsy and confused statement of law, and that the definition proposed for gross negligence is misleading. What is termed gross negligence the better authorities now call wilful negligence, or wilful wrong-doing. But in the two opinions, the one explaining the other, there is no uncertain sound upon the point in dispute. There is no suggestion of a rule of comparative negligence, and it is submitted that a reading of the

[96] Louisville, &c., R. Co. v. Collins, 2 Duv. 114, 119.

[97] Louisville, &c., R. Co. v. Robinson, 4 Bush, 507, 509.

[98] *Cf.* Louisville, &c., Canal Co. v. Murphy's Admr., 9 Bush, 521, and the note.

[99] Louisville, &c., R. Co. v. Robinson, 4 Bush, 509. See, also, Louisville, &c., R. Co. v. Sicklings, 5 Bush, 1.

Kentucky decisions demonstrates that the Court of Appeals of this State has placed itself squarely in line with other common law courts in an orthodox attitude upon the matter of contributory negligence.[100]

[100] See an essay by Helm Bruce, Esq., of the Louisville Bar, in the Kentucky Law Journal for April, 1882, upon "The Kentucky doctrine of contributory negligence," in which the whole subject is fully and learnedly considered.

CHAPTER VI.

THE IMPUTED CONTRIBUTORY NEGLIGENCE OF THIRD PERSONS.

§ 100. The rule stated.
101. The reason of the rule.
102. No contribution among tort feasors.
103. The contributory negligence of the plaintiff's agent must be imputed to the plaintiff.
104. The rule illustrated.
105. The rule in Thorogood v. Bryan.
106. A similar rule in the Admiralty.
107. Baron Pollock's criticism — Thorogood v. Bryan overruled.
108. Thorogood v. Bryan in Pennsylvania.
109. Thorogood v. Bryan in Arkansas, Iowa, Wisconsin, and Michigan.
110. The general American rule.
111. Rule in Federal Courts and in New Jersey.
112. The New Jersey rule further stated.
113. Privity in negligence between a public carrier and a shipper of goods.
114. The prevalence of this rule.
115. Plaintiff's negligence concurring with that of the driver of a private conveyance.
115a. When negligence of driver imputed to other occupant of vehicle.
115b. Imputing neglect of the husband to the wife.
§ 116. In the case of persons *non sui juris*.
117. Who are to be held *non sui juris*.
118. The status of infants.
119. The New York rule — Hartfield v. Roper.
120. The language of the court.
121. The later cases following Hartfield v. Roper.
122. The rule modified in various jurisdictions.
123. The modification in New York.
124. The same subject continued.
124a. Where negligence of parent not a proximate cause.
125. Negligence of the defendant must be shown.
126. The English doctrine further considered.
127. A criticism of Hartfield v. Roper.
128. The same subject continued.
129. The criticism continued.
130. The rule in Hartfield v. Roper denied.
131. When the action is for the parent's benefit.
131a. Where action is brought by parent as administrator, etc.
132. Contributory negligence of child when action brought by parent.

§ 133. The rule modified by reason of the plaintiff's poverty or destitution.
134. A further statement of the rule in Pennsylvania.
135. This doctrine commended.
136. Ordinary care in a child.
137. Children as trespassers.
§ 138. Other English cases.
139. The doctrine condemned.
140. The general American rule.
141. The Massachusetts rule.
142. Duty of parents to guard children; what omissions amount to contributory negligence.

§ 100. The rule stated.— Contributory negligence in its juridical sense, is usually the personal default of the plaintiff himself. The general rule is that when the plaintiff's own want of ordinary care is a proximate cause of the injury he sustains, he cannot recover damages from another therefor. But, under certain exceptional conditions, which we are to consider in this chapter, a plaintiff may be legally chargeable with the negligence of some third person, which is imputed to him as though it were his own. In this particular the law of negligence is analogous to the general principles of the law as to liability, under which one is primarily responsible for his own acts, and only secondarily for the acts of others, as *e. g.* those of his servant or agent. The rule upon this branch of our subject is that the contributory negligence of third persons constitutes a valid defense to the plaintiff's action only when that negligence is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection, which the law recognizes between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person and its legal imputability must concur. It is clear that there is no justification for the negligent misconduct of the defendant in that some third person, a stranger, was also in the wrong. When the defendant pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with that fault. In a case in New York, for example, the defendant's street car, on which the plaintiff's intestate was a passenger, having become over-crowded, and the deceased having been thrown off by another passenger rushing by him in haste in leaving the car, it was held that the wrongful act of such passenger did not relieve the defendants from the consequences of their wrongful act in crowding their car, and thereby compelling the deceased

to stand upon the platform;[1] or, in other words, that the negligent act of the passenger who pushed his way recklessly through the crowd, upon the platform, in leaving the car, ought not to be imputed to one who was thereby pushed off and injured.

§ 101. The reason of the rule.— So, in an action against a railway company for damages resulting from the carelessness of its servants in running over and cutting fire hose, and thus letting the plaintiff's buildings burn, it was held insufficient as a defense, that the firemen were also negligent in stretching their hose across the track and failing to warn an approaching train, the court saying: — "The grounds upon which the defendants are charged in such a case is that the wrong was done by an act in the doing of which it was an actor. The fact that others co-operated, or concurred with it in effecting the wrong does not affect the question or measure of its liability."[2] And, in an action against a gas company for injuries arising from an explosion of gas, upon the ground that the company had supplied a defective gas pipe, it was held no defense that a gas-

[1] Sheridan v. Brooklyn, &c., R. Co., 36 N. Y. 39. See, also, Merwin v. Manhattan Ry. Co., 1 N. Y. Supl. 267, a similar case on the elevated railroad where the same conclusion was reached. *Cf.* Cannon v. The Railway Company, 6 Irish L. R. 199, where a passenger on the platform of a crowded excursion train being pushed under the wheels of the car by the rush of a disorderly crowd of excursionists and injured, was not allowed to recover. It was held that a railway company is not bound, even when an unusually large number of passengers are expected, to provide a staff of servants so large as to be enabled to control the violence of an assemblage of persons entering the station without permission, and overcrowding the platform. The decision went entirely on the ground that the company was not negligent. Mt. Adams, &c., R. Co. v. Reul, 4 Ohio Cir. Ct. 363; Randall v. Frankford, &c., R. Co., 8 Penn. Co. Ct. Rep. 277. In Lehr v. Steinway & H. P. R. Co., 118 N. Y. 556; 23 N. E. Rep. 889, the question of defendant's negligence was left to the jury, but it was said that plaintiff was not negligent as a matter of law.

[2] Hunt, J., in Mott v. Hudson River R. Co., 8 Bosw. 345; 1 Robert. 585. So, where a fire was started by defendant's negligence and spread to the plaintiff's house, it was no defense that it first caught in shavings negligently left by a third person, or that the city was negligent in not putting it out. Atkinson v. Goodrich Transportation Co., 60 Wis. 141; 50 Am. Rep. 352.

fitter's servant had negligently ignited the gas.[3] In each of these cases there was no sufficient legal connection between the plaintiff and the person whose negligence or wrong-doing was sought to be interposed as a defense, and in each there was, accordingly, no legal imputability.

§ 102. No contribution among tort feasors.— This principle is, in some sort, a branch of the rule which refuses to enforce a contribution among tort feasors. Not only, it may be said, does the common law decline to enforce contribution when judgment has gone against one for the wrong-doing of several, but it refuses to allow one wrong-doer to set up the concurrent wrong-doing of another as a defense in the original action. The defendant will not be heard to say that, though guilty himself of negligence, the injury would not have been inflicted if some third person, a stranger to the plaintiff's case, had not also been negligent. This is familiar learning. Numerous cases illustrate and enforce the rule, that the contributory negligence of third persons, who are mere strangers, or mere joint tort feasors, is not a defense in an action for damages resulting from negligence when the actionable negligence of the defendant is established.[4] The rule which imputes to a plaintiff in any case

[3] Burrows v. March Gas & Coke Co., L. R. 5 Exch. 67; L. R. 7 Exch. 96. "If the question," says Pigott, B., "were to be simply regarded as one of contract, the consideration whether the defendant's conduct was the proximate or remote cause of the accident might arise; still, regarding the question as one of negligence, the mere fact of another cause having co-operated with the main cause, does not make the main cause remote, though it may give rise, in this case, whether the doctrine of contributory negligence applies." But in order that this should be so, the plaintiff must in some way be considered as identical with the gas-fitter's servant. And this the court held not to be the case.

[4] Cayzer v. Taylor, 10 Gray, 274; Eaton v. Boston, &c., R. Co., 11 Allen, 500. Where a servant is injured by the joint negligence of his master and a fellow-servant, the master is liable. See Chapter on Master and Servant, *infra*. *A fortiori*, a third person cannot be relieved from liability for his negligence on the ground that the negligence of the plaintiff's fellow-servant contributed to cause the injury. Gray v. Phila., &c., R. Co., 23 Blatchf. 263. It is not sufficient to absolve the defendant from criminal liability for gross negligence causing a runaway, whereby a person is killed, that the horse might have been checked by diligence and care on the part of the driver. Belk v. People, 125 Ill. 584; 17 N. E. Rep.

the negligence of another, savoring as it does, to some extent, of harshness, should not be applied except in a plain case, and, says Chief Judge Church, of New York: — "should not be extended to new cases where the reason for its adoption is not apparent."[5]

§ 103. The contributory negligence of the plaintiff's agent must be imputed to the plaintiff.— Inasmuch as the contributory negligence of third persons is, under some circumstances, but not generally, to be imputed to a plaintiff who seeks to recover

744. In Gulf, &c., Ry. Co. v. McWhirter, 77 Tex. 356; 14 S. W. Rep. 26, a railway company was held responsible for injuries to a child in playing about a turn-table negligently left unfastened, though the negligent acts of older children (possibly *sui juris*) assisted in causing the accident. The Bernina, L. R. 12 P. & D. 58. In Churchill v. Holt, 127 Mass. 165; 34 Am. Rep. 355; 131 Mass. 67; 41 Am. Rep. 191, it is held that if an occupant of a building, by reason of his connection with it, is compelled to pay damages recovered in an action of tort by a person who sustains an injury by falling into a hatchway, which had been left open by the negligent act of a third person, he may maintain an action against such third person for indemnity. The rule that one of two joint tort feasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. Otherwise, had the plaintiff left the hatchway in an unsafe condition, and the third person had so interfered as to make it more dangerous. Brehm v. Great Western Ry. Co., 34 Barb. 256; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Ring v. City of Cohoes, 77 N. Y. 83; 33 Am. Rep. 574; Masterton v. New York, &c., R. Co., 84 N. Y. 247; 38 Am. Rep. 510; Cuddy v. Horn, 46 Mich. 596; 41 Am. Rep. 178; Beauchamp v. Saginaw Mining Co., 50 Mich. 163; 45 Am. Rep. 30; Baltimore, &c., R. Co. v. Reaney, 42 Md. 117; Transfer Co. v. Kelly, 36 Ohio St. 86; 38 Am. Rep. 558; Town of Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Sullivan v. Phila, &c., R. Co., 30 Penn. St. 234; Byrne v. Wilson, 15 Ir. Rep. C. L. 332; Harrison v. Great Northern Ry. Co., 3 Hurl. & C. 231; Wettor v. Dunk, 4 Fost. & Fin. 298, in which it was held that if an excavation has been made so near to a highway as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so. Harrison v. Great Northern Ry. Co., 3 Hurl. & C. 231.

[5] Robinson v. New York, &c., R. Co., 66 N. Y. 13; 23 Am. Rep. 1.

damages for an injury sustained through the negligence of the defendant, it is material to determine what contributory negligence of third persons will be so imputed to him as to prevent his recovery. We remark at the outset that, in order to this imputability, there must be a *pro tanto* identification of the third person with the plaintiff, and that such an identity will be found to exist, or be in dispute, in two classes of cases — the first, where the third person was guilty of the contributory negligence as the agent of the plaintiff, and the second, where the cause of action is derived from the third person. The rule as to the first class of cases may be expressed as follows: — The contributory negligence of a third person who is guilty thereof as the agent of the plaintiff must be imputed to the plaintiff. An agent, in the contemplation of this rule, is a person whose negligence, as understood in the rule, would be treated as the principal's in an action for such negligence brought by a third person against the principal. Whenever the contributory negligence of the third person is of such a character, and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff, for damages for the consequences of such negligence, then, when the plaintiff himself brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him. *Qui facit per alium facit per se*, and whenever the agency is undisputed and full, the rule is manifestly correct.[6]

§ **104. The rule illustrated.**— Where, for example, a servant, having in charge a valuable team, stopped on the highway, and, leaving the team unhitched and unattended, engaged in a boisterous altercation with one R., which frightened the team so that it ran away, and the horses were injured, it was held, in an action by the owner of the horses to recover damages from R., that the contributory negligence of the plaintiff's servant, in exposing the horses upon the highway, was a defense. The court says: — "For such a wrong, no doubt the defendant R. would be liable, unless the negligence of the plaintiff, or the person whom he had placed in charge of the team, contributed proximately to the injury. But if the servant was guilty of such negligence in the care of the team as would preclude him,

[6] Puterbaugh v. Reasor, 9 Ohio St. 484.

if he had been its owner, from maintaining an action against R., this negligence must be equally fatal in an action brought by this plaintiff, who confided the team to his servant's care. It is true, the plaintiff was not responsible for the unlawful act of his servant in accepting the challenge and fighting with R.; but for leaving the team loose and uncared for, whilst this noisy affray was occurring in close proximity, he was responsible, so far as others were concerned, if he entrusted the custody of the horses to his servant, and his remedy in such a case is against the servant alone;" and further, the court concludes: — "the same want of proper care which would give the plaintiff a cause of action against his servant must prevent a recovery against R."[7] It is not necessary to cite the reader to authorities in support of the proposition that a master or principal is responsible for the negligent wrong-doing of his servant or agent in all cases in which the servant or agent is acting about his master's or principal's business, of which the rule just laid down is a necessary corollary.

§ **105. The rule in Thorogood v. Bryan.**—A common or private carrier is, for certain purposes, unquestionably the agent of the passenger or shipper whose person or goods he receives for transportation. The undertaking of the carrier is to receive and transport persons or property from place to place, and, in virtue of that undertaking, he constitutes himself *quoad hoc* the agent of the person who employs him.[8] In cases of injury by collision or other misadventure, occasioned by the negligence or misconduct of the carrier, or his servant, concurring or co-operating with the negligent wrong-doing of a third party, where the passenger or shipper brings his action for damages against the third party, rather than against his carrier, the question is at once presented whether the carrier

[7] Puterbaugh v. Reasor, 9 Ohio St. 484. In Page v. Hodge, 63 N. H. 610, the facts and the judgment of the court were identical with those in the Puterbaugh case.

[8] See, as between a shipper and his carrier, Bedel v. Lull, Cro. Jac. 224; Simpson v. Hand, 6 Whart. (Penn.) 311; 36 Am. Dec. 231. There is a privity of contract between these parties, and when the merchant commits the management and direction of his goods to the carrier, he necessarily constitutes him, to some extent, his agent.

is so far forth the agent of the plaintiff that the rule set forth in the preceding section should be applied; or in other words, the question is, whether the contributory negligence of the common carrier is to be imputed to the plaintiff, in such a case, as a defense to the action against the third party. This question has been found one of very considerable difficulty, and the authorities are not consistent upon the point in dispute. Thorogood v. Bryan,[9] until recently overruled, was the leading English case in point, and it established the rule that, in these actions, the negligence of the carrier, contributing to produce the mischief, must be imputed to the plaintiff to bar a recovery. This was the English rule, to which for nearly forty years the rule of *stare decisis* compelled the English courts to submit. In this case it appeared that the plaintiff's intestate had been a passenger in an omnibus, and that his death was caused by a collision of the omnibus with the defendant's vehicle. The court, holding that the negligence of the omnibus driver prevented a recovery, says: — "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence, he must be considered a party to it."[10]

§ **106. A similar rule in the Admiralty.**— Lord Tenterden, more than twenty years before, in an action against the owners of a vessel for damage done to goods upon another vessel, announced a similar rule,[11] and it is plain that the doctrine of privity in negligence between a public carrier and a passenger or shipper was well established in England, at least to the ex-

[9] 8 C. B. 115, decided in 1849.

[10] Thorogood v. Bryan, 8 C. B. 115, 130.

[11] Vanderplank v. Miller, 1 Moody & M. 169. *Cf.* Arctic Fire Insurance Co. v. Austin, 69 N. Y. 470, 484, where it is shown that Lord Tenterden's common law rule could not be applied in admiralty courts, as it would overthrow the governing principle of that jurisdiction — the doctrine of dividing the loss between those in fault. As a common law rule, however, its authority is unquestioned, and thoroughly acted upon.

tent of preventing recoveries in actions of this character.[12] In a comparatively recent case[13] the rule in Thorogood v. Bryan was strongly insisted upon, Bramwell, B., saying: — "It must not be supposed, as far as my individual opinion is of any value, that I am at all dissatisfied with the decision in Thorogood v. Bryan, * * * which, though it may have been questioned and impeached, has never been overruled, and has since been acted on." As the learned Baron suggests, however, this rule had been much "questioned and impeached" by the English judges. Dr. Lushington said that he would not be bound by it, and did not approve of it.[14] In the note to Ashby v. White, in Smith's Leading Cases,[15] the rule is sharply criticised, "and this criticism," says Chief Justice Beasley, "has on two occasions at least been referred to by the English courts with marked respect.[16] From these considerations this case does not bear the weight which a deliberate decision of the Court of the King's Bench ordinarily carries with it."[17] Not only has the correctness of the rule[18] been frequently questioned

[12] Bridge v. Grand Junction Ry. Co., 3 M. & W. 244; Child v. Hearn, 22 W. R. 864; L. R. 9 Exch. 176; Armstrong v. The Lancashire & Yorkshire Ry. Co., 23 W. R. 295; L. R. 10 Exch. 47. *Cf.* also, Waite v. Northeastern, &c., Ry. Co., 7 W. R. 311; El., Bl. & El. 719, 728, in which case, although the action was against the contracting company, from the opinions it may be inferred that the same conclusion would have been reached had it been against another company.

[13] Armstrong v. Lancashire, &c., Ry. Co., L. R. 10 Exch. 47.

[14] In his own words:—"I decline to be bound by it, because it is a single case, because I know upon inquiry that it has been doubted by high authority, because it appears to me not reconcilable with other principles laid down at common law; and lastly, because it is directly against the ordinary practice of the Court of Admiralty." The Milan, Lush, Admr., 388, 403.

[15] 1 Smith's L. C. (6th Eng. ed.) 266; 8th American edition of 1885, vol. 1, page 505.

[16] Citing Tuff v. Warman, 2 C. B. (N. S.) 750, and Waite v. Northeastern, &c., R. Co., El., Bl. & El. 728.

[17] Bennett v. New Jersey, &c., R. Co., 36 N. J. Law, 225.

[18] Consult, on this point, Rigby v. Hewett, 5 Exch. 240; Greenland v. Chaplin, 5 Exch. 243; Quarman v. Burnett, 6 M. & W. 499; Jones v. Corporation of Liverpool, 14 Q. B. D. 890; Reedie v. London, &c., Ry. Co., 4 Exch. 244; Dayrell v. Tyrer, 28 L. J. (Q. B.) 52; Tuff v. Warman, 2 C. B. (N. S.) 740; Waite v. Northeastern, &c., Ry. Co., El., Bl. & El. 719.

in the English decisions, but the reason upon which it was originally made to rest was, even before The Bernina case, flatly denied, and wholly abandoned.

§ 107. Baron Pollock's criticism — Thorogood v. Bryan overruled.— Says Baron Pollock: — "The only difficulty I have had in applying it [*i. e.* the rule in Thorogood v. Bryan] has been in consequence of the use of the word 'identified' in the judgment of the court there. If the courts are to be taken as meaning by that word, that the plaintiff by his own proper conduct, or by the selection of the omnibus in which he was riding, so acted as to constitute the driver his agent, the proposition would, I think, be an unsustainable one. But I do not understand the word to be used in that sense. I take the court to mean by it that, under the circumstances of the case, the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or his driver. The case of Waite v. Northeastern, &c., Ry. Co. (El., Bl. & El. 719) is an illustration of this, where the child, as far as regards contributory negligence, was 'identified' with its grandmother, in whose charge it was, although it could not be said that the child exercised any volition in the selection of its grandmother for its companion."[19] But in the Bernina case, afterwards decided, it was distinctly held that Waite v. Northeastern, &c., Ry. Co. had no affinity with Thorogood v. Bryan.[20] Such was the status of Thorogood v. Bryan in England until 1887, when a case went to the Court of Appeal involving the precise point that was litigated in Thorogood v. Bryan, and was the first case in which an appellate tribunal had been afforded an opportunity of expressing its opinion of the rule. A passenger was killed by a collision between two steamers without fault on his part, but both carriers were negligent. Thorogood v. Bryan was severely criticised in a long opinion, and unanimously overruled as unjust and unsound.[21] The case was afterward taken to

[19] Armstrong v. Lancashire, &c., Ry. Co., L. R. 10 Exch. 47.

[20] Read, also, upon this point Wabash, &c., R. Co. v. Shacklet, 105 Ill. 364; 44 Am. Rep. 791.

[21] The Bernina, L. R. 12 P. & D. 58.

the House of Lords in 1888, and that body affirmed the decision of the Court of Appeal.[22]

[22] The Bernina (Armstrong v. Mills), L. R. 13 App. Cas. 1. In the course of his opinion, it was said by Lord Herschell:—"With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master: though if 'negligence of the owner's servants is to be considered negligence of the passenger,' or if he 'must be considered a party' to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrong-doer. To say that it is a defense because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in Thorogood v. Bryan (1). Maule, J., says:—'On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. * * * But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust.' I confess I cannot concur

§ 108. Thorogood v. Bryan in Pennsylvania.—The English rule upon this subject, as declared in Thorogood v. Bryan,[23] prevails in several States of the Union. In Pennsylvania it is followed both in the case of a shipper who brings his action for damage to his goods,[24] and in the case of a passenger where the action is brought for personal injuries.[25] In each instance it is held without equivocation that the negligence of the carrier must be imputed to the plaintiff, to the extent of barring his action. Simpson v. Hand,[26] which is a leading authority, was decided long before Thorogood v. Bryan. It is the earliest case, excepting only Vanderplanck v. Miller,[27] precisely in

in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways, the unreasonableness of such doctrine is even more glaring. The only other reason given is contained in the judgment of Cresswell, J., in these words:—'If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position.' Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have not dealt with all the reasons on which the judgment in Thorogood v. Bryan was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory." The law of Scotland is opposed to Thorogood v. Bryan. Ball's Leading Cases, 303; Martin v. Ward, 14 C. of S. Cas. (N. S.) 814. See, also, Mathews v. London Street Tramway Co., 58 L. J. (Q. B.) 12.

[23] 8 C. B. 115.

[24] Simpson v. Hand, 6 Whart. (Penn.) 311; 36 Am. Dec. 231.

[25] Lockhart v. Lichtenthaler, 46 Penn. St. 151; Phila., &c., R. Co. v. Boyer, 97 Penn. St. 91.

[26] 6 Whart. (Penn.) 311; 36 Am. Dec. 231.

[27] 1 Moody & M. 169, by Lord Tenterden.

point, which I have found. The opinion was written by Chief Justice Gibson, and the reason upon which that eminent judge rested his position is, that the carrier is the shipper's agent for whose negligence, contributing to the loss, the shipper is justly held responsible. He cited Verplanck v. Miller with approval. The case of Lockhart v. Lichtenthaler,[28] was an action for the accidental killing of a brakeman — the circumstances, however, being such that the court held that the deceased must not be considered, for the purposes of the action, a servant, but rather regarded in the light of a passenger. This case is, therefore, an authority upon the second branch of the subject, *i. e.* the rule as affecting actions for personal injuries, as contra-distinguished from those for the loss of goods. It sustains the ruling in Thorogood v. Bryan, but questions the reason of the rule as set forth in that case — rejecting alike the theory of agency, which had controlled not only in Thorogood v. Bryan, but also in Simpson v. Hand,[29] and the theory of identity, and assigning as the true reason "that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence."[30] In two later cases in Pennsylvania, Thorogood v. Bryan has been distinctly repudiated, so far as it is attempted to apply the rule to bar an action by a passenger in a private conveyance.[31]

§ 109. Thorogood v. Bryan in Arkansas, Iowa, Wisconsin, and Michigan.— In Arkansas, also, in a very carefully considered case, the former English rule was followed. The plaintiff, in this action, sued to recover damages for the loss of some cattle which he had shipped on board a Mississippi river steamboat, bound to New Orleans, which steamboat, going down the river, was negligently run into and sunk by the defendants' steamboat

[28] 46 Penn. St. 151.

[29] 6 Whart. (Penn.) 311; 36 Am. Dec. 231.

[30] Lockhart v. Lichtenthaler, 46 Penn. St. 151. "We confess," says Mr. Justice Mulkey, in referring to this conclusion, "that we are unable to perceive the force of this argument; for, conceding that to hold the carrier of the plaintiff or his intestate alone responsible would have the tendency claimed, yet to relieve the other guilty party from all responsibility whatever, would have the contrary effect, so that whatever was gained in one direction would be lost in the opposite direction." Wabash, &c., R. Co. v. Shacklet, 105 Ill. 364, 381.

[31] Carlisle v. Brisbane, 113 Penn. St. 544; 57 Am. Rep. 483; Deane v. Penn. R. Co., 129 Penn. St. 514; 18 Atl. Rep. 718.

coming up the river, whereby the plaintiff's cattle were drowned. The defendants had judgment in the court below on the ground of the contributory negligence of the plaintiff's carrier, and upon appeal the judgment on this point was affirmed.[32] The Supreme Court of Arkansas for the twenty years prior to the Civil War was a very learned and able court, and Duggins v. Watson is entitled to count as a cogent authority in favor of the English rule in the United States. In Iowa Thorogood v. Bryan is wholly discarded."[33] Some of the earlier cases in that State have been cited by judges and text-writers in support of the rule imputing the negligence of a private driver to the occupant of the vehicle;[34] but in Nisbet v. Garner[35] that view of those cases was pronounced erroneous, and they were reconciled with a total repudiation of Thorogood v. Bryan. In Wisconsin the contributory negligence of the driver of a private vehicle is imputed to one riding with him.[36] So, also, it seems in

[32] Duggins v. Watson, 15 Ark. 118; 60 Am. Dec. 560. It should be noted, however, that while the court, in this case, very decidedly followed Lord Tenterden's rule as to the relation between shipper and carrier, it did not commit itself to a support of Thorogood v. Bryan. On the contrary, Chief Justice Watkins remarked that it was quite possible that the law affecting passenger and carrier might be different, since here, unlike the case where merchandise is shipped, the carrier could hardly be called a bailee, and hence the fact that a passenger could exercise volition of his own, might very likely enlarge his resource, as one occupying an independent position, against all persons contributing to the injury.

[33] Nisbet v. Garner, 75 Iowa, 314; 39 N. W. Rep. 516.

[34] Payne v. Chicago, &c., Ry. Co., 39 Iowa, 523; Yahn v. City of Ottumwa, 60 Iowa, 429; Slater v. Burlington, &c., Ry. Co., 71 Iowa, 209; Stafford v. City of Oskaloosa, 57 Iowa, 748.

[35] 75 Iowa, 314.

[36] Prideaux v. Mineral Point, 43 Wis. 513; 28 Am. Rep. 558. But in that case the court said:— "There might be great difficulty in applying to them [common carriers] the rule of personal trust and agency applicable to private conveyances." Otis v. Janesville, 47 Wis. 422. See, for a contrary rule in such a case, Knapp v. Dagg, 18 How. Pr. (N. Y.) 165, where the court held that the plaintiff was not chargeable with the negligence of the driver. She was injured both by his negligence and by that of the defendant. Hence, an action against either would be sustained. Metcalf v. Baker, 11 Abb. Pr. (N. S.) 431; Sheridan v. Brooklyn City R. Co., 36 N. Y. 39; Robinson v. New York, &c., R. Co., 66 N. Y. 11; Dyer v. Erie Ry. Co., 71 N. Y. 228; Follman v. Mankota, 35 Minn. 522; Elyton Land Co. v. Mingea, 89 Ala. 521; 7 So. Rep. 66; Transfer Co. v. Kelly, 36 Ohio St. 86; St. Clair Street Ry. Co. v. Eadie, 43 Ohio St. 91; 54 Am. Rep.

Michigan.[37] In several jurisdictions it has been held, where an action is brought for injuries to a wife from the negligence of the defendant, that the contributory negligence of her husband, driving the vehicle in which she was hurt, should be imputed to her in bar of the action. It appears that the English doctrine of privity in negligence between a common carrier and a passenger or shipper, obtains to the full extent, in the United States, only in Pennsylvania; that it has been held applicable as between a shipper and a common carrier in Arkansas, and this will hereafter be shown to be the rule in New York and Kentucky.[39] With these exceptions we shall see that elsewhere, in this country, a different rule is applied.

§ 110. The general American rule.— The rule in Thorogood v. Bryan, except as has appeared in the preceding section, is denied in the United States. It is the general American rule that there is no privity in negligence between passenger and carrier, and that, therefore, when the passenger brings an action of negligence the contributory negligence of his carrier is not to be imputed to him, in any degree, for the purpose of barring his recovery. The rule in Thorogood v. Bryan has long been wholly repudiated. Neither upon the theory of agency, nor upon the theory of identity, nor from a supposed consideration of public policy and convenience, will the passenger be held to such a connection with the common carrier by which he is transported, as to be responsible for negligence on his part.[40]

144, note; Philadelphia, &c., R. Co. v. Hogeland, 66 Md. 149; 7 Atl. Rep. 105; Noyes v. Town of Boscawen, 64 N. H. 361; 10 Atl. Rep. 690; Town of Knightstown v. Musgrove, 116 Ind. 121; 18 N. E. Rep. 452; State v. Boston, &c., R. Co. (Me.), 15 A. 36; Nisbet v. Garner, 75 Iowa, 314.

[37] Cuddy v. Horn, 46 Mich. 596; 41 Am. Rep. 178.

[39] See *infra*, § 114.

[40] Little v. Hackett, 116 U. S. 366; Gray v. Philadelphia, &c., R. Co., 24 Fed. Rep. 168; Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578; 6 S. W. Rep. 441; New York, &c., R. Co. v. Cooper, 85 Va. 939; 9 S. E. Rep. 321; Becke v. Missouri Pac. Ry. Co., 102 Mo. 544; 13 S. W. Rep. 1053; Gulf, Colorado & Santa Fe Ry. Co. v. Pendy, 87 Tex. 553; 29 S. W. Rep. 1038; St. Claire Co. v. Eadie, 43 Ohio St. 91; Flaherty v. Minneapolis, &c., Ry. Co., 39 Minn. 328; 40 N. W. Rep. 160; Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610; 6 So. Rep. 413; New York, &c., R. Co. v. Steinbrenner, 47 N. J. Law, 161; 54 Am. Rep. 126; Kuttner v. Lindell Ry. Co., 29 Mo. App. 502; Tompkins v. Clay Street R. Co., 66 Cal. 163; Markham v. Houston Direct Nav.

§ 111. Rule in the Federal courts and in New Jersey.— This doctrine, which may properly be denominated the American rule, as distinguished from the English rule in Thorogood v.

Co., 73 Tex. 247; 11 S. W. Rep. 131; Whelan v. New York, &c., R. Co., 38 Fed. Rep. 15; Parshall v. Minneapolis, &c., Ry. Co., 35 Fed. Rep. 649; McCullum v. Long Island R. Co., 38 Hun, 569; Holzab v. New Orleans, &c., R. Co., 38 La. Ann. 185; 58 Am. Rep. 177; Danville, &c., Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119; Louisville, &c., R. Co. v. Case's Admr., 9 Bush, 728; Otis v. Thorn, 23 Ala. 469; Bennett v. New Jersey, &c., Trans. Co., 36 N. J. Law, 225; 13 Am. Rep. 435. In Transfer Co. v. Kelly, 36 Ohio St. 86, 91; 46 Am. Rep. 230, McIlvaine, C. J., in arraigning the English rule, exclaims:—"It seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to the injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. Town of Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Cuddy v. Horn, 46 Mich. 596; 41 Am. Rep. 178. One of the reasons advanced by some cases favoring the former English rule why the action should be confined to the carrier company is, that this company, by its contract, express or implied, is under special obligations to the passenger to use due care, and carry him safely, whereas, the other company has entered into no such engagement with him. The learned judge, in Wabash, &c., R. Co. v. Shacklet, 105 Ill. 364, 379; 44 Am. Rep. 791, very ably meets this argument by saying:—"While this affords a conclusive reason why an action *ex contractu* will not lie against the other company it does not, in our judgment, furnish the slightest reason why an action *ex delicto* may not well be maintained against it for the tort committed by it, independently of a contract, which has resulted in an injury to the plaintiff." * * * Entirely aside from the right *in personam* against the carrier, the plaintiff has a right *in rem* which entitles him, if free from fault, to be protected from all persons whomsoever. The Washington and The Gregory, 9 Wall. 513; Knapp v. Dagg, 18 How. Pr. 165; Chapman v. New Haven, &c., R. Co., 19 N. Y. 341; Colgrove v. New York, &c., R. Co., 20 N. Y. 492; Sheridan v. Brooklyn City R. Co., 36 N. Y. 39; Webster v. Hudson River R. Co., 38 N. Y. 260; Barrett v. Third Ave. Ry. Co., 45 N. Y. 628; Robinson v. New York, &c., R. Co., 66 N. Y. 11; 65 Barb. 146; 23 Am. Rep. 1, and note; Dyer v. Erie Ry. Co., 71 N. Y. 228; Metcalfe v. Baker, 11 Abb. Pr. (N. S.) 431. In Perry v. Lansing, 17 Hun, 34, the plaintiff, the pilot of a tug-boat, was injured in consequence of a collision with a boat owned by the defendant, and was allowed to recover, though the other employees of the tug-boat were contributorily negligent, he himself being free from all personal negligence. Bockes, J., dissented, however, on the ground that here, unlike the cases where

Bryan, is fully set forth by Mr. Justice Field, of the Supreme Court of the United States, in Little v. Hackett,[41] and by Beasley, C. J., in the New Jersey case of Bennett v. New Jersey Railroad and Transportation Co.,[42] and again by Mr. Justice Mulkey, in the case of Wabash, St. Louis & Pacific Railway Co. v. Shacklet.[43] In the opinions in these leading cases, the question in dispute is learnedly and exhaustively argued, and, in the judgment of the writer, so far as that may be supposed to have any value, the reasons assigned for the refusal to follow the English precedent are cogent and conclusive. In Little v. Hackett Judge Field reviews the English and American cases, and thus concludes: — "The truth is, the decision in Thorogood v. Bryan rests upon undefensible grounds. The identification of the passenger with the negligent driver or the owner without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by

the plaintiffs are allowed to recover, the plaintiff was not a mere passenger, but, with others, was in charge of the vessel, and though himself free from fault, yet this fact would bar all recovery as well against the owners of the boat of which he was pilot, as against the defendant. *Contra*, Brown v. New York, &c., R. Co., 32 N. Y. 597; 31 Barb. 385; Mooney v. Hudson River R. Co., 5 Robt. 548; Beck v. East River Ferry Co., 6 Robt. 82. These three cases announcing a contrary doctrine have been distinctly overruled, and it is clear that, in New York, the contributory negligence of the managers of a vehicle or vessel — either a public or private carrier — is not to be imputed to a passenger, whether he be journeying gratuitously or for hire, and irrespective of the kind of conveyance. Compare, also, as illustrating the New York rule, Spooner v. Brooklyn City R. Co., 54 N. Y. 230; 13 Am. Rep. 570; Cooper v. E. T. Co., 75 N. Y. 116. See in this connection Hillan v. Newington, 57 Cal. 56. Masterson v. New York, &c., R. Co., 34 N. Y. 247; 38 Am. Rep. 510, where the American rule is squarely upheld, the court refusing to exonerate the defendant, because of the negligent acts of a third party, a driver of a wagon, who had invited the plaintiff to ride with him. See, also, Ricker v. Freeman, 50 N. H. 420; Wheeler v. Worcester, 10 Allen, 591; Eaton v. Boston, &c., R. Co., 11 Allen, 500; McMahon v. Davidson, 12 Minn. 357; Griggs v. Fleckenstein, 14 Minn. 81; Peck v. Neil, 3 McLean, 26.

[41] 116 U. S. 366.

[42] 36 N. J. Law, 225; 13 Am. Rep. 435.

[43] 105 Ill. 364; 44 Am. Rep. 791.

the daily experience of the world."[44] In the New Jersey case Judge Beasley says: — "The reason given for the judgment [in Thorogood v. Bryan] is that the passenger in the omnibus 'must be considered as identified with the driver of the omnibus in which he voluntarily' becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is, that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could only result in one way, that is by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view it certainly does not exist."

§ 112. **The New Jersey rule further stated.**— In the same case the rule is further stated as follows: — "The passenger has no control over the driver, or agent in charge of the vehicle, and it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver, or conductor of such car, is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. And yet it is to be presumed that no court would go this length and impose on each person being carried by a railroad train, responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single

[44] Little v. Hackett, 116 U. S. 366.

purpose of preventing the passenger from bringing suit against a third party, whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent to such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrong-doers, and I see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrong-doers."[45] The former English doctrine has not found favor with the critics or text-writers;[46] it has been, as has appeared, generally repudiated by our courts, and it is reasonably certain that Thorogood v. Bryan will not be followed in the future, in any State in the Union not already committed to that rule.

§ 113. Privity in negligence between a public carrier and a shipper of goods.— The doctrine of privity in negligence between a common carrier and a shipper of goods stands upon quite a different ground from that upon which the rule in Thorogood v. Bryan has been made to rest. The contract for the carriage of goods differs in several very essential particulars from that for the carriage of passengers. In the one case

[45] Bennett v. New Jersey, &c., Transportation Co., 36 N. J. Law, 225; 13 Am. Rep. 435. In a recent case in Louisiana, it was said:— "On the faith of those authorities, we assume it to be a proposition definitely settled that passengers on a public vehicle, whether street car, railway train, omnibus or tally-ho, do not exercise any control over the conductor or driver, unless they undertake to superintend and direct him further than to indicate the route which they wish to travel or the places to which they desire to go, and consequently do not become responsible for the negligence of the driver." Perez v. The New Orleans, City & Lake R. Co., 47 La. Ann. 1391, 1399; 17 So. Rep. 869.

[46] Wharton on Negligence, § 395; Thompson on Carriers, 284; 1 Smith's Leading Cases (8th Am. ed. of 1885), 505, the note to Ashby v. White. See, also, an essay by Ernest Howard Crosby, Esq., of the New York Bar, upon "The Imputed Contributory Negligence of Third Persons," 1 Am. Law Rev. (N. S.) (Nov., 1880), 770, to which I have frequently referred in the preparation of this section. "It is with great satisfaction that we learn, just as these pages go to press, that the English Appellate Court has finally overruled Thorogood v. Bryan, and put an end to the mischief which that very unwise decision has been working for nearly forty years. We doubt not that the few American courts which have followed it will now hasten to retrace their steps." Shearman & Redfield on Negligence (4th ed.), § 66.

the carrier, at common law, is an insurer, in the other he is not. As to the shipper, the carrier is an agent, and liable to the full extent involved in that relation; as to a passenger, the carrier is indeed an agent to a certain extent; but in a degree essentially different, and with powers and obligations materially modified and curtailed. The possession of the carrier is that of the merchant-shipper, he is the bailee and, *quasi*, the agent of the shipper. Whatever he does in the course of the service and bailment, he does as the agent and representative of the owner of the goods, and, this being so, it follows that all the consequences of the negligence of the carrier ought to be visited upon the owner of the freight, to the extent of depriving him of a remedy over against a third party for losses to which the carrier by his wrongful or negligent act has contributed. The general rules as to contributory negligence as a defense are properly applied to the shipper in a case of this kind. It needs no argument to show that there is no analogy between these cases and those in which passengers in one conveyance have been held entitled to an action against the owner of either, or both of the vehicles, from the negligent management of which injury has been received. In those cases there is no bailment, and no agency. There is in them no absolute obligation on the part of the carrier to deliver his passenger safely, and the carrier cannot maintain an action for an injury to the passenger, whose right of action, however, is, and ought to be, the same against both wrong-doers, and rests upon the same foundation of wrong-doing. If it is concurrent, although not in intentional concert, the injured passenger may recover of either. But the shipper, who has entrusted his goods to the common carrier, stands upon no such footing, and it is justly held that the negligence of the carrier shall be imputed to the shipper, when it has contributed to produce the injury for which the shipper brings his action against a third party.

§ 114. The prevalence of this rule.—This rule was announced in Vanderplank v. Miller,[47] by Lord Tenterden, and it has been followed in this country, in Kentucky,[48] Pennsylvania,[49] New

[47] 1 Moody & M. 169.

[48] Broadwell v. Swigert, 7 B. Mon. 39; 45 Am. Dec. 47.

[49] In Simpson v. Hand, 6 Whart. 311; 36 Am. Dec. 231, a thorough review of the cases in point is made, and the court announces the conclusion that it is an undoubted principle of the common law, that where there has been

York,[50] Arkansas,[51] and perhaps in Massachusetts.[52] The weight of authority is, without question, in favor of imputing the negligence of a common carrier to a shipper, in actions of the character considered in this and the preceding sections, to the extent of barring an action by him against a third party, upon the grounds herein set forth; and, on the other hand, there is a decided weight of precedent against imputing the negligence of the carrier to a passenger in like case. The shipper should, while the passengers should not, be charged with his carrier's negligence. The shipper, having constituted the carrier his agent, should recover only when his agent has been free from fault, while the passenger, not having constituted the carrier his agent to the same extent, and not being chargeable with the consequences of his acts or defaults, should recover whenever he is himself free from the imputation of contributory neglect, without regard to the acts or omissions of the carrier. This is the rule, in respect of both shipper and passenger, as declared by the Courts of Appeal in New York,[53] and Kentucky,[54] and it is submitted as the proper solution of the question.

mutual negligence, the owner of goods on board a vessel cannot maintain an action against the owners of another vessel which collided with his carrier's.

[50] Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; 25 Am. Rep. 221, where it is held that the possession of the carrier is that of the owner of the freight, and whatever is done by the former in the course of his service and bailment, he does as the agent and representative of the latter. And, therefore, the owner is deprived of all action for injury to his goods against a third party, unless it can be proved that the damage or loss was occasioned solely by the wrongful acts or negligence of such third party.

[51] Duggins v. Watson, 15 Ark. 118; 60 Am. Dec. 560.

[52] Smith v. Smith, 2 Pick. 621; 13 Am. Dec. 464. In this case the owner, suing for an injury to a horse received from a nuisance in the highway, while in possession, and being used by one who had hired him, was defeated of his action by reason of the negligence of the bailee in possession.

[53] *Cf.* Chapman v. New Haven R. Co., 19 N. Y. 341, for the rule of non-imputability in the case of a passenger, and The Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470, for the rule of imputability in case of a shipper.

[54] Danville, &c., Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119, for the rule as to passengers, and Broadwell v. Swigert, 7 B. Mon. 39, for the corresponding rule as to a shipper.

§ 115. Plaintiff's negligence concurring with that of the driver of a private conveyance.— It is everywhere held, on familiar grounds, that if the negligence of the occupant contributes with that of the driver and a third person, there can be no recovery against the latter. Thus, if A., being driven in the carriage of B., who is not a common carrier, willingly joins B. in driving over a place obviously dangerous, and is injured in consequence, A. has no right of action against the municipality.[55] And where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband, and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company, it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen.[56] So, it has been held that a failure to look and listen, on the part of one riding with his back to the driver, while approaching a well-known railroad crossing at a fast trot, or to warn the driver, or to take any precautions whatever was contributory negligence barring recovery.[57] In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than the driver to learn of the danger and avoid it if possible.[58]

[55] Township of Crescent v. Anderson, 114 Penn. St. 643; 8 Atl. Rep. 379.

[56] Hoag v. N. Y. C. & H. R. R. Co., 111 N. Y. 199; 18 N. E. Rep. 648.

[57] Dean v. Pennsylvania R. Co., 129 Penn. St. 514; 18 Atl. Rep. 718.

[58] Brichell v. N. Y. C. & H. R. R. Co., 120 N. Y. 290; 24 N. E. Rep. 449. Where a slightly intoxicated driver recklessly drove across a railroad track, it was held that the plaintiff could not recover if by ordinary care he should have noticed the driver's condition and remonstrated with him. Smith v. New York, &c., R. Co., 38 Hun, 33; Crawford v. Delaware, &c., R. Co., 54 N. Y. Super. Ct. 262; Galveston, &c., R. Co. v. Kutac, 72 Tex. 643; 11 S. W. Rep. 127. A refusal to charge that plaintiffs cannot recover if deceased's husband, with whom she was riding, but who was not driving, could, by the use of ordinary care, have prevented the collision, and if his failure to use such care contributed proximately to the death of deceased, was sustained. Galveston, &c., Ry. Co. v. Kutac, 76 Tex. 473; 13 S. W. Rep. 327. The fact that plaintiff and the driver were both in the employ of the city, and engaged in the common enterprise of driving to a fire, did not render them mutually responsible for

§ 115a. When negligence of driver imputed to other occupant of vehicle.— The rule is now established by the weight of authority that the contributory negligence of the driver will not be attributed to one riding in a vehicle, where the person so riding has no control of the vehicle nor of the driver in its management; and that the person riding is affected by the negligence of the driver only where there exists the relation of principal and agent, or of master and servant, or they are engaged in a joint enterprise in the sense of mutual responsibility for each other's acts.[59] And in order to constitute such

each other's acts. Elyton Land Co. v. Mingea, 89 Ala. 521; 7 So. Rep. 666. As to the duty of one riding with another to use precautions when crossing a railroad track, see Smith v. N. Y. C. & H. R. R. Co., 4 App. Div. (N. Y.) 493; Smith v. Maine Central R. Co., 87 Me. 339; 32 Atl. Rep. 967. The fact that another person who was in company with the deceased looked and listened, but did not hear or see the approaching train, does not establish that he would have failed also had he looked and listened. Wiwlrowski v. Lake Shore & W. S. R. Co., 124 N. Y. 420; 26 N. E. Rep. 1023. But in Pyle v. Clark (75 Fed. Rep. 644), it was said that the passenger is not required to exercise the same watchfulness as the driver to discover an approaching train and to give notice thereof. See, also, Howe v. M. S. P. & S. M. R. Co., 62 Minn. 71; 64 N. W. Rep. 102. See further on this subject, § 181.

[59] Robinson v. N. Y. C. & H. R. R. Co., 66 N. Y. 11; Dyer v. Erie R. Co., 77 N. Y. 228; Hoag v. N. Y. C. & H. R. R. Co., 111 N. Y. 199; 18 N. E. Rep. 648; Cumford v. D., L. & W. R. Co., 121 N. Y. 652; 24 N. E. Rep. 1092; Kessler v. Brooklyn Heights R. Co., 3 App. Div. (N. Y.) 426; Strauss v. Newburgh Electric R. Co., 6 App. Div. (N. Y.) 264; Board of Commissioners of Broome County v. Mutchler, 137 Ind. 140, 148, 149; 36 N. E. Rep. 140; City of Leavenworth v. Hatch, 57 Kan. 57; 57 Am. St. Rep. 355; Consolidated Traction Co. v. Behr, 37 Atl. Rep. 142; A. & V. R. Co. v. Davis, 69 Miss. 444; 13 So. Rep. 693; Pyle v. Clark, 79 Fed. Rep. 744, "It is the generally accepted doctrine of the courts of this country, that the contributory negligence of a carrier, or the driver of a public or private vehicle, not owned or *controlled* by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received. The *only* principle upon which such contributory negligence could bar the right of recovery is, that the driver should be regarded as the agent or servant of the passenger. But when, as in this case, he has no control over the driver, and does not own the vehicle, and is without blame, and there is no ground, in truth and reality, for holding him to be the principal or master, *there is neither reason nor justice* in holding him bound by the contributory negligence of the driver." Baltimore & Ohio R. Co. v. State of Maryland, 79 Md. 335, 343-344; 29 Atl. Rep. 518. See, also, Atlantic

a joint enterprise, the party must have some voice in the control, management or direction of the same; but if this condition exists, then even if any part of the work is delegated to one the others are responsible for his acts, because as between the parties the relation of principal and agent exists, as it does among partners.[60] Accordingly, where a father and son were engaged in moving goods, for which purpose the horse and vehicle were used, and both were so occupied at the time of the accident, it was held that they were engaged in a joint enterprise, and each became liable for the negligence of the other.[61] On the other hand, where a police sergeant sent two policemen in an ambulance to bring in a prisoner and detailed one of them to drive, it was held that the duty of the driver was a separate and independent one, and that the negligence of the driver in attempting to cross a railroad track in front of an approaching engine could not be imputed to his companion.[62] One who, uninvited or without the knowledge of the driver, of a private vehicle, gets upon such vehicle for the purpose of riding, and rides thereon, does not thereby assume the relation of master or superior toward such driver; and therefore he is

& D. R. Co. v. Ironmonger (Va.), 29 S. E. Rep. 319. *Contra*, Mullen v. City of Owosso, 100 Mich. 103; 58 N. W. Rep. 663; Railroad Co. v. Miller, 25 Mich. 274.

[60] Kessler v. Brooklyn Heights R. Co., 3 App. Div. (N. Y.) 426, 431. In this case it was said by Cullen, J.: "The sole ground of imputed liability, whether of contributory negligence or of injuries done others by negligence, is that the party has some right, voice or control in the conduct of the enterprise. We can see no distinction in principle between one riding in a vehicle upon the invitation and as the guest of one person or of a dozen. If he is a guest the liability is the same in either case." The doctrine of imputed negligence rests upon the relation of master and servant or of principal and agent. C. St. P. & K. C. R. Co. v. Chambers' Exrs., 32 U. S. App. 253; 68 Fed. Rep. 148. See, also, O. & R. V. R. Co. v. Talbot, 48 Neb. 627; 67 N. W. Rep. 599.

[61] Schron v. Staten Island Electric R. Co., 16 App. Div. (N. Y.) 111.

[62] Bailey v. Jourdan, 18 App. Div. (N. Y.) 387. If the driver were obviously incompetent, then it might be deemed negligence on the part of the occupant of the vehicle to have entrusted himself to such a driver. Roach v. Western, &c., R. Co., 93 Ga. 785; 21 S. E. Rep. 67; Board of Commissioners of Boone County v. Mutchler, 137 Ind. 140, 148-149; 36 N. E. Rep. 534. In the case last cited it was said: "If the daughter were a young girl, and were carelessly entrusted with the reins, the mother might well be charged with negligence in case of accident."

not chargeable with the negligence of the driver in driving or managing such vehicle.[63]

§ 115b. Imputing neglect of the husband to the wife.— In some States it is held that the husband's contributory fault is imputable to the wife in a suit brought by her against a third party for injuries sustained through the concurrent negligence of such third party and her husband.[64] This is put upon the

[63] Cincinnati Street Ry. Co. v. Wright, 54 Ohio St. 181; 48 N. E. Rep. 688.

[64] Yahn v. City of Ottumwa, 60 Iowa, 429; 15 N. W. Rep. 257; Nesbit v. Town of Garner, 75 Iowa, 314, 316; 39 N. W. Rep. 516; Peets v. N. Y., N. H. & H. R. Co., 50 Conn. 379; Carlisle v. Sheldon, 38 Vt. 440, 447; C., B. & Q. R. Co. v. Honey, 27 U. S. App. 196, 199; 63 Fed. Rep. 39. In California the negligence of the husband is imputed to the wife, or rather, bars her recovery, for a reason peculiar to that state. By the California Code the damages recovered in such a case would become the joint property of the husband and wife, and the Supreme Court of that State has held that it would be inequitable for him to share in the proceeds of his own wrong. McFadden v. Santa Ana, &c., Ry. Co., 87 Cal. 464; 25 Pac. Rep. 681. In Iowa the wife is barred solely by the relationship of the parties, the rule in Thorogood v. Bryan, being expressly excluded. Yahn v. Ottumwa, *supra*, as explained in Nisbet v. Garner, *supra*. In Ohio the contributory negligence of a husband in the purchase of a drug to be used by his wife is not to be imputed to her in an action by her administrator against the dealer for death resulting from the use of such drug, unless she constituted him her agent, and in simply making known to her husband her desire for the medicine, by reason of which he obtains it, the wife did not constitute him her agent so that his contributory negligence in purchasing can be imputed to her. Davis v. Guarnieri, 45 Ohio St. 470; 15 N. E. Rep. 350. In Peck v. N. Y., &c., R. Co., 50 Conn. 379, no reason is assigned. The United States Circuit Court holds that she may recover, though her husband's negligence "contributed" to the injury, if defendant's negligence "directly contributed" to it. Shaw v. Craft, 37 Fed. Rep. 317; Sheffield v. Cent. Union Tel. Co., 36 Fed. Rep. 164; Huntoon v. Trumbull, 2 McCrary, 314; Nanticoke v. Warne, 106 Penn. St. 373. In Carlisle v. Sheldon, 38 Vt. 440, 447, the reasoning of the court is exactly that of Thorogood v. Bryan. "If the wife," the judge holds, "had been a passenger in a stage-coach, and had received the same injury, under the same circumstances, although she might have had a cause of action against the proprietors for the negligence of the driver, we regard it as clear that no action could have been maintained against the town [the defendant in the case], because the proprietors and their driver would, in respect to the town, be treated as being her

ground of the marital relationship, which entitles her to his care and protection.[65] In other jurisdictions the wife is not thus affected by the husband's negligence when she sues in her own right for injuries sustained by her.[66] But if the husband is joined as a party to the action, then his negligence will be a bar to the recovery of any judgment for the wife's injuries.[67] On the other hand when the husband brings an action for the

agents and servants, and their negligence would be imputed to her. There is nothing in the marital relation which would change the situation of the wife in respect to her husband's negligence under such circumstances; for the same consequences would have followed if the relation, instead of being that of husband and wife, had been that of parent and child, or master and servant, or if she had been an entire stranger, and had been carried by her husband as a passenger gratuitously." *Contra*, Flori v. St. Louis, 3 Mo. App. 231. It is there held that, under the laws of Missouri, any right of action which has grown out of the violation of the personal rights of a *feme covert* is her separate property, free from the control of her husband, and hence, that although the contributory fault of the injured party, or of some one whose fault is attributable to him, may excuse the defendant, the contributory fault of the plaintiff of record is no answer to the claim. See § 104, *supra*, and the discussion therein of the case of Puterbaugh v. Reasor, 9 Ohio St. 484. And observe that Smith v. Smith, 2 Pick. 621; 13 Am. Dec. 464, which is a standing citation, both by judges and text-writers, as an authority in support of the rule in Thorogood v. Bryan, has nothing to do with the question at all. Puterbaugh v. Reasor is sometimes miscited to the same effect.

[65] See cases above cited.

[66] Reading Township v. Telfair, 57 Kan. 798; 48 Pac. Rep. 134; 57 Am. St. Rep. 355; Hoag v. N. Y. C. & H. R. R. Co., 111 N. Y. 199; 18 N. E. Rep. 648; Hennessy v. Brooklyn City R. Co., 73 Hun, 569; 147 N. Y. 721; 42 N. E. Rep. 723; Lake Shore, &c., R. Co. v. McIntosh, 140 Ind. 261; 38 N. E. Rep. 476; C., St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 402-403; 33 N. E. Rep. 280; 34 N. E. Rep. 218. In the last case cited it was said:— "Because the wife, riding in the wagon with her husband, was under his control and protection, and because he was in control of the team, it does not follow that his negligence, if he should be guilty of any, could be ascribed to her. Before his negligence could be imputed to her, it should appear that he was her agent, or was so united with her in a common enterprise, that his act became her act." It can make no difference that the journey was undertaken at the solicitation of the wife. Reading Township v. Telfair, *supra*.

[67] Pennsylvania R. Co. v. Goodenough, 55 N. J. Law, 577, 587-588; 28 Atl. Rep. 3. The rule at common law was that for a tort to the wife, either *ante* or *post-nuptial*, the husband must be joined with the wife in the action.

loss of his wife's society and services, her want of ordinary care will nevertheless be imputed to the husband.[68]

§ 116. In the case of persons non sui juris.— In actions brought by or in behalf of children, idiots, lunatics, or other persons *non sui juris*, for injuries to which the negligence of their legal custodians contributed, the question has arisen, whether or not, upon the theory of agency or identity, such contributory negligence on the part of the parent or guardian should be imputed to the plaintiff in bar of the action. Upon this question the courts have not been able to agree. It is held in many jurisdictions in this country, that such negligence is justly to be imputed to an infant plaintiff, while in others it is strenuously denied. Let us first consider the classes of persons to which the term *non sui juris* is applicable.

§ 117. Who are to be held non sui juris.— Idiots and lunatics are of this class, and therefore, in general, have no redress when injured through the carelessness of their legal custodians in exposing them, or in suffering them to expose themselves to danger, or where they are liable to injury from being subjected to the same rules of conduct as rational persons.[69] Infants, also, it may be said, in general, belong to this class, but not all infants very evidently. It is a question of capacity, and it has been found a very difficult question, and has been, in many courts, a very fruitful source of controversy, as to what age is sufficient to constitute an infant *sui juris*. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case.[70] Where there is no doubt as to the

[68] C., B. & Q. R. Co. v. Honey, 27 U. S. App. 196, 200-201; 63 Fed. Rep. 39. "As the respective rights of action are predicated on different grounds the one growing out of the marriage relation, and the other existing entirely independent of that relation, there is no logical difficulty in holding the husband accountable for the contributory negligence of the wife, although the latter is not responsible for the contributory fault of her husband." Per Thayer, J.

[69] Willetts v. Buffalo, &c., R. Co. 14 Barb. 585.

[70] Silberstein v. Houston, &c., R. Co., 4 N. Y. Supl. 843; Western, &c., R. Co. v. Young, 81 Ga. 397; 7 S. E. Rep. 912; McCarthy v. Cass Ave. Ry. Co., 92 Mo. 536; 4 S. W. Rep. 516; Bridger v. Asheville, &c., R. Co., 25 S. C. 24; Pennsylvania R. Co. v. Wilson, 132 Penn.

capacity of the child, at one extreme or the other, to avoid danger, the court will decide it as a matter of law. Thus, courts have held, as a matter of law, children of various ages from one year and five months to seven years *non sui juris*.[71]

St. 27; 18 Atl. Rep. 1087; Dorman *v.* Broadway R. Co., 5 N. Y. Supl. 769; Strawbridge v. Bradford, 128 Penn. St. 200; Stone v. Dry-Dock, &c., Ry. Co., 115 N. Y. 104; 21 N. E. Rep. 712; Chicago City Ry. Co. v. Wilcox (Ill.), 24 N. E. Rep. 419. In Bridger v. Asheville, &c., R. Co., 27 S. C. 456, it was said that the test of a boy's contributory negligence was his age, intelligence, ability to know his surroundings and the danger of what he was doing. Connolly v. Knickerbocker Ice Co., 114 N. Y. 104; 21 N. E. Rep. 101; Dealey v. Muller, 149 Mass. 432; 21 N. E. Rep. 763; Moebus v. Herman, 38 Hun, 370; Whalen v. Chicago, &c., Ry. Co., 75 Wis. 654; 44 N. W. Rep. 849. See § 21b.

[71] Jones v. Utica, &c., R. Co., 36 Hun, 115; Ryan v. New York, &c., R. Co., 37 Hun, 186; Moynihan v. Whidden, 143 Mass. 287; Central Trust Co. v. Wabash, &c., Ry. Co., 31 Fed. Rep. 246. Boy of six. Erie City Ry. Co. v. Schuster, 130 Penn. St. 412; 57 Am. Rep. 471; Kreig v. Wells, 1 E. D. Smith, 76; Toledo, &c., R. Co. v. Grable, 88 Ill. 441; Callahan v. Bean, 9 Allen, 401; Evansville, &c., R. Co. v. Wolf, 59 Ind. 89; O'Flaherty v. Union R. Co., 45 Mo. 70; Mangam v. Brooklyn, &c., R. Co., 38 N. Y. 455; Mascheck v. St. Louis, &c., R. Co., 3 Mo. App. 600; Lafayette, &c., R. Co. v. Huffman, 28 Ind. 287, where it is laid down as law that the unexplained presence of a child under the age of five years upon a track is an act of negligence on the part of its parents, which would prevent recovery. Pittsburgh, &c., R. Co. v. Caldwell, 74 Penn. St. 421; Jeffersonville, &c., R. Co. v. Bowen, 40 Ind. 545; McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510. The court in North Pennsylvania R. Co. v. Mahoney, 57 Penn. St. 187, holds broadly that no contributory negligence can be imputed to any child of "tender years." Lehman v. Brooklyn, 29 Barb. 234; McLain v. Van Zandt, 7 Jones & Spencer, 347; Gavin v. City of Chicago, 97 Ill. 66; Bay Shore R. Co. v. Harris, 67 Ala. 6; Morgan v. Bridge Co., 5 Dillon, 96. When the capacity of the infant has once been adjudged, the question of the amount of care exercised by it or its custodian is, as in all other cases, one for the jury. McGeary v. East, &c., R. Co., 135 Mass. 363; Texas, &c., R. Co. v. O'Donnell, 58 Tex. 27; Frick v. St. Louis, &c., R. Co., 75 Mo. 542, 595; Chicago v. Starr's Admr., 42 Ill. 174; Meeks v. Southern, &c., R. Co., 52 Cal. 602; Pittsburgh, &c., R. Co. v. Vining, 27 Ind. 513. But a child seven or eight years of age has been held capable of taking ordinary care of himself. Gillespie v. McGowen, 100 Penn. St. 144. So a child of eleven years when active and intelligent. McMahon v. New York, 33 N. Y. 642. And so one of thirteen and of fourteen years of age. Achtenhagen v. Watertown, 18 Wis. 331; Plumley v. Birge, 124 Mass. 57, 58, in which the court says:—"The age of the plaintiff [he was thirteen] was an important fact for the consideration of

§ **118. The status of infants.**— "An infant," says the Court of Appeals of New York, "in its first years is not *sui juris*. It belongs to another to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or to those standing *in loco parentis*, and not having that discretion necessary for personal protection, the parent is held in law to exercise it for him, and in cases of personal injuries received from the negligence of others, the law imputes to the infant the negligence of the parents. The infant being *non sui juris*, and having a keeper in law, to whose discretion in the care of his person he is confided, his acts, as regards third persons, must be held in law the acts of the infant, his negligence the negligence of the infant."[72]

§ **119. The New York rule — Hartfield v. Roper.**— In New York it is sturdily maintained that the contributory negligence of a third person, who is guilty thereof as parent, custodian, or one *in loco parentis*, must be imputed to a plaintiff who is *non sui juris*, and who is, therefore, in contemplation of law under the charge or control of such third person. The leading authority upon this question is the case of Hartfield v. Roper,[73]

the jury; but the court correctly held that the true rule was, that he was entitled to recover if he were in the exercise of that degree of care which, under like circumstances, would reasonably be expected of a boy of his years and capacity." Rockford, &c., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 308; Nagle v. Allegheny, &c., R. Co., 88 Penn. St. 35; 32 Am. Rep. 413. See, also, the cases cited in the preceding note. In Messenger v. Dennie, 137 Mass. 197; 20 Am. Rep. 295; 141 Mass. 335; Twist v. Winona, &c., R. Co., 39 Minn. 164; 39 N. W. Rep. 402, and McPhillips v. N. Y., &c., R. Co., 12 Daly (N. Y.) 365, boys of eight, ten and one-half and twelve, respectively, were held guilty of contributory negligence as a matter of law. Contributory negligence on the part of a plaintiff of six years, or of eight, cannot be inferred as a matter of law so as to sustain a demurrer. Mackey v. City of Vicksburg, 64 Miss. 777; 2 So. Rep. 178; City of Vicksburg v. McLain, 67 Miss. 4; 6 So. Rep. 774. In Westbrook v. Mobile, &c., R. Co., 66 Miss. 560; 6 So. Rep. 321, it was held that a plea of contributory negligence on the part of a plaintiff of four, without alleging exceptional maturity and capacity, was demurrable, the law presuming him to be *non sui juris*. See § 21b.

[72] Mangam v. Brooklyn, &c., R. Co., 38 N. Y. 455.

[73] 21 Wend. 615; 34 Am. Dec. 273; decided in 1839 in the Supreme Court of Judicature of New York.

in which this question, as affecting an infant plaintiff, was first presented to the court. The facts disclosed by the evidence were these: The plaintiff, a child about two years old, was alone in the traveled portion of a highway at some distance from any house; the defendant was driving a sleigh; the child was run over by the horses and injured; neither the defendant nor those with him saw the child before the injury. The action was an action upon the case. The verdict was for the plaintiff. The opinion of the court was by Cowen, J., upon a motion for a new trial. A new trial was granted; first, because the evidence, which is fully reported, failed to show negligence on the part of the defendant, and, secondly, because it did show clearly, negligence on the part of the plaintiff. The reasoning of the court upon the second branch of the decision is in substance as follows: — The custody of a child is confided by law to its parents; it cannot be exposed, as this child was, without gross negligence. An adult injured by a collision cannot recover if he has contributed to the injury; the same rule is applicable to children; it can be enforced only by requiring care from those who have their custody. An infant is not *sui juris*. He belongs to his custodian; the custodian is his agent. The custodian's neglect is the infant's neglect.

§ 120. **The language of the court.**— "Was the plaintiff," said the learned judge, the first of common law magistrates in New York, "guilty of negligence? His counsel seem to think he made a complete exception to the general rule demanding care on his part by reason of his extreme infancy. Is this, indeed, so? The custody of such a child is confided by law to its parents, or to others standing in their place, and it is absurd to imagine that it could be exposed in the road, as this child was, without gross carelessness. * * * The child has the right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, or even more, the infant cannot personally exercise that degree of discretion that becomes instinctive at an advanced age, and for which the law must make him responsible through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in this country. It is perfectly well settled that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect he is not entitled to an action, even though he be lawfully in the

highway pursuing his travels, which can scarcely be said of a toppling infant suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when made to small children. As they are known to have no personal discretion, common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule when they bring an action for redress — and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case have delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed that of the infant, his neglect the infant's neglect. * * * If his proper agent and guardian has suffered him to incur mischief it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travelers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct."[74]

§ **121. The later cases following Hartfield v. Roper.**— This judgment, and the reasoning upon which it was based, have always satisfied the New York courts, and they have consistently adhered to this rule, abating no jot or tittle of its anomaly and harshness.[75] It is followed, moreover, by the courts of many other States, to the effect that, in the case of a young child, the negligence of a parent, or other person to whose care the child is entrusted, has the same effect in preventing the maintenance of an action for an injury occasioned by the negligence of an-

[74] Hartfield v. Roper, 21 Wend. 615.

[75] Thurber v. Harlem, &c., R. Co., 60 N. Y. 333; Mangam v. Brooklyn, &c., R. Co., 36 Barb. 239; 38 N. Y. 456; Lehman v. City of Brooklyn, 29 Barb. 237; Mowrey v. Central, &c., R. Co., 66 Barb. 43; McLain v. Van Zandt, 7 Jones & Spencer, 351; McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510; Morrison v. Erie, &c., R. Co., 56 N. Y. 302. Here the plaintiff, an infant of twelve years of age, was a passenger on defendant's cars. While the train was in motion, her father took her under his arm, stepped from the car, fell, and she was injured. Held (Church, Ch. J., and Andrews, J., dissenting), that the act of plaintiff's father was her act, and, as the facts were undisputed, plaintiff, as matter of law, was chargeable with contributory negligence. Honegsberger v. Second Ave. R.

other, that his own want of due care would have if the plaintiff were an adult.[76]

Co., 1 Keyes, 552; 33 How. Pr. 193; 2 Abb. App. Dec. 378; Burke v. Broadway, &c., R. Co., 49 Barb. 532; Kreig v. Wells, 1 E. D. Smith, 77; Ihl v. Forty-second Street R. Co., 47 N. Y. 323; 7 Am. Rep. 450; Cosgrove v. Ogden, 49 N. Y. 255; 10 Am. Rep. 361. But, compare, Lannen v. Albany Gas Light Co., 46 Barb. 270, in which Hogeboom, J., says:—"I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent when, if he were an adult, he would escape it." This is a much quoted but somewhat irrelevant *dictum*. The opinion from which it is taken was given in a case where the child was of such an age as to have, perhaps, some degree of discretion. In such cases, as will hereafter appear, the rule in Hartfield v. Roper is usually modified even in those jurisdictions where it is generally upheld. In a late case in the Appellate Division, it was said by Cullen, J.: "Whatever criticisms may have been passed by text-writers upon the doctrine of imputed negligence in the case of a person *non sui juris* as declared by the courts of this State, the doctrine is too well established in our jurisdiction to be now questioned." Hennessey v. Brooklyn City R. Co., 6 App. Div. 206, 207.

[76] Wright v. Malden, &c., R. Co., 4 Allen, 283; Lovett v. Salem, &c., R. Co., 9 Allen, 557; Callahan v. Bean, 9 Allen, 401; Holly v. Boston Gas Light Co., 8 Gray, 123, holding that the infant plaintiff cannot recover without proving ordinary care on the part of itself *and* its father. Mulligan v. Curtis, 100 Mass. 512; Lynch v. Smith, 104 Mass. 52; 6 Am. Rep. 188; McGerry v. East, &c., R. Co., 135 Mass. 363; Brown v. European, &c., R. Co., 58 Me. 384; Leslie v. City of Lewiston, 62 Me. 468. Compare O'Brien v. McGlinchy, 68 Me. 552; Karr v. Parks, 40 Cal. 188; Schierhold v. North, &c., R. Co., 40 Cal. 447; Meeks v. Southern, &c., R. Co., 52 Cal. 602; 56 Cal. 513; 38 Am. Rep. 67; City of St. Paul v. Kuby, 8 Minn. 166; Fitzgerald v. St. Paul, &c., R. Co., 29 Minn. 336; 43 Am. Rep. 212; McMahon v. Northern, &c., R. Co., 39 Md. 439; Baltimore, &c., R. Co. v. McDonnell, 43 Md. 551. In Pittsburgh, &c., R. Co. v. Vining's Admr., 27 Ind. 513, the rule laid down is absolute that the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of *mature years*, is an act of negligence sufficient to defeat a recovery, unless the injury be wilful. La Fayette, &c., R. Co. v. Huffman, 28 Md. 287; Jeffersonville, &c., R. Co. v. Bowen, 40 Md. 545; 49 Md. 154; Hathaway v. Toledo, &c., R. Co., 46 Md. 25; Evansville, &c., R. Co. v. Wolf, 59 Md. 89; Aurora, &c., R. Co. v. Grimes, 13 Ill. 585; Chicago, &c., R. Co. v. Major, 18 Ill. 349; Chicago, &c., R. Co. v. Starr's Admr., 42 Ill. 174; Chicago, &c., R. Co. v. Gregory, 58 Ill. 226; Hund v. Geier, 72 Ill. 393; Chicago, &c., R. Co. v. Becker, 76 Ill. 25; 84 Ill. 482; Ohio, &c., R. Co. v. Stratton, 78 Ill. 88; Chicago, &c., R. Co. v. Hesing, 83 Ill. 204; Toledo, &c., R. Co. v.

§ 122. **The rule modified in various jurisdictions.**—It appears that the New York rule laid down in Hartfield v. Roper,[77] obtains in Massachusetts, Maine, California, Minnesota, Maryland, Indiana and Illinois. But in several instances the courts of these States, while adhering more or less consistently to the rule, have modified it in several very essential particulars. The harshness of it is recognized even in the courts that are governed by it, and there may be noticed in the reports of each of these States a tendency to confine the rule very strictly, and not in anywise to extend it. Thus, in Maryland, it has been held that, where the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of his negligence, a child *non sui juris* will not be prevented from recovering in consequence of its parents' neglect.[78] This is, perhaps, an attempt to apply the learning in Davies v. Mann,[79] since it amounts to very little more than the rule that if the defendant, being a traveler, can, by the exercise of ordinary care, avoid doing an injury to something exposed in the highway, he is bound at his peril to do it — without much reference to the conduct of the plaintiff. In another Maryland case,[80] where the plaintiff, a child five years and nine months old, having been sent by its parents across a street, upon an errand, was injured by the defendant's cars, while returning to its home, and there was some evidence of negligence on the part of the persons in charge of the train, it was held a proper case for the jury, and the court instructed the jury that the plaintiff might recover if the injury resulted from a want of ordinary care on the part of the defendant's agents, provided it appeared that the plaintiff had acted with such a degree of care and caution as, under the circumstances, might reasonably be expected from one of his age and intelligence.[81]

Grable, 88 Ill. 441; Gavin v. City of Chicago, 97 Ill. 66. Smith v. Atchison, &c., R. Co., 25 Kan. 738; Atchison, &c., R. Co. v. Smith, 28 Kan. 541; Chicago City Ry. Co. v. Wilcox (Ill.), 24 N. E. Rep. 419. See, also, Kyne v. Wilmington, &c., R. Co. (Del.), 14 Atl. Rep. 922.

77 21 Wend. 615; 34 Am. Dec. 273.

78 Baltimore, &c., R. Co. v. McDonnell, 43 Md. 556.

79 10 M. & W. 546.

80 McMahon v. Northern, &c., R. Co., 39 Md. 439.

81 Barksdull v. New Orleans, &c., R. Co., 23 La. Ann. 180. In this case the infant was of the age of five years and a half. The evidence showed that it was in the habit of going on the streets

§ 123. **The modification in New York.**—Even in New York, where the rule was first announced, it has been in some degree qualified in late decisions. In McGarry v. Loomis,[83] it was held that a child four years old, being upon the sidewalk and in the exercise of due care, might recover for an injury received by falling into a pool of hot water formed near the sidewalk by the escape of water from a waste pipe from the works of the defendant,[84] and, again, in Ihl v. Forty-second Street R. Co.,[85] where a child about three years of age was run down and fatally injured by the negligent management of a street railroad car, it was held that, if the child exercised proper care, the company was liable without reference to the negligence of the parents of the child in allowing it to go across the street. But it was said that, if the child did not exercise due care, the conduct of its parents would then be essential to determine the liability of the company. Where a child, even though never so much *non sui juris*, has not committed, or omitted any act which would be held to constitute negligence in an adult, the contributory negligence of its parent or guardian must not be imputed to it, in an action in its behalf, for an injury from the negligence of another. When the child has, of itself, acted with discretion, and is, notwithstanding that, injured by another's fault, it is hardly short of monstrous to impute its parents' or custodian's negligence or folly to it for the purpose of defeating its action for the injury it has suffered.[86]

alone. Having been run over by a car, it was held, in an action to recover damages, that the defendant, in face of the evidence above noted, could not set up negligence on the part of the infant's parents; and further that the fact of the infant's failure to get out of the way of the car would not preclude recovery, as the car was being driven at a speed unusual, if not unlawful. Mallard v. Ninth Ave. R. Co., 7 N. Y. Supl. 666.

[83] 63 N. Y. 104; 20 Am. Rep. 510. Upon a precisely similar state of facts in the case of Prime v. Kentucky Furniture Co., it was decided, in Nov., 1884, in the Court of Common Pleas at Louisville, by Stites, J., that the defendant was not liable for such hot water suffered to escape into a gutter, and that there was in consequence no cause of action in favor of a scalded child.

[84] 47 N. Y. 317; 7 Am. Rep. 450.

[85] Munn v. Reed, 4 Allen, 431; Lynch v. Smith, 104 Mass. 52; 6 Am. Rep. 188. In O'Brien v. McGlinchey, 68 Me. 552, 556, the court says:—"If the child, at the time of the accident, exercised as much care and caution as any person of the years of discretion could exercise under the same circumstances, then the parental negligence did not contribute to the injury. It matters not whether

§ 124. The same subject continued.— "I know of no just or legal principle," says Hogeboom, J., "which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, 'visiting the sins of the fathers upon the children' to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."[87] It is believed that the rule of Hartfield v. Roper has not been construed in any court, either to excuse gross negligence or to permit a voluntary injury to one *non sui juris*. It is a general rule, quite apart from this matter of the imputability of a parent's negligence to an injured child, that a higher degree of care must be exercised toward persons of this class than the law exacts in dealing with other classes of persons.[88] Conduct which might ordinarily be up to the standard of "due care" is sometimes held "gross negligence," or as evidence of a purpose to do a wilful injury, when considered with reference to these irresponsible classes.[89] Children, by reason of their tender age, are entitled to more care under the same circumstance than an

the plaintiff was three or thirty years of age, if he managed for his safety while upon the street with the amount of care which the law requires of persons generally." Pittsburgh, &c., R. Co. v. Bumstead, 48 Ill. 221; Chicago City Ry. Co. v. Robinson, 127 Ill. 1; 18 N. E. Rep. 772.

[86] Lannen v. Gas Co., 46 Barb. 264; affirmed, 44 N. Y. 459.

[87] Phila, &c., R. Co. v. Spearen, 47 Penn. St. 300; Smith v. O'Conner, 48 Penn. St. 218; Penn. R. Co. v. Morgan, 82 Penn. St. 134; Isabel v. Hannibal R. Co., 60 Mo. 475; Chicago, &c., R. Co. v. Dewey, 26 Ill. 259; Walters v. Chicago, &c., R. Co., 41 Iowa, 76; O'Mara v. Hudson River R. Co., 38 N. Y. 445; Singleton v. Eastern Counties Ry. Co., 7 C. B. (N. S.) 287. *Contra*, Bannon v. Baltimore, &c., R. Co., 24 Md. 108, holding that the infancy of the plaintiff does not change either the degree of care or diligence to be used by the defendant, or enhance the measure of damages to be adopted by the jury. The rules regulating the rights and duties of persons to each other cannot vary according to the years or degree of intellect of natural persons, "without producing an uncertainty in the law destructive of all principle." Branson v. Labrot, 81 Ky. 638; 50 Am. Rep. 193.

[88] Robinson v. Cone, 22 Vt. 213; 54 Am. Dec. 67; Pittsburgh, &c., R. Co. v. Caldwell, 74 Penn. St. 421, where it was held to be culpable negligence for a driver to allow an infant of five years to ride on the platform of the car. Lucas v. Taunton, &c., R. Co., 6 Gray, 71; Kerr v. Forgue, 54 Ill. 484; 5 Am. Rep. 146; Brennan v. Fair Haven, &c., R Co., 45 Conn. 284; Walters v. Chicago, &c., R. Co., 41 Iowa, 76; East Saginaw, &c., R. Co. v. Bohn, 27 Mich. 503. So,

adult. The policy of the law requires that peculiar tenderness should be exercised in extending to them civil protection. This view is clearly recognized on the criminal side of the law. So far from the neglect, or dereliction, of parents or guardians being a reason why a child should be misused with impunity by third persons, it has been held that such wrong-doing causing injury to children is an offense of an aggravated nature.[90]

§ 124a. Where negligence of parent not a proximate cause.— But the negligence of the parent will not be imputed to the child unless such negligence is a proximate cause of the injuries. For example, in case a child not in the care of a parent or custodian is injured by the negligence of a defendant, and the child neither committed nor omitted any act which would have been contributory negligence in an adult, the antecedent negligence of the parent in permitting the child to be in the street is not the proximate cause of the accident, and is not a defense to the action.[91] And upon similar principles it has been held that the negligence of a father driving an infant child held in its mother's arms will not be imputed to the child.[92]

in Kenyon v. New York, &c., R. Co., 5 Hun, 479, it was held that if the driver of defendant's engine had failed to use ordinary care, the contributory negligence of the infant plaintiff would not constitute a bar to recovery. Texas, &c., R. Co. v. O'Donnell, 58 Tex. 27; Galveston, &c., R. Co. v. Evansich, 61 Tex. 3, 24.

89 Wharton's Criminal Law, § 2529; Rex v. Friend, R. & R. 20; Rex v. Squire, 1 Russ., C. & M. 80, 678. Thus, "where a parent supplies sufficient food and clothing to another, for the purpose of administering to his child, and that other person wilfully withholds it from the child, and the parent is conscious that it is so withheld, and does not interfere, and the child dies for want of proper food and clothing, the parent is guilty of manslaughter." Rex v. Bubb, 4 Cox's C. C. 455; Rex v. Smith, L. & C. 607; 10 Cox's C. C. 82.

90 Winters v. Kansas City, &c., Ry. Co., 99 Mo. 509; 12 S. W. Rep. 652.

91 Metcalfe v. Rochester Ry. Co., 12 App. Div. (N. Y.) 147, 158; Cumming v. Brooklyn City R. Co., 104 N. Y. 669; 10 N. E. Rep. 855; Wiswell v. Doyle, 160 Mass. 42, 43; 35 N. E. Rep. 107; McGuiness v. Butler, 159 Mass. 233; 34 N. E. Rep. 259; Lynch v. Smith, 104 Mass. 52.

92 Hennessey v. Brooklyn City R. Co., 6 App. Div. (N. Y.) 206. In the opinion in this case it was said by Cullen, J.:—"In the present case, the control the father had of the infant was of a two-fold character: *First*, as parent, the right to direct the management and action of the child; and, *second*, as driver of the vehicle, the physical power over those rid-

§ 125. Negligence of the defendant must be shown.—In actions for injuries to irresponsible persons there must be, in every case, where the action can be sustained, a breach of duty. It is not enough that somebody's child is hurt. There must be

ing with him in the vehicle of the character already indicated. Now, assuming the father was negligent in driving the vehicle, is that to be considered as negligence in his duty as parent or custodian of the child, or is his negligence to be considered as in a subject-matter apart from parental duty and his relation to the child, or are the two so interwoven as to be incapable of separation? And if the negligence was not in parental custody or duty, is such negligence a bar to plaintiff's recovery? In Shearman & Redfield on Negligence, it is stated (§ 81): "Under the 'New York rule,' therefore, the negligence of a parent or guardian when not acting in that capacity is not chargeable to his child even though it tends to expose the child to injury from other persons." The authority cited to sustain this proposition by the learned authors (Lannen v. Albany Gas Light Co., 46 Barb. 264; affirmed, 44 N. Y. 459), does not proceed upon this principle, although the case involved such a point. Nevertheless, I think it clear that the proposition stated must be correct. While it may be that "illustration is not argument," it is sometimes a most convenient substitute for it, and the whole argument of the distinguished judges of the Court of Appeals who wrote the opinions in the case last cited is based on illustration. Suppose the mother and baby had been riding as passengers in a railroad train of which the father was the engineer, and that by the negligence of the father, as engineer, an accident had occurred to the train and the child had been injured, in such a case could the negligence of the father be held to prevent a recovery by the child against the railroad company? Would it not be so clear that the conduct of the father was in a service so far apart from that proceeding from the parental relation as to have no effect on the rights of the injured child? In this case, the child, while in law subject to the paramount guardianship of the father, was in the immediate custody of the mother. Its extreme youth rendered it necessary that, except while in the house, some one must have not merely legal control, but almost actual personal possession of the child. Here that person was the mother, who held the child in her arms. It should, for the purposes of this action, be deemed as in her immediate custody, not as in the custody of both parents, or of the father alone. The attention or care that at the time was to be bestowed upon it, from its helpless condition because it was an infant and not an adult, was to proceed from the mother. The care that the father was to exercise, he was to exercise whether the plaintiff was *non sui juris* or an adult, whether it was his child or a stranger's. The mother's negligence was, therefore, properly to be attributed to the child, but not that of the father."

some dereliction on the part of the defendant, or it is, in case of the child, as in the case of any one else, *damnum absque injuria*. This important element in every proper action of this nature seems frequently to be overlooked. Judge Thompson calls attention to a curious instance of it in the case of Lygo v. Newbold.[93] Alderson, B., says, in that opinion: — "The negligence in truth is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." In such a supposed case as this *dictum* suggests, we should have the thoughtless act of a child bringing himself in contact with a person performing his business in a lawful manner, and, although the child were too young to perceive the difference between danger and safety, still, there being no breach of duty on the part of the owner of the vehicle, the action as supposed would clearly be entirely without foundation.[94] In North Penn. R. Co. v. Mahoney,[95] where an infant was in the arms of one to whom it had not been entrusted, and who, having rescued it from one peril, immediately exposed it to another, it was held that the child was not barred of its action, there being no proper legal connection between the infant plaintiff and its self-constituted custodian.[96] The English rule is declared in Waite v. Northeastern Ry. Co.[97] In this case it

[93] 9 Exch. 302.

[94] Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300; Bulger v. Albany, &c., R. Co., 42 N. Y. 459; Hubener v. New Orleans, &c., R. Co., 23 La. Ann. 492; Chicago, &c., R. Co. v. Stumps, 69 Ill. 409; Phila., &c., R. Co. v. Hummel, 44 Penn. St. 375; Ostertag v. Pacific, &c., R. Co., 64 Mo. 421. A railroad company, for example, will not be held liable for injuries received by a child while getting on one of its cars, in consequence of an invitation from an employee who, in so doing, was acting entirely beyond the scope of his authority. Snyder v. Hannibal, &c., R. Co., 60 Mo. 413; Boland v. Missouri, &c., R. Co., 36 Mo. 484; Brown v. European, &c., R. Co., 58 Me. 384; Meeks v. Southern, &c., R. Co., 52 Cal. 602; 56 Cal. 513.

[95] 57 Penn. St. 187.

[96] *Cf.* Pittsburgh R. Co. v. Caldwell, 74 Penn. St. 421; Bellefontaine, &c., R. Co. v. Snyder, 18 Ohio St. 399; 24 Ohio St. 670, where it is held that neither the negligence of the parent in permitting an infant to be upon a track, nor of the person in charge of the child in not keeping a proper lookout for the car, would bar recovery if the defendant failed to exercise great caution. East Saginaw, &c., R. Co. v. Bohn, 27 Mich. 503. *Contra*, Leslie v. Lewiston, 62 Me. 468.

[97] El., Bl. & El. 719.

appears that the plaintiff, an infant about five years of age, was in charge of its grandmother, who procured tickets for both at a station, with the intention of taking the train at that place. In crossing the track to reach a platform they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and of the servants of the company. The grandmother was killed, and the plaintiff seriously injured. Lord Campbell held that the plaintiff was so identified with its grandmother that the action could not be maintained. This view was sustained on the appeal. "The case is the same as if the child had been in the mother's arms." * * * "The person who has charge of the child is identified with the child." * * * "If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say that though he himself could not maintain an action, the child could," said the judges in the Court of Exchequer Chamber to which this case was appealed.

§ 126. The English doctrine further considered.—There seems to be no other English case in point, and no decisions similar to those in the American reports that follow more or less exactly the New York case of Hartfield v. Roper.[98] Waite v. Northeastern Ry. Co.[99] turns upon the legal identity of the infant plaintiff with his guardian or custodian, and it does not go beyond that class of cases in which the parent or custodian is present and controlling the infant at the time of the injury. Many American cases recognize it to be material, in actions of this kind, when the negligence of the parent is to be imputed to the infant, that the parent be present when the injury is suffered. Holly v. Boston Gas Light Co.[1] is in point. In this case a child nine years of age was injured by escaping gas, in her father's house, the father failing to take proper precautions against injury after the leak was discovered. The court held that the plaintiff, being under the control of her parent, would have to bear the consequences of any want of ordinary care on

[98] Zut see Singleton v. Eastern Counties Ry. Co., 7 C. B. (N. S.) 287; Mangan v. Atterton, 4 Hurl. & Colt. 388; L. R. 1 Exch. 239; Gardner v. Grace, 1 Fost. & Fin. 359; Hughes v. Macfie, 2 Hurl. & Colt. 744; 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; Campbell on Negligence, § 81.

[99] El., Bl. & El. 719.

[1] 8 Gray, 123.

his part. "She was under the care of her father," said the court, "who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."[2] This is the doctrine of the English case,[3] which, reduced to a rule, is, that whenever the child is in the actual custody and control of the parent or guardian, any negligence contributing to the injury, of which such custodian may have been guilty, must be imputed to the child, in an action by, or for the benefit of the child, for damages suffered by reason of the negligence of another.[4]

§ 127. **A criticism of Hartfield v. Roper.**—The rule of imputed negligence, as applied to persons *non sui juris*, is an anomaly. The English law on this point presents an extraordinary illustration. On the one hand it is held that the negligence of a person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant.[5] But, *per contra*, where a donkey is carelessly run down in the highway, where he is negligently exposed, the defendant is held liable,[6] and though oysters are negligently placed in a river-bed, it is an injury redressible at law in damages for a vessel negligently to disturb them.[7] It appears, therefore, that the child, were he an ass or an oyster,[8]

[2] Holly v. Boston Gas Light Co., 8 Gray, 123.

[3] Waite v. Northeastern Ry. Co., El., Bl. & El. 719.

[4] Stillson v. Hannibal, &c., R. Co., 67 Mo. 671; Lannen v. The Albany Gas Co., 46 Barb. 264; 44 N. Y. 459; Ohio, &c., R. Co. v. Stratton, 78 Ill. 88; Carter v. Towne, 98 Mass. 567; 103 Mass. 507; Morrison v. Erie Ry. Co., 56 N. Y. 302.

[5] Waite v. Northeastern Ry. Co., El., Bl. & El. 719.

[6] Davies v. Mann, 10 M. & W. 546.

[7] Mayor of Colchester v. Brooke, 7 Q. B. 377; Vennall v. Garner, 1 Cromp. & M. 21.

[8] In England, even a dog, when a trespasser, has some rights. Townsend v. Wathen, 9 East, 277, holding that an action on the case would lie where plaintiff's dog, at-

would secure a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect.[9] But the objection to the rule which imputes a parent's or guardian's negligence to an infant plaintiff, goes far beyond the matter of consistency or inconsistency. The case of Hartfield v. Roper is obnoxious to far more serious criticism, than that it seems to afford less protection in courts of justice to our infant children than to dogs, and oysters and asses. With respect to the reasoning of Cowen, J., in that case, it may be said: (*a*) that whether the distinction made between slight negligence, and gross negligence, and voluntary injury has any foundation in principle is, to say the least, doubtful.[10] A person, generally, in exercising his own rights, must take due care not to interfere with the rights of others. What is due care depends, in any given instance, upon the particular circumstances of the case. If a person does not use due care, that is, the care requisite under the circumstances, he then is guilty of negligence in the legal signification of the word. Whether his conduct be called simply negligence, or be alluded to with tenderness as slight negligence, or be spoken of vituperatively as gross negligence, his liability is the same. Neither is there generally a distinction, except perhaps in the form of action, between the negligent and the wilful infliction of an injury. (*b*) A second objection to the defense in question may be drawn from its novelty. That an action is of first impression is regarded as a weighty argument against it, but that a defense has been for the first time taken in a class of actions where, if valid, there must have been many previous opportunities for setting it up, is considered a very weighty, and all but conclusive objection to its validity.[11]

tracted by his instinct, trespassed on defendant's land, on which traps baited with meat were placed, and was injured. So, too, a railroad company must exercise reasonable care to prevent injuries to stock attracted to its track by salt, or cotton seed, left there by the company. Brown v. Hannibal, &c., R. Co., 37 Mo. App. 394; Little Rock, &c., Ry. Co. v. Dick, 52 Ark. 402.

[9] Wharton on Negligence, § 312; Thompson on Negligence, 1184, § 34 *et seq.* See, also, Bamberger v. Citizens Street Ry. Co., 95 Tenn. 18, 30; 31 S. W. Rep. 163, where the text is cited.

[10] Grill v. General, &c., Collier Co., L. R. 1 C. P. 600; Briggs v. Taylor, 28 Vt. 185; Steamboat New World v. King, 16 How. (U. S) 474.

[11] Co. Litt. 81 b, 379 b.

§ 128. **The same subject continued.**— (*c*) A third objection lies to the false assumption as to the legal status of an infant. It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit he is *sui juris*. As far as his right of action is concerned he is in no respect the chattel of his father. At common law he was required to sue by guardian. By Stats. Westm. I, c. 48, and Westm. II, c. 15, he was authorized to sue by *prochein ami*. But in theory of law both guardian and *prochein ami* are appointed by the court. They are at all times subject to the control of the court, and are its officers. To protect the interest of the minor is the common law duty of the court. The judgment, if any is recovered, is the property of the minor; it is recovered to his sole use. It is an entirely false assumption, in Hartfield v. Roper, that the parent or guardian may recover "heavy verdicts for their own misconduct." Again, it is assumed in that opinion, that an infant, injured by the joint negligence of his parent and a third person, can have legal redress against his parent. "It is much more fit," says the court, "that he should look for redress to that guardian." If this be so, if the right of the infant be so distinct from the duty of the parent that the relation of parent and child is not an objection to the maintenance of such a suit, then the whole theory upon which this class of cases rests falls to the ground.

§ 129. **The criticism continued.**— (*d*) Again it is falsely assumed that the parent is the agent of the child. "Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his own account, and by which the other assumes to do the business and to render an account of it."[12] The relation of child and parent is not the relation of principal and agent, neither is it analogous to it. The child does not appoint his father; he has no control over his acts; he cannot remove him from power, or appoint another in his stead; he has no right of action against him; every element of agency is wanting. The want of any one of these elements is sufficient to prevent the acts or omissions of the parent from being viewed as the acts or omission of the child upon any analogy to be drawn from the law of agency. By the common

[12] 2 Kent's Commentaries, 612.

law, a child cannot appoint an agent. The authority by which the parent exercises control over the child is, therefore, an authority derived from the law. It is a principle of law, laid down before "the spacious days of great Elizabeth," that the abuse of an authority derived from the law shall not work harm to, or prejudice the rights of, the person subjected to it.[13] The parents' authority is given for the protection of the child, but the principle of Hartfield v. Roper turns the shield into a sword, and uses it to deprive the child of the very protection arising from the parental relation. (*c*) Again the negligence which will bar the plaintiff's recovery must be negligence which contributes to the injury. But the negligence of a parent in suffering his child to be exposed to danger, is not negligence which can be said in any legal sense to contribute to the injury. Even if such negligence be therefore imputed to the infant plaintiff it cannot bar his recovery.[14] The doctrine of Hartfield v. Roper, not being based upon authority, must be judged by the reasoning by which it can be supported. The reasoning is founded upon false assumptions that there are varying degrees of negligence, and corresponding degrees of liability; that the judgment recovered, belongs not to the child but to the parent; that there is no duty upon the court to protect the child; that the parent is the child's agent; that the child has an adequate remedy against his parent, and that such negligence is contributory negligence.[15]

§ 130. The rule in Hartfield v. Roper denied.— The rule which imputes the negligence of parents and custodians to persons *non sui juris*, is denied in many of the States of the Union. A leading case, repudiating the rule of Hartfield v. Roper, is Robinson v. Cone, decided by the Supreme Court of Vermont, in 1850.[16] In this case, the plaintiff, a boy less than four years of age, attending a school in the country, as he returned home from school, amused himself by sliding down hill on his sled,

[13] The Six Carpenters' Case, 8 Rep. 146; 1 Smith's Leading Cases (8th Am. Ed. of 1885) 257.

[14] Davies v. Mann, 10 M. & W. 546; Tuff v. Warman, 2 C. B. (N. S.) 739; 5 C. B. (N. S.) 573; Mayor of Colchester v. Brooke, 7 Q. B. 339; Townsend v. Wathen, 9 East, 277

[15] In the preparation of this section I have drawn freely from a very trenchant article, entitled "Contributory Negligence on the Part of an Infant," in the American Law Review, for April, 1870 (Vol. IV, page 405), published anonymously, but presumably written by Judge Oliver Wendell Holmes, Jr.

[16] 22 Vt. 213; 54 Am. Dec. 67.

and, while engaged in his sport, as he lay on his breast upon the sled, with his legs hanging over the sled, was run down by the two-horse sleigh of the defendant who drove down the hill upon a smart trot. Plaintiff's injuries were serious. The court denied the doctrine of imputed negligence, and held that, although a child of tender years may be in the highway through the fault or negligence of his parents, and so be improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from his redress; all that is required of an infant plaintiff in such a case being that he exercise care and prudence equal to his capacity. The Supreme Court of Pennsylvania has shown no toleration of the doctrine of imputed negligence in these cases. In an action on behalf of a child four years of age, says that court: — "To a child of plaintiff's years no contributory negligence can be imputed, she is not precluded from recovery against one tort feasor, by showing that others have borne a share in it."[17] Carpenter, J., delivering the opinion of the Supreme Court of New Hampshire, gives the doctrine a hard and contemptuous kick. He says,—"The plaintiff would be entitled to damages for the defendant's negligent injury of his property similarly exposed to danger by the carelessness of his guardian.[18] An infant of such tender years as to be capable of exercising care is not less under the protection of the law than his chattel."[19] And this rule, which prevents the imputation of a parent's or custodian's negligence or folly, to an infant, in an action brought by it or in its behalf, is maintained in several other States.[20] "The rule which visits the negligence of the fathers on the children in this way is denied

[17] North Penn. R. Co. v. Mahoney, 57 Penn. St. 187; 6 Phila. 242; Erie City, &c., Passenger Ry. Co. v. Schuster, 113 Penn. St. 412; 57 Am. Rep. 471. *Cf.* Pennsylvania R. Co. v. Kelly, 31 Penn. St. 372; Rauch v. Lloyd, 31 Penn. St. 358; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300. Strong, J., in Smith v. O'Connor, 48 Penn. St. 218, 221, referring to the rule in Hartfield v. Roper, says:—"This is compelling the child to exercise not of its own but of the parent's discretion. It is holding it responsible for the ordinary care of adults. In our opinion the rule thus broadly stated does not rest upon sound reason." Glassey v. Hestonville, &c., R. Co., 57 Penn. St. 172; Kay v. Penn. R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; Phila., &c., R. Co. v. Long, 75 Penn. St. 257; Wharton on Negligence, § 310, note.

[18] Davies v. Mann, M. & W. 546; Smith v. Railroad, 35 N. H. 366, 367; Giles v. Railroad, 55 N. H. 555.

[19] Bisaillon v. Blood, 64 N. H. 565; 15 Atl. Rep. 147.

[20] Government St. R. Co. v.

in some of the States of the Union, and has not yet been adopted by the English courts."[21] While, on the one hand, in the States of New York, Massachusetts, Maine, California, Minnesota, Maryland, and Indiana,[22] the negligence or misconduct of a parent or custodian is imputed to an infant plaintiff, who brings an action for damages he has sustained by reason of another's negligence, the better rule, that in such an action, by or in behalf of an infant, the negligence of parent or guardian is not to be so imputed, prevails in Alabama,[23] Georgia,[24] Connecticut,[25] Illinois,[26] Iowa,[27] Kansas,[28] Michigan,[29] Mississippi,[30] Missouri,[31]

Hanlon, 53 Ala. 70; Wymore v. Mahaska County, 78 Iowa, 396; 43 N. W. Rep. 264; Westbrook v. Mobile, &c., R. Co., 66 Miss. 560; 6 So. Rep. 321; Ferguson v. Columbus, &c., Ry. Co., 77 Ga. 102; Newman v. Phillipsburgh, &c., R. Co. (N. J.), 19 Atl. Rep. 1102; Huff v. Ames, 16 Neb. 139; 49 Am. Rep. 716. A parent's admission that he had warned an infant to avoid a certain danger cannot be used against the son on the trial of his action for an injury. Power v. Harlow, 57 Mich. 107; Bellefontaine, &c., R. Co. v. Snyder, 18 Ohio St. 399; Cleveland, &c., R. Co. v. Manson, 30 Ohio St. 451; Norfolk, &c., R. Co. v. Ormsby, 27 Gratt. 455; Birge v. Gardner, 19 Conn. 507; Daley v. Norwich, &c., R. Co., 26 Conn. 591; Bronson v. Southbury, 37 Conn. 199; Winters v. Kansas City, &c., Ry. Co., 99 Mo. 509; 12 S. W. Rep. 652; Boland v. Missouri, &c., R. Co., 36 Mo. 484; Stillson v. Hannibal, &c., R. Co., 67 Mo. 671; Frick v. St. Louis, &c., R. Co., 75 Mo. 542; 75 Mo. 595. In this case, the court is of the opinion that the weight of authority sustains the rule, that in an action *by the infant* for damages resulting from an injury to himself by the negligence of a third party, the negligence of the parent or guardian is not to be considered, or imputed to the infant. Whirley v. Whiteman, 1 Head, 610; Galveston, &c., R. Co. v. Moore, 59 Tex. 64; 46 Am. Rep. 265; Texas, &c., R. Co. v. O'Donnell, 58 Tex. 27; Houston, &c., R. Co. v. Simpson, 60 Tex. 103; Railroad Co. v. Herbeck, 60 Tex. 612.

[21] Shirley's Leading Cases, 274.

[22] § 121, *supra*.

[23] Government Street R. Co. v. Hanlon, 53 Ala. 70; Pratt Coal & Iron Co. v. Browby, 83 Ala. 371; 3 So. Rep. 555.

[24] Atlanta, &c., Ry. Co. v. Gravitt, 93 Ga. 369; 20 S. E. Rep. 550; 44 Am. St. Rep. 145; Ferguson v. Columbus, &c., Ry. Co., 77 Ga. 102.

[25] Daley v. Norwich, &c., R. Co., 26 Conn. 591.

[26] Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; 27 N. E. Rep. 899.

[27] Wymore v. Mahaska County, 78 Iowa, 396; 43 N. W. Rep. 264.

[28] Union Pacific Ry. Co. v. Young, 57 Kan. 168; 45 Pac. Rep. 580.

[29] Shippy v. Village of Au Sable, 85 Mich. 280; 48 N. W. Rep. 584.

[30] Westbrook v. Mobile & Ohio R. Co., 66 Miss. 560; 6 So. Rep. 321.

[31] Brill v. Eddy, 115 Mo. 596, 606; 22 S. W. Rep. 488; Winters v. Kansas City Ry. Co., 99 Mo. 509; 12 S. W. Rep. 652.

Nebraska,[32] New Jersey,[33] North Carolina,[34] Ohio,[35] Pennsylvania,[36] Tennessee,[37] Texas,[38] Virginia,[39] and West Virginia.[40]

§ 131. When the action is for the parent's benefit.— When an action for the negligent injury of an infant is brought by the parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. This is only one phase of the general rule of contributory negligence to the effect that the plaintiff's own negligence is a defense to his action. Its application to cases of this kind is well illustrated in the case of Bellefontaine, &c., R. Co. v. Snyder.[41] In the earlier action, brought in the name of the child, for injuries received by it through the negligence of the employees of the railroad company, the contributory negligence of the parent, or of the person to whom the parent had temporarily entrusted the child, was held no bar to the action; while in the second suit, brought by the parent in his own name, and for his own benefit, it was held that the action would not lie. The negligence of his agent to whom he had entrusted the child having contributed to cause the injury, and such negligence being, in contemplation of law, the parent's negligence was held to bar the action. A great number of authorities can be cited in support of this rule.[42]

[32] Huff v. Ames, 16 Neb. 139; 19 N. W. Rep. 623.

[33] Newman v. Phillipsburg, &c., R. Co., 52 N. J. Law, 446; 19 Atl. Rep. 1102.

[34] Bottoms v. Seaboard, &c., R. Co., 114 N. C. 699; 19 S. E. Rep. 730.

[35] Bellefontaine, &c., R. Co. v. Snyder, 18 Ohio St. 399; St. Clair Street Ry. Co. v. Eadie, 43 Ohio St. 91; 1 N. E. Rep. 519.

[36] Westerberg v. Kinzua Creek R. Co., 142 Penn. St. 471; 21 Atl. Rep. 878; Erle Pass. Ry. Co. v. Schuster, 113 Penn. St. 412; 26 Atl. Rep. 269; North Pennsylvania R. Co. v. Mahoney, 57 Penn. St. 187.

[37] Bamberger v. Citizens' Street Ry. Co., 95 Tenn. 18; 31 S. W. Rep. 163; 49 Am. St. Rep. 909; Whirley v. Whiteman, 1 Head, 610.

[38] Williams v. Texas, &c., Ry. Co., 60 Tex. 205; Galveston, &c., Ry. Co. v. Moore, 59 Tex. 64.

[39] Norfolk, &c., R. Co. v. Groseclove, 88 Va. 267; 13 S. E. Rep. 454.

[40] Dickin v. Liverpool Salt, &c., Co., 41 W. Va. 511; 23 S. E. Rep. 582; Tunn v. Ohio River R. Co., 42 W. Va. 676; 26 S. E. Rep. 546.

[41] 18 Ohio St. 399; 24 Ohio St. 670.

[42] Smith v. Hestonville, &c., R. Co., 92 Penn. St. 450; 37 Am. Rep. 705; Penn. R. Co. v. Bock, 93 Penn. St. 427; Penn. R. Co. v. James, 81 Penn. St. 194; Phila., &c., R. Co. v. Long, 75 Penn. St.

§ 131a. Where action is brought by the parent as administrator, &c.— But while the courts are all agreed as to the legal consequences of the parent's negligence where he brings the action in his own right for loss of the services of the child, there is a conflict in the decisions as to the effect of such negligence

257; Pittsburgh, &c., R. Co. v. Pearson, 72 Penn. St. 169. "There is a class of cases, not brought by infants for their own benefit, but brought to recover for loss of services by parents of children and by masters of apprentices whose negligence contributed to the injury of the child or apprentice, holding that the negligence of the parent or master is a defense. These cases do not rest on the doctrine of imputed negligence, though the term is sometimes carelessly used in such cases. A plaintiff who is *sui juris* is not allowed to recover, for his own benefit, damages caused by the concurrent negligence of himself and of the defendant, no matter whether the person injured is the plaintiff, his wife, his child, or his servant." Metcalfe v. Rochester Ry. Co., 12 App. Div. (N. Y.) 147, 158, per Follett, J. When an action for personal injury to an infant is brought in the name of the infant, and for his benefit, by his parent, as next friend, the plea of contributory negligence on the part of the parent is no defense. Westbrook v. Mobile, &c., R. Co., 66 Miss. 560; 6 So. Rep. 321; Kay v. Penn. R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; Glassey v. Hestonville, &c., R. Co., 57 Penn. St. 172; Penn. R. Co. v. Zebe, 33 Penn. St. 318; 37 Penn. St. 420; Isabel v. Hannibal, &c., R. Co., 60 Mo. 475; Koons v. St. Louis, &c., R. Co., 65 Mo. 592. In Hooker v. Chicago, &c., R. Co., 76 Wis. 542, where the action was by the parent, the court said:— "Counsel contends that the negligence of the temporary custodian of the child ought not to be imputed to the child itself, or to the plaintiff. This court has not yet decided that question. It has frequently held, however, that in such a case, where the child is so young as to be *non sui juris*, it is a material question whether the parent was or was not negligent in committing the child to such temporary custodian, and whether such custodian was of proper age and discretion to suitably care for it. There has been no occasion to go further and decide the above question." O'Flaherty v. Union, &c., R. Co., 45 Mo. 70; Daley v. Norwich, &c., R. Co., 26 Conn. 591, 598, holding it to be "obvious that the negligence of the parents is not the want of ordinary care in a child less than three years of age, however much such negligence might be a defense to an action by the father, had he sued for expenses incurred, or for loss of service." Birmingham v. Dorer, 3 Brewst. 690. But see Walters v. Chicago, &c., R. Co., 41 Iowa, 71 [Laws of Iowa (1860), § 411]. It was there held that *when the parents of an infant are unable to give it their personal care*, and entrust him to the custody of a suitable person, the negligence of the latter cannot be imputed to the parents, and will not defeat a recovery for negligence resulting in the death of the infant. Albertson v. Keokuk, &c., R. Co., 48

where the action is brought by the parent as administrator of the child's estate. In some jurisdictions it is held that if the facts are such that the child could have maintained the action had its injuries not been fatal, the administrator may recover the full damages sustained by the child's estate, even though the parent is the sole beneficiary of the recovery.[43] But in other courts the rule is established that the negligence of the parent will bar a recovery by the administrator, when the parent is the sole beneficiary.[44]

Iowa, 492; Wright v. Malden, &c., R. Co., 4 Allen, 283; Pittsburgh, &c., R. Co. v. Vining's Admr., 27 Ind. 573; Chicago v. Major, 18 Ill. 349; Louisville, &c., Canal Co. v. Murphy, 9 Bush, 522.

[43] Wymore v. Mahaska County, 78 Iowa, 396; 43 N. W. Rep. 264; Norfolk, &c., R. Co. v. Groseclose, 88 Va. 267; 13 S. E. Rep. 454; Cleveland, &c., R. Co. v. Crawford, 24 Ohio St. 641; Westerfield v. Levis, 43 La. Ann. 64; 9 So. Rep. 52; Williams v. Texas, &c., R. Co., 60 Tex. 205. In the case first cited it was said:—"Where a suit is by a parent, for loss of services caused by an injury to a child, the contributory negligence of the plaintiff is a good defense, but such negligence is not imputable to the child, and is, consequently, not to be considered when the suit is by the child or its personal representative. Hence, when the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of parents at the time the injuries were received, and although the estate is inherited by the parents. The parents' negligence is no defense, because it is regarded not as a proximate but as a remote cause of the injury; and the reason lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another." "It would seem that the sounder view is that entertained by the courts of Iowa and Virginia, especially when it is considered that the object of the rule is not to shield a negligent defendant from the penalty of his wrong-doing, but merely to deny aid to a plaintiff who, though equally guilty, nevertheless comes into a court of justice and demands the fruits of his own unpardonable neglect of both a moral and a legal duty." Per Lumpkin, J., in Atlanta, &c., Ry. Co. v. Gravitt, 93 Ga. 369; 20 S. E. Rep. 550; 44 Am. St. Rep. 145.

[44] Bamberger v. Citizens' Street Ry. Co., 95 Tenn. 18; 31 S. W. Rep. 163; 49 Am. St. Rep. 909; Pekin v. McMahon, 154 Ill. 141; 39 N. E. Rep. 484; 45 Am. St. Rep. 114; Chicago v. Hessing, 83 Ill. 204. In the case first cited it was said by the Supreme Court of Tennessee:—"The underlying principle in the whole matter is, that no one shall profit by his own negligence, and, to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would be to defeat this

§ 132. Contributory negligence of child when action brought by parent.— In actions by a parent, the child's contributory negligence will defeat the claim, because when a plaintiff derives his cause of action from an injury done to a third person, such plaintiff is justly chargeable with the contributory negligence of the third person.[45] "The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy."[46] This rule is applicable to actions under Lord Campbell's act,[47] and the statutes in this country which authorize actions for personal injuries resulting in death. It is accordingly held in suits brought under statutes of this kind, that any contributory negligence which might have barred a recovery by the deceased, had he survived, in an action brought by him for his injuries, is a defense in the action for the benefit of the next of kin.[48]

underlying principle by a mere change of form, when the entire recovery in either event goes to him alone. Upon principle, we think that no matter how the suit is brought, whether as administrator or as father, it can be defeated by the father's contributory negligence when he is sole beneficiary."

[45] Chicago, &c., R. Co. v. Harney, 28 Ind. 28; Gilligan v. New York, &c., R. Co., 1 E. D. Smith, 453; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Burke v. Broadway, &c., R. Co., 34 How. Pr. 239; 49 Barb. 529; Fitzgerald v. St. Paul, &c., R. Co., 29 Minn. 336; 43 Am. Rep. 212.

[46] Burke v. Broadway, &c., R. Co., 34 How. Pr. 239; 49 Barb. 529.

[47] 9 and 10 Vict., chap. 93.

[48] Thorogood v. Bryan, 8 C. B. 115; Tucker v. Chaplin, 2 Car. & Kir. 730; Witherley v. Regent's Canal Co., 12 C. B. (N. S.) 2; 6 L. T. (N. S.) 255; 3 Fost. & Fin. 61; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson River R. Co., 24 N. Y. 430; 29 N. Y. 315; 33 Barb. 503; Lehman v. Brooklyn, 29 Barb. 234. Here the intestate, a child four years old, had left its home, and a half hour later was found dead in a well. In an action against the city, by the child's administrator, it was held that the plaintiff, in order to recover damages, must show that the negligence and improvidence of the intestate did not contribute to the result. Chicago v. Major, 18 Ill. 349; Chicago v. Starr's Admr., 42 Ill. 174; Boland v. Missouri, &c., R. Co., 36 Mo. 484; Ewen v. Chicago, &c., R. Co., 38 Wis. 613. This defense is also valid in those States where the statute contains no provision applying to the negligence of the deceased. Lofton v. Vogles, 17 Ind. 105 [2 Stat. of Indiana (1876), 44, § 27]; Penn. R. Co. v. Lewis, 79 Penn. St. 33 [Laws of Penn. (1885), chap. 323]; Rowland v. Cannon, 35 Ga. 105 [Code of Georgia (1873), § 2971]. See, also, Walters v. Chicago, &c., R. Co., 41 Iowa, 71 [Laws of Iowa (1860), § 411].

§ 133. The rule modified by reason of the plaintiff's poverty or destitution.— In courts which repudiate the harsh rule in Hartfield v. Roper, an infant plaintiff, as we have seen, is not prejudiced in his action by an imputation to him of his parent's neglect. In some States we find it held, as a refinement even upon this rule, that it may be a matter to go to the jury, in case the parent is poor, and destitute of means for safely restraining his child, whether or not proper, or ordinary, care was displayed; the question being, whether the parent has exercised reasonable care of his child, the jury may take account of his lack of means in determining it.[49] Sharswood, J., said, in Pittsburgh, &c., R. Co. v. Pearson:[50]— "The only question raised by these assignments of error which it is deemed necessary to discuss, is whether, under the evidence, the plaintiffs below — the parents of the child who was run over and killed by the railroad car of the defendants — were guilty of culpable negligence in permitting him to run abroad in the street without a competent protector. It was, undoubtedly, settled very properly in Glassey v. Hestonville Passenger Railway Co.,[51] that, if the parents permit a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury. But in this case there was evidence that the child was not permitted to run at large with-

[49] Isabel v. Hannibal, &c., R. Co., 60 Mo. 475, 483; Walters v. Chicago, &c., R. Co., 41 Iowa, 71; Pittsburgh, &c., R. Co. v. Pearson, 72 Penn. St. 169; Phila., &c., R. Co. v. Long, 75 Penn. St. 257. See, also, Hoppe, Admr., v. Chicago, &c., R. Co., 61 Wis. 357; Chicago, &c., R. Co. v. Gregory, 58 Ill. 226. In Illinois, &c., R. Co. v. Slater, 129 Ill. 91; 21 N. E. Rep. 575, it was held that evidence of the father's wealth was inadmissible in defense where it was not shown that the boy was incapable of taking care of himself. Evidence of the parent's negligence in any given case cannot be made to turn upon the state of his finances. Fox v. Oakland St. Ry., 118 Cal. 55, 63-66; 50 Pac. Rep. 25. Evidence of the father's poverty was excluded in Mayhew v. Burns, 103 Ind. 328, but on liberal grounds, the court holding that wealth and poverty were alike immaterial in any case, as the question of negligence was to be determined by the *actual* situation of the household. The cases in which such evidence was admitted were disapproved.

[50] 72 Penn. St. 169.

[51] P. F. Smith, 172.

out a protector, and it was a question for the jury whether the accident was to be attributed to the negligence of the parents. These parents were careful parents. A board at the door prevented the child from leaving the house of his own accord. When abroad he was in charge of an older sister, between twelve and thirteen years of age. It so happened, however, that the board was removed temporarily for the purpose of scrubbing the floor. The child watched his opportunity and escaped. He was immediately missed, and his brother at once sent after him. He returned and said that he was playing in the alley with Lizzie Orr, a little girl of the neighborhood, between seven and eight years of age, who was in the habit of playing with him. The parents were satisfied that he was safe with her. In the caprice of childhood the little boy ran away from her down the alley to Rebecca street, where the railway was, ran across the track, and in the course of a very few minutes was run over. Now, whether Lizzie Orr was a competent protector, whether the parents ought to have been satisfied when informed that he was with her, were questions for the jury."

§ 134. A further statement of the rule in Pennsylvania.—The court in the same case further said: — " Children of that age — more especially girls—are often sufficiently prudent and thoughtful to be entrusted with the care of young children. Persons in the condition of life of these parents cannot afford to employ servants to look after their children. Their necessary domestic duties prevent them from being constantly on the watch themselves. We agree that ' to say it is negligence to permit a child to go out and play without it is attended by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor.' O'Flaherty v. Union R. Co.[52] Agnew, J., has made a similar observation in Kay v. The Pennsylvania R. Co.[53] ' Here, a mother toiling for daily bread, and having done the best she could in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame? ' That, indeed, was an action by the child in

[52] 45 Mo. 70.

[53] 65 Penn. St. 277.

which the negligence of the parent would, perhaps, be no defense, but we may ask with equal propriety why should the necessities of the parents' position cover them with blame if they have done all in their circumstances they could do."[54] Again, in Philadelphia, &c., R. Co. v. Long,[55] the case of a child of humble parents run over in the street, the court, Agnew, J., says: — "In that part of the charge recited in the fourth assignment the judge said, 'that the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took reasonable care of the child; if she did not, it was negligence.' To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exists, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child so to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be reasonable care, dependent upon the circumstances. This is a fact for the jury. If she did not exercise this care, she was negligent. What more than this care can be demanded of her? When a railroad runs through a populous city, has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements without a breath of healthy air? Is this the life they must lead, or be adjudged to be negligent? This mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say that this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing over her

[54] Pittsburgh, &c., R. Co. v. Pearson, 72 Penn. St. 169.

[55] 75 Penn. St. 257.

dying child:—'*Your* negligence caused this. *You* suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right.' We can endorse no such cruel doctrine, but we must say, as was said in Kay v. Railroad Co.,[56] the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil."

§ 135. This doctrine commended.— This argument satisfies at once the sense of justice and the instincts of humanity. Unless the rights of the poor are to be carelessly sacrificed to the rapacity of the rich, account must betaken in such actions as these, of the pecuniary condition of the plaintiff, in determining whether or not due care has been exercised. Most of the families living in the large cities are poor, and unable to employ assistance in taking care of their children. Often both parents' labor is required away from home, to procure the food necessary for the family. Children are crowded together in the ill-ventilated rooms of tenement houses. A child cannot live if constantly confined in that manner. The children of the poor can have no place of resort but the streets. If one of these children is injured in its helplessness, it by no means follows that either the child or its parents have neglected any duty. If it is injured by accident, all that can be done is to pity those whose poverty exposes them to such accidents; but, if it is injured by the negligence of others, not only ought it to have the same measure of justice to which every one is entitled who brings an action in court, but also when its parents are needy, that circumstance ought to be duly considered by the court in reaching a conclusion upon the question of negligence. Poverty in these cases, ought to be, however, only a shield, and never a sword. The destitution of the parent is not a license to the child to act recklessly. But is there any principle of law by which in this class of actions children are excepted out of the rule applicable to all other plaintiffs, and on account of their own weakness, and their parents' poverty, are made to bear an additional burden? Is there any principle upon which it can be held that they must establish not only their own due care,

[56] 65 Penn. St. 276.

but the due care of another person over whom they have no control, measured by a standard beyond that other person's power to attain?

§ 136. Ordinary care in a child.— An infant plaintiff, who, on the one hand, is not so young as to escape entirely all legal accountability, and, on the other hand, is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child.[57] In Lynch v. Smith[58] the court said: —

[57] Lynch v. Nurdin, 1 Q. B. 29; Railroad Co. v. Stout, 17 Wall. 657; 2 Dill. 294; Gray v. Scott, 66 Penn. St. 345; Robinson v. Cone, 22 Vt. 213; 54 Am. Dec. 67.

[58] 104 Mass. 52; 6 Am. Rep. 188. In McGulness v. Butler, 159 Mass. 233, 236-237; 34 N. E. Rep. 259, the court said:—"In order that a child may recover against one through whose negligence he claims to have been injured, it is not always sufficient for him to show that he himself was in the exercise of such care as might reasonably have been expected of him. His conduct, notwithstanding that fact, may have been that of a wrong-doer, and may have contributed to the injury of which he complains. When it clearly appears that such was the case, he cannot avoid the effect of his conduct by showing that he was doing only what a child might have been expected to do. An infant cannot shift any more than an adult the consequences of his own wrong-doing or negligence upon another. Whether he was negligent or a wrong-doer very often is a difficult question to determine, and it is hard to say in all cases where the line should be drawn between negligence or wrong-doing, and such care as, considering his age and experience, reasonably should be expected of him. But about the general principles there can, we think, be no question. Thus, if a child trespasses on the premises of the defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly inflicted by, or was due to the recklessly careless conduct of the defendant. Gay v. Essex Electric Street Ry. Co., 159 Mass. 238, 242; 34 N. E. Rep. 186, 258; Daniels v. N. Y. & N. E. R. Co., 154 Mass. 349; 28 N. E. Rep. 283; McEachern v. Boston & Me. R. Co., 150 Mass. 515; 23 N. E. Rep. 231. So, if a child voluntarily participates in wrongful acts of others, and is thereby injured, he cannot recover, though there may have been negligence on the part of the defendant which contributed to the injury. Lane v. Atlantic Works, 107 Mass. 104; 111 Mass. 136. Again, if a boy is injured while playing with a machine on which he has been set to work with proper instructions, he cannot recover, because such conduct

"If the jury find that the plaintiff was of such capacity that he was in the street without negligence, either on the part of himself or his parents, then the question arises, what degree of care he was bound to exercise. In Mulligan v. Curtis,[59] it was held to be a question for the jury, whether a boy three and a half years old might not without negligence be trusted to go across the street, accompanied by his brother nine years old. Certainly the jury could not find that a boy nine years old must exercise the capacity of an adult. But it was implied that, if it was proper for him to be there, it was only necessary for him to exercise such capacity as he had. School children, who are properly sent to school unattended, must use such reasonable care as school children can. It must be reasonable care, adapted to the circumstances or, in other words, the ordinary care of school children. * * * If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury." In Munn v. Reed,[60] where the infant had been bitten while playing with a dog, it was held that if the child had been attacked by the dog while using such care as is usual with children of its age, the action might be maintained. In a case in Michigan, where the plaintiff was under the age of fifteen years, it was held to be the duty of the court, without being requested, to instruct the jury that a different rule should be applied in considering the question of contributory negligence from that applicable in the case of an adult.[61] The decisions enforcing this rule that children are to be held responsible only for such a degree of care as may reasonably be expected of them, taking due account of their age and the particular circumstances of each case, are very numerous.[62]

constitutes contributory negligence on his part. Rock v. Indian Orchard Mills, 142 Mass. 522; 8 N. E. Rep. 401.

[59] 100 Mass. 512.

[60] 4 Allen, 431.

[61] Wright v. Detroit, &c., Ry. Co., 77 Mich. 123; 43 N. W. Rep. 765.

[62] Hemmingway v. Chicago, &c., Ry. Co., 72 Wis. 42; 37 N. W. Rep. 804; Hussey v. Ryan, 64 Md. 426; 54 Am. Rep. 772; Meuhlhausen v. St. Louis, &c., R. Co., 91 Mo. 832; 2 S. W. Rep. 315; Bridger v. Asheville, &c., R. Co., 25 S. C. 24. In denying a motion for a new trial, the court said:—"If an adult had been injured under the same circumstances, instead of a child about ten years of age, I should have little hesitation in granting the motion. I feel, however, that this case was a proper one for the

§ 137. Children as trespassers.— Lynch v. Nurdin,[63] is the leading English case upon this subject. The circumstances of the case were these: — Negligence on the part of the defendant's servant, tempting the plaintiff to mischief; a technical trespass by the infant, a child, capable of only a small measure of care for its own safety; conduct by the plaintiff which in an adult would have been negligence *per se*. The facts were these: — Defendant's cart being in charge of his cartman was driven into a street where a number of children were playing; the cartman left the horse and cart standing unattended before the door of a house which he had entered; the plaintiff, a child under seven years of age, climbed upon the wheel of the cart; another boy led the horse a step or two forward, the plaintiff fell off and was run over by the wheel, and his leg was broken. The defendant was held liable, although the plaintiff was a trespasser, and contributed to the mischief by his own act. The question of the negligence of the lad's parents, in suffering him to be at large in the street unattended, was not raised, and the

jury." McGuire v. Chicago, &c., Ry. Co., 37 Fed. Rep. 54. A boy of seven is not bound as a matter of law to "look and listen" before crossing a railroad track. Baker v. Flint, &c., R. Co., 68 Mich. 90; 35 N. W. Rep. 836. See, also, Lehman v. Louisiana, &c., R. Co., 37 La. Ann. 705; Finklestein v. N. Y., &c., R. Co., 41 Hun, 34; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283; 20 N. E. Rep. 466; Western, &c., Ry. Co. v. Young, 83 Ga. 512; 10 S. E. Rep. 197; Ill. Cent. R. Co. v. Slater, 129 Ill. 91; Kansas Pac. Ry. Co. v. Whipple, 39 Kan. 531; 18 Pac. Rep. 730; Hicks v. Pacific, &c., R. Co., 64 Mo. 430; Railroad Co. v. Gladmon, 15 Wall. 401; Kay v. Penn. &c., R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Mobile, &c., R. Co. v. Crenshaw, 65 Ala. 566; Barry v. N. Y., &c., R. Co., 92 N. Y. 289; 44 Am. Rep. 377; Byrne v. N. Y. &c., R. Co., 83 N. Y. 620. The law fixes no certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent on those of mature years, and in every case the question of intelligence of a child is one for the jury. Houston, &c., R. Co. v. Simpson, 60 Tex. 103. Ordinary neglect as to a person of full capacity, might be gross negligence as to a child. Lehman v. McQueen, 65 Ala. 566; Galveston, &c., R. Co. v. Moore, 59 Tex. 64; 46 Am. Rep. 265; Plumley v. Birge, 124 Mass. 57; 26 Am. Rep. 645; Meibus v. Dodge, 38 Wis. 300; 20 Wis. 6. If the child does not act with the ordinary prudence of a person of his age and intelligence, he is guilty of contributory negligence. Cook v. Houston Nav. Co., 76 Tex. 8; 13 S. W. Rep. 475; Dowling v. Allen, 88 Mo. 293.

[63] 1 Q. B. 29.

case is therefore no authority upon this point, though it is often cited as though it were.

§ 138. Other English cases.— Wait v. Northeastern Ry. Co.[64] should not be regarded as questioning it, for the two cases have nothing in common; but whether or not Hughes v. Macfie[65] and Mangan v. Atterton[66] are not to be regarded as shaking its authority is a much more difficult question. The opinion of Pollock, C. B., in the former case, if not expressly repudiating, is wholly inconsistent with it. In that case two children, seven and five years of age respectively, playing about and jumping on the covering of a bulkhead which had been left tilted up against a wall upon a highway, were injured by its falling upon them. The court says: — "We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose. Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled, for no lawful purpose, with that which, if left alone, would not have hurt him. He would, therefore, at all events, have contributed by his own negligence to his damage. As far as the child's act is concerned, he had no more right to touch this flap, for the purpose for which he did touch it, than he would have had if it had been inside the defendant's premises."[67] In Mangan v. Atterton,[68] the defendant exposed for sale, unfenced and unattended, a machine which might be set in motion by any passer-by, and which when in motion was dangerous. The plaintiff, a boy of four years old, by the direction of his brother, a boy of seven, put his fingers into the cogs of the machine, while another boy was turning the handle, whereby his hand was crushed. The defendant was held not liable, on the ground that he was guilty of no negligence in exposing his machine, and because the plaintiff's own act had brought the injury upon himself. The judge, in rendering the opinion, which was probably right, assigned a reason which was certainly wrong. "The defendant," says the court, "is no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the

64 El., Bl. & El. 719.
65 2 Hurl. & Colt. 744.
66 L. R. 1 Exch. 239.
67 Hughes v. Macfie, 2 Hurl. & Colt. 744.
68 L. R. 1 Exch. 239.

child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tort feasor?"[69]

§ 139. The doctrine condemned.— Nothing worse than this, as a specimen of judicial reasoning, can be found in the reports. These three comparatively recent cases seem to leave unsettled in England the question whether a child of tender years, exercising all the care that can be expected of him, but yet yielding to a temptation in his play to commit a technical trespass, may recover of a defendant for an injury caused by his negligently exposing that which a child's natural instinct may bring him in contact with to his hurt.[70]

§ 140. The general American rule.— In this country the rule in Lynch v. Nurdin has been very generally followed, both in the Federal and in many State courts. The leading case in the Federal reports is Railroad Co. v. Stout,[71] in which Judge Dillon wrote the opinion at circuit.[72] This is the turn-table case. It holds a railroad company liable for an injury to an infant caused by a turn-table, left unguarded and unlocked, in a place likely to attract children, even though upon the company's own ground.[73] In the case of Birge v. Gardner,[74] the facts are es-

[69] Mangan v. Atterton, L. R. 1 Exch. 239.

[70] Clark v. Chambers, 3 Q. B. Div. 327. In this case a contrary doctrine to the later English cases is laid down. It goes even farther than Lynch v. Nurdin, and in discussing the case of Mangan v. Atterton, Cockburn, C. J. (p. 339), says:—"It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

[71] 17 Wall. 657.

[72] 2 Dillon, 294.

[73] *Cf.* Kerr v. Forgue, 54 Ill. 482; 5 Am. Rep. 146; Chicago v. Starr's Admr., 42 Ill. 174; Keefe v. Milwaukee, &c., R. Co., 21 Minn. 207; 18 Am. Rep. 393; Nagal v. Missouri, &c., R. Co., 75 Mo. 653; 42 Am. Rep. 418; Evanisch v. Gulf, &c., R. Co., 57 Tex. 126; 44 Am. Rep. 586. Kansas, &c., R. Co. v. Fitzsimmons, 22 Kan. 686; 31 Am. Rep. 203, in which the court aptly remarks that it was probably intense amusement, almost irresistible, for the boy to ride upon a turn-table; and probably he did not imagine that he was a trespasser or in the slightest danger. "Boys," it goes on to say, "can seldom be said to be negligent

sentially the same as in the English case of Hughes v. Macfie;[75] but the Connecticut court sustains the authority of Lynch v. Nurdin, and reaches a conclusion exactly contrary to that of its English counterpart.[76] In Mississippi, a city was held liable for injuries to a child by falling into an excavation negligently left unguarded, the servants of the city having reason to anticipate the probability that the child would follow the pathway leading to the pit.[77] But where a pile of lumber fell upon a child, in a lumber yard, from some unknown cause, the defendants, who had given orders to their watchman to exclude all children from the yard, were held not liable.[78] Under different circumstances, however, the owners of lumber piled upon and near the sidewalk of a public street may be liable for damages to children from it, though it was piled contrary to their

when they merely follow the irresistible impulses of their own natures." Koons v. St. Louis, &c., R. Co., 65 Mo. 592; St. Louis, &c., R. Co. v. Bell, 81 Ill. 76; 25 Am. Rep. 269; Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261. And see a full discussion of "the turntable cases" in the following chapter, §§ 204, 205 *et seq.*

[74] 19 Conn. 507; 50 Am. Dec. 261.

[75] 2 Hurl. & Colt. 744.

[76] Whirley v. Whiteman, 1 Head, 610; Mullaney v. Spence, 15 Abb. Pr. (N. S.) 319. *Cf.* Meibus v. Dodge, 38 Wis. 300. Hydraulic Works v. Orr, 83 Penn. St. 332. Here the facts were, that adjoining a factory was a private alley which communicated with a public street. At the entrance of the alley was a gate upon which was posted "private," and "no admittance." This gate was frequently opened, although the employees of the factory were instructed to keep it closed. Intestate, a child of four years, while at play in the street, strayed into the alley, and was killed by the falling of a platform used to raise and lower goods. Held, that while it is true in general, that where no duty is owed no liability arises, yet this rule varies with circumstances, and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property, and its openness to accident, the question of duty then becomes one for the jury. Verdict was given for the intestate's parents.

[77] Mackey v. Vicksburg, 64 Miss. 777. But see Klix v. Nieman, 68 Wis. 271; 32 N. W. Rep. 223; Schmidt v. Kansas City Distilling Co., 90 Mo. 284; Clark v. City of Manchester, 62 N. H. 577; Jewett v. Keene, 62 N. H. 701. In the two latter cases it was held that the city was not liable, though the place had a tendency to lure children. Martin v. Cahill, 39 Hun, 445. A contractor employed slowly moving cars for the transportation of earth. These cars were dangerous only to persons attempting to ride upon them, and it was held that the contractor was not bound to employ men to keep children away from them. Emerson v. Peteler, 35 Minn. 481.

[78] Vanderbeck v. Hendry, 34 N. J. Law, 467.

order.[79] In a similar case in Kentucky the owner was held liable, the lot upon which the lumber was piled being unfenced, and having been used as a playground by children of the neighborhood.[80]

§ 141. The Massachusetts rule.— The Massachusetts court seems to follow the rule in Mangan v. Atterton[81] and Hughes v. Macfie.[82] It is the only court in this country that has not affirmed Lynch v. Nurdin.[83] Lane v. Atlantic Works[84] was the case of an infant, seven years old, injured while playing about a truck, standing in front of a foundry, loaded with a heavy casting, which, when the truck was shaken or moved, rolled off and injured the plaintiff. The defendant, owner of the foundry, was held not liable upon essentially the grounds assumed in the English cases.[85] The position of the Supreme Judicial Court of Massachusetts, upon the general question of contributory negligence, as well as upon that branch of it affecting infant plaintiffs, is not a satisfactory one. It has taken extreme ground upon almost every point.[86]

[79] Cosgrove v. Ogden, 49 N. Y. 255. See, also, as germane to this subject, McAlpin v. Powell, 55 How. Pr. 163; 70 N. Y. 126.

[80] Branson v. Labrot, 81 Ky. 638; 50 Am. Rep. 193, where the court said:—"Conduct which toward the general public may be up to the standard of due care, may be gross or wilful negligence when considered in reference to children of tender years and immature experience."

[81] L. R. 1 Exch. 239.

[82] 2 Hurl. & Colt. 744.

[83] Lane v. Atlantic Works, 109 Mass. 104; 111 Mass. 136.

[84] 109 Mass. 104; 111 Mass. 136.

[85] See, also, Lyons v. Brookline, 119 Mass. 491; Wood v. School District, 44 Iowa, 27; Boland v. Missouri R. Co., 36 Mo. 484. In this last case, Wagner, J., said:—"If, therefore, any one using dangerous instruments, running machinery, or employing vehicles which are peculiarly hazardous, knows that infants, idiots, or others who are bereft of, or have but imperfect discretion, are in close or immediate proximity, he will be compelled to the exercise of a degree of caution, skill and diligence which would not be required in cases of other persons." And see Gillespie v. McGowen, 100 Penn. St. 144; Porter v. Anheuser-Busch Brewing Assn., 24 Mo. App. 1; Jonasch v. Standard Gas Light Co., 56 N. Y. Super. Ct. 447. In regard to objects alluring to children, an interesting analogy in favor of the children may be found in Brown v. Hannibal & St. J. R. Co., 27 Mo. App. 394, and Little Rock, &c., Ry. Co. v. Dick, 52 Ark. 402, where the railroad companies were held liable for injuries to stock allured to the track by salt and cotton seed negligently allowed to accumulate there.

[86] "The law gives equal protection to all, and requires, in turn,

§ 142. Duty of parents to guard children — What omissions amount to contributory negligence.— Parents of children of tender years must use care proportionate to known dangers, or dangers that might be known by the exercise of ordinary diligence and prudence; but parents are not bound to guard their children against unknown dangers, or dangers that ordinary diligence and prudence would not make it their duty to know.[87] The degree of care required will depend upon the circumstances of the case, and often upon the situation

that each, according to his capacity, shall protect himself. A different requirement would place the weak at the mercy of the strong, against whom they have a right to ask for protection. It is plain that, in the case of a foot passenger who is injured in the street by being run over, through the negligence of another, the negligence of the plaintiff is not to be measured, except by his capacity. Any other rule would deprive half mankind of the protection of the law. Infants, lunatics and persons weak in body or mind are all civilly responsible for the injury they inflict upon others. When they become active doers of injury, it may be that, to protect the community, they are held responsible for that prudent foresight which might be expected from a strong and intelligent adult, and that no allowance is to be made for their want of strength, of skill, or of understanding. But where they are the victims of wrong, there is no rule of law which makes the afflicted of Providence outlaws in court. An old person is not required to avoid danger with the activity of youth, or a woman to ward off peril with the strength of a man. Sometimes blind men walk the streets. Their necessities compel them to do so. They have a legal right in the highway, but from their infirmity they are more exposed to accidents than other men are. For accidental injuries there is no redress. If a blind man is run over by a vehicle, the fact that the driver was ignorant of the man's infirmity is to be considered in determining the question of the driver's negligence. Yet, when that negligence is established, it is very unreasonable to say that the fact that impaired vision might perhaps have enabled the blind man to escape the peril is an answer to the action. If the law does not require, under such circumstances, sight from the blind nor strength from the weak, neither should it under the same circumstances require from a child more forethought than it possesses. It should not require, as the Massachusetts cases do require, that the child of a foolish man should have a prudent father." 4 American Law Review, 405 (April, 1870), an essay which arraigns the Massachusetts courts upon this point almost savagely.

[87] Louisville, New Albany & Chicago Ry. Co. v. Shanks, 132 Ind. 395, 397; 31 N. E. Rep. 1111; Johnson v. Reading City Pass. Ry. Co., 160 Penn. St. 647; 28 Atl. Rep. 1001; Grant v. City of Fitchburg, 160 Mass. 16; 35 N. E. Rep.

of the parents. When a parent whose means are limited has done all that can reasonably be expected from one in his condition, he will not be debarred from a recovery for the loss of his child's services in consequence of an injury caused by the negligence of others because he has not exercised the same degree of care in protecting his child as would reasonably be expected from parents having more means at their command. All circumstances, therefore, that tend to show the degree of care exercised by the parent or guardian over his child for its protection are to be considered, and in case of injury to the child by the negligence of others, his conduct is to be measured by what will reasonably be expected from a prudent person of his financial condition and station in life.[88] Whether or not the parent was negligent will generally be a question for the jury.[89] But it has been held that it is not negligence, as matter of law, for the parent of a child so young as to be *non sui juris* to permit the child to be on a city street unattended;[90] nor to permit a child of three to go upon a city street attended only by a child of seven,[91] or a child of four attended by his sister of eleven[92] or a child of two in charge of his brother of eight;[93] nor is it negligence *per se* in a mother to allow a boy twelve years of age to go from one car to another of a train, upon which they are traveling, in search of a seat,[94] nor to permit children to play upon an unfrequented street in the absence of any circum-

84; Western Union Tel. Co. v. Hoffman, 80 Tex. 420; 15 S. W. Rep. 1048; Hemmingway v. Chicago, &c., Ry. Co., 72 Wis. 42; 37 N. W. Rep. 804; Pratt, &c., Coal Co. v. Browley, 103 Ala. 371.

88 Hedin v. Suburban Ry. Co., 26 Or. 155, 160; 37 Pac. Rep. 540. But see Fox v. Oakland St. Ry., 118 Cal. 55; 50 Pac. Rep. 25, where it was held that evidence of the parent's financial condition is inadmissible. See § 134.

89 Hyland v. Burns, 10 App. Div. (N. Y.) 386; Weil v. Dry Dock, &c., R. Co., 119 N. Y. 147; 23 N. E. Rep. 487; Lederman v. Pennsylvania R. Co., 165 Penn. St. 118; 30 Atl. Rep. 735; Moreland v. Murray, 148 Mass. 91; 18 N. E. Rep. 680; O'Brien v. McGlinchy, 68 Me. 552; Barrett v. Southern Pac. Ry. Co., 91 Cal. 296; 27 Pac. Rep. 666.

90 Huerzeler v. Central Cross Town R. Co., 139 N. Y. 490; 34 N. E. Rep. 1111; Dan v. Street R. Co., 99 Tenn. 88; 41 S. W. Rep. 339.

91 Stafford v. Rubens, 115 Ill. 196.

92 Collins v. South Boston R. Co., 142 Mass. 301; 57 Am. Rep. 675.

93 Bliss v. South Hadley, 145 Mass. 91; 13 N. E. Rep. 352.

94 Downs v. N. Y., &c., R. Co., 47 N. Y. 83.

stances to render it dangerous;[95] nor to allow small children to go to and fro from school without attendance;[96] nor to send children of errands in the street under ordinary circumstances.[97] But to allow a child to engage in a dangerous occupation is negligence.[98]

[95] It is not, as a matter of law, negligence to allow a child of four and one-half years to play on the sidewalk with her brother, six years of age, in a thickly populated portion of a city, on an August afternoon, but the question is for the jury. Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; 18 N. E. Rep. 108; Karr v. Parks, 40 Cal. 188; Mangam v. Brooklyn, &c., R. Co., 38 N. Y. 455; Jetter v. N. Y., &c., R. Co., 2 Keyes, 154; O'Flaherty v. Union R. Co., 45 Mo. 70. And so held in McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510, the question whether the sidewalk was frequented or deserted not arising. Cosgrove v. Ogden, 49 N. Y. 255; Oldfield v. Harlem, &c., R. Co., 14 N. Y. 310; Schierhold v. North Beach, &c., R. Co., 40 Cal. 447.

[96] Drew v. Sixth Ave. R. Co., 26 N. Y. 49; Lynch v. Smith, 104 Mass. 53; 6 Am. Rep. 188; Ihl v. Forty-second St. R. Co., 47 N. Y. 317; 7 Am. Rep. 450; C., C., C. & St. L. Ry. Co. v. Keely, 138 Ind. 600; 37 N. E. Rep. 406.

[97] East Saginaw City R. Co. v. Bohn, 27 Mich. 503; Bellefontaine, &c., R. Co. v. Snyder, 18 Ohio St. 399; McMahon v. Northern, &c., R. Co., 39 Md. 438; Mulligan v. Curtis, 100 Mass. 512. In all of the following cases the question of contributory negligence under various circumstances was left to the jury. Ames v. Broadway, &c., R. Co., 56 N. Y. Super. Ct. 3; Higgins v. Deeney, 78 Cal. 578; 21 Pac. Rep. 428; Chrystal v. Troy, &c., R. Co., 4 N. Y. Supl. 703; 105 N. Y. 164; 11 N. E. Rep. 380; Hoppe v. Chicago, &c., Ry. Co., 61 Wis. 357; Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600; 7 S. W. Rep. 407; Marsland v. Murray, 148 Mass. 91; 18 N. E. Rep. 680; Ahern v. Steele, 1 N. Y. Supl. 259; Hyland v. Yonkers R. Co., 4 N. Y. Supl. 305; Weil v. Dry Dock, &c., R. Co., 119 N. Y. 147; 23 N. E. Rep. 487; Kunz v. City of Troy, 104 N. Y. 344; 10 N. E. Rep. 442; Illinois Cent. R. Co. v. Slater, 129 Ill. 91; 21 N. E. Rep. 575; South & North Ala. R. Co. v. Donovan, 84 Ala. 141; 4 So. Rep. 142; Dahl v. Milwaukee City Ry. Co., 65 Wis. 371; Parish v. Eden, 62 Wis. 272.

[98] As where a child, seven years old, for a small compensation, served the drivers and conductors of railway cars with drink. Smith v. Hestonville, &c., R. Co., 92 Penn. St. 450. See, also, Conley v. Pittsburgh, &c., R. Co., 95 Penn. St. 398; 98 Penn. St. 498; Gavin v. City of Chicago, 97 Ill. 66; Morgan v. Bridge Co., 5 Dillon, 96; Penn. R. Co. v. Bock, 93 Penn. St. 427. Parents are not obliged to restrain their children within doors at their peril. Mangan v. Brooklyn, &c., R. Co., 38 N. Y. 455; Mullaney v. Spence, 15 Abb. Pr. (N. S.) 319; McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510; Cosgrove v. Ogden, 49 N. Y. 255; Fallon v. Central Park, 64 N. Y. 13; Lovett v. Salem, &c., R. Co., 9 Allen, 557; Barksdull v. New Orleans, &c., R. Co., 23 La. Ann. 180; Munn v. Reed, 4 Allen, 431.

CHAPTER VII.

RAILWAY PASSENGERS.

§ 143. Contributory negligence as a defense to actions brought against railway companies.
144. Duty of a public carrier to passengers.
145. The reciprocal duty of the passenger.
146. Boarding moving trains.
147. Alighting from moving trains.
148. Where the passenger acts upon the advice or direction of the train-men.
149. Standing or riding on platform.
149a. Leaving seat while train in motion.
150. Riding in baggage cars, on locomotives, or in other unauthorized positions or places.
151. The passenger must comply with the reasonable rules of the company.
152. Employee's waiver of the rules not a defense.
153. The rule herein summarized.
154. Riding in exposed or unlawful places.
155. Injuries at car windows and doors.
156. The same subject continued.
§ 157. The rule in Wisconsin.
158. Notice of the danger.
159. The English rule.
160. Injuries at and about railway stations.
161. The same subject continued.
162. The English rule.
163. The rule further stated.
164. Where plaintiff is hit by something thrown or dropped from a moving train.
165. Injuries to free passengers.
166. The same subject continued.
167. Newsboys, peddlers, etc.
168. Carrier's liability limited by contract.
169. The English rule.
170. The rule of the Supreme Court of the United States.
171. The New York rule.
172. The general American rule.
173. Passenger's negligence as to baggage.
174. Conditions stamped or printed on checks.
175. Travelling on Sunday.
176. Bosworth v. Inhabitants of Swansey.
177. Rule in Vermont, Maine and elsewhere.

§ 143. Contributory negligence as a defense to actions brought against railway companies.— In this chapter it is proposed to consider contributory negligence as a defense in actions brought against railway companies by passengers. The term "pas-

sengers" will include not only regular passengers for hire, but free passengers, intended passengers, and those classes of persons transported which may be known as *quasi* passengers. By the term "strangers," *per contra*, the law affecting which class of litigants is considered in the following chapter, is meant all persons who bring actions of negligence for personal injuries against railway companies and who are not, on the one hand, passengers, or on the other, employees. The law of contributory negligence, from one point of view, is scarcely more than a branch of the law of railways. A very large proportion of the cases in which the plea of contributory negligence is made in defense are actions against these corporations. In addition to the two classes of plaintiffs in such actions, already referred to, we find employees of the railroads bringing a great number of suits in which this defense is urged — and within these three classes, passengers, strangers, and employees, may be included all the actions a consideration of which, as concerning railways, is pertinent to this treatise. In the chapter next following the law affecting actions by the class denominated strangers is discussed, and the authorities are collected and cited, and in the chapter upon Master and Servant,[1] is found a full discussion of the law affecting actions by railway employees. It therefore remains, herein, to treat of contributory negligence as a defense in actions by plaintiffs who belong to the first of these classes.

§ 144. Duty of a public carrier to passengers.— A carrier of passengers, unlike a carrier of goods at common law, is not an insurer. He is not held to warrant absolutely the safety of his passengers.[2] But while the passenger assumes all the ordinary

[1] Chap. X, *infra*, *q. v.*

[2] Peters v. Rylands, 20 Penn. St. 497; 59 Am. Dec. 746; Ingalls v. Bills, 9 Metc. 1; 43 Am. Dec. 346, and the note; Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Carroll v. Staten Island R. Co., 58 N. Y. 138; 17 Am. Rep. 228; Shirley's Leading Cases, 263; Williams' Forensic Facts and Fallacies, 136. "While a carrier does not insure his passengers against every conceivable danger, he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful act against him." Taylor on Private Corporations, § 347; 2 Redfield on Railways (5th ed.), 216; Angell on Carriers, § 570; Story on Bailments, § 601; Thompson on Carriers, 200. And see particularly, Wheeler's Modern Law of Carriers, *in loco*, where this subject is fully and very satisfactorily discussed.

risks incident to the carriage,[3] it is the settled rule, both here and in England, that the carrier must exercise the highest possible degree of care, diligence, vigilance and skill both in the selection, construction and repair of his vehicles, and in the conduct and management of them, in every particular, with a view to the safety of his passengers and their baggage. For the slightest negligence or carelessness in these respects the carrier is liable,[4] and a casualty resulting in injury to a passenger raises a presumption of negligence against the former.[5] This measure of carefulness must be exercised alike toward all classes of passengers. It is a duty to be discharged not only toward regular passengers for hire, but also as to free passengers,[6] in-

[3] Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Chicago, &c., R. Co. v. Hazzard, 26 Ill. 381.

[4] Dougherty v. Missouri R. Co. (Mo.), 8 S. W. Rep. 900; Furnish v. Missouri Pac. Ry. Co. (Mo.), 13 S. W. Rep. 1044; Louisville, &c., Ry. Co. v. Thompson, 107 Ind. 442; Louisville, &c., Ry. Co. v. Pedigo, 108 Ind. 481; Foru v. London, &c., Ry. Co., 2 Fost. & Fin. 730; Readhead v. Midland Ry. Co., L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; Stokes v. Saltonstall, 13 Peters, 181; Philadelphia R. Co. v. Derby, 14 How. (U. S.) 468. When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence — that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. Pennsylvania R. Co. v. Ray, 102 U. S. 451; Baltimore, &c., R. Co. v. Wightman, 29 Gratt. 431; 26 Am. Rep. 384; Farish v. Reigle, 11 Gratt. 697; 62 Am. Dec. 666; Taylor v. Grand Trunk Ry. Co., 48 N. H. 304; 2 Am. Rep. 229; Laing v. Colder, 8 Penn. St. 479; 49 Am. Dec. 533; McElroy v. Nashua, &c., R. Co., 4 Cush. 400. In Union Pac. Ry. Co. v. Hand, 7 Kan. 380, the court holds that railway companies are required to use "the *utmost* human sagacity and foresight in the construction of roads, to prevent accidents to passengers." Simmons v. New Bedford, &c., R. Co., 97 Mass. 368; Keokuk Packet Co. v. True, 88 Ill. 608; Philadelphia, &c., R. Co. v. Boyer, 97 Penn. St. 91; Lemon v. Chanslor, 68 Mo. 340; 30 Am. Rep. 799.

[5] Carter v. Kansas City Cable Ry. Co., 42 Fed. Rep. 37; Central R. Co. v. Freeman, 75 Ga. 331; Central R. Co. v. Sanders, 73 Ga. 513; Louisville, &c., Ry. Co. v. Snider, 117 Ind. 435; 20 N. E. Rep. 284. An express averment that plaintiff was not guilty of contributory negligence is not necessary where the complaint states that by reason of the negligence of the defendant railroad company its train broke through a bridge. Bedford, &c., R. Co. v. Rainbolt, 99 Ind. 551.

[6] Gulf, &c., Ry. Co. v. McGown, 65 Tex. 640; Philadelphia, &c., R. Co. v. Derby, 14 How. (U. S.) 468; Indianapolis, &c., R. Co. v. Horst, 93 U. S. 291; Steamboat New World v. King, 16 How. (U. S.) 469; Jacobus v. St. Paul, &c., R.

tended passengers,[7] and that class which may be known as *quasi* passengers.[8]

§ 145. The reciprocal duty of the passenger.— This duty on the part of the carrier is qualified by the reciprocal duty which is imposed upon the passenger. While the carrier must exercise extraordinary, or great care and diligence in taking care of his passenger, the passenger must, on his part, exercise ordi-

Co., 20 Minn. 125; 18 Am. Rep. 360. Even if the party injured was a trespasser on the car, his right of action is not necessarily thereby defeated. Brennan v. Fair Haven, &c., R. Co., 45 Conn. 284; 29 Am. Rep. 679; Waterbury v. New York, &c., R. Co., 21 Blatchf. 314; Todd v. Old Colony, &c., R. Co., 3 Allen, 18; Lemon v. Chanslor, 68 Mo. 340; 30 Am. Rep. 799. *Cf.* Kinney v. Central R. Co., 34 N. J. Law, 513; 3 Am. Rep. 265; Austin v. Great Western, &c., Ry. Co., L. R. 2 Q. B. 442; Angell on Carriers, § 528. But the rule is otherwise in the case of baggage carried gratuitously. Here the railway company is held to no greater diligence than any other gratuitous bailee, one of the reasons being that the element of public policy is now no longer present. Flint, &c., R. Co. v. Weir, 37 Mich. 111; 26 Am. Rep. 499.

[7] Bartlett v. New York, &c., Transp. Co., 57 N. Y. Super. Ct. 348; Shephard v. Midland Ry. Co., 20 W. R. 705; Longmore v. Great Western Ry. Co., 19 C. B. (N. S.) 183; 115 Eng. Com. L. 183; Burgess v. Great Western Ry. Co., 6 C. B. (N. S.) 923; 95 Eng. Com. L. 923; Carpenter v. Boston, &c., R. Co., 97 N. Y. 494; 49 Am. Rep. 540; Weston v. Elevated Ry. Co., 73 N. Y. 595; McDonald v. Chicago, &c., R. Co., 26 Iowa, 124, by Dillon, C. J.; Caswell v. Boston, &c., R. Co., 98 Mass. 194; Snow v. Fitchburg R. Co., 136 Mass. 552; 49 Am. Rep. 40. *Cf.* Wheelwright v. Boston, &c., R. Co., 135 Mass. 225. And see Gardner v. N. H., &c., Co., 51 Conn. 143; 50 Am. Rep. 12, where two persons were accompanying stock, and one of them, intending to pay his fare, but having had no time to buy a ticket, was injured by the negligence of the company before he was called upon for his fare. It was held that there was no contract relation to protect him and therefore no liability on the part of the company.

[8] *E. g.* Employees of express companies riding on railway trains in the line of their duty. Lyon v. Union Pac. Ry. Co., 35 Fed. Rep. 111; Kentucky Central R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208; Blair v. Erie Ry. Co., 66 N. Y. 313; 23 Am. Rep. 55; Yeomans v. Contra Costa, &c., Co., 44 Cal. 71. Mail agents riding in postal cars. See, also, Rev. Stat. of U. S., §§ 3997-4005; Seybolt v. New York, &c., R. Co., 95 N. Y. 562; 47 Am. Rep. 75; Houston, &c., R. Co. v. Hampton, 64 Tex. 427; Hammond v. Northeastern R. Co., 6 S. C. 130; 24 Am. Rep. 467. See, for a contrary view, Pennsylvania R. Co. v. Price, 96 Penn. St. 256, which turned, however, mostly on the requirements of a statute. Persons traveling on "drovers' passes."

nary care and prudence in taking care of himself.[9] If the passenger's failure to exercise ordinary care causes or contributes to the injury, such a failure is, upon familiar grounds, a bar to his action against the carrier. It is not necessary that the passenger should exercise extraordinary care, or the highest degree of prudence to avoid injury, but only such care as an ordinarily prudent person would use under the circumstances.[10] In the succeeding sections, the contributory negligence of a passenger, as affecting his right to recover damages from a railway company by whose negligence he has suffered, is considered in detail. The duty of a passenger in his dealings with a public carrier to exercise ordinary care, as, under all circumstances, and in dealing with every other person, there is imposed upon all men a duty to exercise ordinary care, being assumed, we may take up in order various acts and omissions on the part of a

Carroll v. Union Pac. Ry. Co., 88 Mo. 239; Lockwood v. New York, &c., R. Co., 17 Wall. 357; 10 Am. Rep. 366; Martin v. Baltimore, &c., R. Co., 14 W. Va. 180; 35 Am. Rep. 748; Little Rock, &c., R. Co. v. Miles, 40 Ark. 298; 48 Am. Rep. 10; Ohio, &c., R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; Penn. R. Co. v. Henderson, 51 Penn. St. 315. *Contra*, Poucher v. New York, &c., R. Co., 49 N. Y. 263; 10 Am. Rep. 364, where one traveling under a drover's pass was not allowed to recover, he having made a contract with the defendant company to exonerate it from all liability. Gallin v. London, &c., Ry. Co., L. R. 10 Q. B. 212. See, also, Commonwealth v. Vermont, &c., R. Co., 108 Mass. 7; 11 Am. Rep. 301, and McCorkle v. Chicago, &c., R. Co., 61 Iowa, 555. For a consideration of the question how far a common carrier of passengers may limit his common law liability by contract, see *infra*, § 168 *et seq.*

[9] Thompson on Carriers, 257; Patterson's Ry. Accident Law, p. 46 *et seq.*; Jeffersonville, &c., R. Co. v. Hendricks, 26 Ind. 228; Price v. St. Louis, &c., R. Co., 72 Mo. 414.

[10] West Chicago Street R. Co. v. McNulty, 166 Ill. 203; 46 N. E. Rep. 784. Under the provisions of section 3, article 1, chapter 72, Compiled Statutes of Nebraska, it is only necessary to a right of recovery against a railroad company to show that the person injured was, at the time, being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of such railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured or that it was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured. Chicago, Burlington & Quincy R. Co. v. Hague, 48 Neb. 97; 66 N. W. Rep. 1000.

passenger held to be negligent, to the extent of preventing a recovery when an action is brought by a passenger against a railway company, for personal injuries sustained through the company's negligent default.

§ 146. Boarding moving trains.— It is not contributory negligence, as matter of law in all cases, to attempt to get on to a moving train.[11] The circumstances may be such as to render it entirely safe and prudent, and whether or not there was contributory negligence in the attempt is generally a question for the jury upon a view of all the facts.[12] In a majority of instances, however, where the character of such an act has been an issue, it has been held contributory negligence.[13] And in

[11] Distler v. Long Island R. Co., 151 N. Y. 424; 45 N. E. Rep. 931. It is not negligence *per se* for an embarking passenger to step, by direction of the conductor, from a station platform upon a railroad train moving at the rate of two or three miles an hour, when there is nothing to indicate any unusual or peculiar danger. (Id.) But one who, having his arms full of bundles, attempts to board a train while it is running at from four to seven miles per hour, is guilty of contributory negligence. Birmingham Electric Ry. Co. v. Clay, 108 Ala. 233; 19 So. Rep. 309. See also Baltimore & O. R. Co. v. Kane, 69 Md. 11; 13 Atl. Rep. 387; Johnson v. Westchester, &c., R. Co., 70 Penn. St. 357; Swigert v. Hannibal, &c., R. Co., 75 Mo. 475.

[12] Jamison v. San Jose, &c., R. Co., 55 Cal. 593; Johnson v. West Chester, &c., R. Co., 70 Penn. St. 357; Illinois, &c., R. Co. v. Abel, 59 Ill. 131. Where a boy fifteen years old was injured in an attempt to board a train moving at the rate of from twelve to fifteen miles an hour, which he would not have tried to do but for the invitation of the brakeman, a verdict against the company was not disturbed. Western, &c., R. Co. v. Wilson, 71 Ga. 22; Missouri Pac. Ry. Co. v. Texas, &c. Ry. Co., 34 Fed. Rep. 92; Warren v. Southern Kan. Ry. Co., 37 Kan. 408; 15 Pac. Rep. 601; Richmond, &c., R. Co. v. Pickleseimer, 85 Va. 798; 10 S. E. Rep. 44; Kansas, &c., R. Co. v. Dorough, 72 Tex. 108; 10 S. W. Rep. 711; Missouri Pac. R. Co. v. Texas, &c., R. Co., 36 Fed. Rep. 879; Weeks v. New Orleans, &c., R. Co., 40 La. Ann. 800; 5 So. Rep. 72; Denver, &c., R. Co. v. Pickard, 8 Colo. 163. An aged man, on a dark and cold night, made such a desperate attempt to board a train in motion that, upon missing his footing, he was dragged one hundred and fifty yards without relinquishing his valise. He was not allowed to recover, though the train had not stopped at the station a reasonable time. McMurtray v. Louisville, &c., Ry. Co., 67 Miss. 601; 7 So. Rep. 401; Patterson's Ry. Accident Law, p. 264.

[13] Hunter v. Cooperstown, &c., R. Co., 126 N. Y. 18; 26 N. E. Rep. 958; Phillips v. Rensselaer, &c., R. Co., 49 N. Y. 177; Knight v. Pontchartrain R. Co., 23 La. Ann. 462; Harper v. Erie R. Co., 32 N. J.

Massachusetts it is held, as matter of law, that such an attempt is *prima facie* contributory negligence.[14] Though the servants of the company fail to observe the time-table notice as to the stopping of a train at a station, that fact does not entitle one to disregard the usual prudential considerations which should govern human action, nor does it subject the railroad company to liability for the consequences of an attempt to get upon a train in motion.[16]

§ **147. Alighting from moving trains.**— In some cases it has been held that it is not contributory negligence *per se* for a passenger to alight from a moving train; but the question as to whether the act constitutes negligence depends upon whether the danger was so obvious that a prudent person would not under the circumstances have made the attempt, and is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place, the conduct of those in charge of the train, and all circumstances connected with the act of alighting.[17] But in other cases the rule has been

Law, 88. Chicago, &c., R. Co. v. Scates, 90 Ill. 586, citing Ohio, &c., R. Co. v. Stratton, 78 Ill. 88, where it was held that a passenger had no right to get off a train in motion, and, however disastrous the consequences, he must bear them. The court held the same rule to apply to passengers boarding moving trains. Vicksburg, &c., R. Co. v. Hart. 61 Miss. 468

[14] Harvey v. Eastern, &c., R. Co., 116 Mass. 269. In N. Y., &c., R. Co. v. Euches, 127 Penn. St. 316; 17 Atl. Rep. 991, it was held an absolute bar to recovery for a person to attempt to board a train at a station after it began to move.

[16] Hunter v. C. & S. V. R. Co., 126 N. Y. 18; 26 N. E. Rep. 958. Where the attempt is made by permission or direction of the conductor, the burden is on the plaintiff to show that the permission or direction relied on was in accordance with the rules and regulations of the company. Young v. C., M. & St. P. Ry. Co., 100 Iowa, 357; 69 N. W. Rep. 682.

[17] Atchison, Topeka & Santa Fe Ry. Co. v. Hughes, 55 Kan. 491; 40 Pac. Rep. 919. "The act of a passenger in jumping from a moving train is not negligence *per se*, but it is for the jury to say, under all the circumstances of the case, whether the act of jumping was justifiable or not; and if the passenger jumped when carried less than one hundred feet beyond the station, after an attempt to alight at the station, where there was no sufficient time allowed to alight with safety, and there is no evidence as to the speed of the train, at the time of jumping, it is proper to instruct the jury that if they find that the train did not stop a reasonable length of time to allow the plaintiff to get off, and that she jumped therefrom while the train was in motion, and under such circumstances that an

adopted that a passenger who attempts to get off a railway train while it is in motion is not in the exercise of due care.[18]

ordinarily cautious, careful and prudent person would not have apprehended danger therefrom, she was entitled to recover; but if they found that the jumping was under circumstances where such a person would have apprehended danger, it was an act of carelessness which would relieve the defendant from responsibility, and entitle it to a verdict." Carr v. Eel River & Eureka R. Co., 98 Cal. 366; 33 Pac. Rep. 213. See, also, Louisville, &c., R. Co. v. Crunk, 119 Ind. 542; 21 N. E. Rep. 31; Little Rock, &c., Ry. Co. v. Atkins, 46 Ark. 423; Galveston, &c., R. Co. v. Smith, 59 Tex. 406; Loyd v. Hannibal, &c., R. Co., 53 Mo. 509; Penn. R. Co. v. Kilgore, 32 Penn. St. 292; Brooks v. Boston, &c., R. Co., 135 Mass. 21; International, &c., R. Co. v. Satterwhite (Tex.), 47 S. W. Rep. 41.

[18] Merritt v. N. Y., N. H. & H. R. Co., 162 Mass. 326, 329; 38 N. E. Rep. 447; McDonald v. Boston & Maine R. Co., 87 Me. 466; 32 Atl. Rep. 1010; Leslie v. Wabash, &c., Ry. Co., 88 Mo. 50; Taylor v. Missouri Pac. Ry. Co., 26 Mo. App. 336; Pennsylvania Ry. Co. v. Peters, 16 Penn. St. 206; 9 Atl. Rep. 317; Covington v. Western, &c., R. Co., 81 Ga. 273; 6 S. E. Rep. 593; Raben v. Central Iowa Ry. Co., 74 Iowa, 732; 34 N. W. Rep. 621; Central R. & B. Co. v. Miles, 88 Ala. 256; 6 So. Rep. 696; Jackson v. St. Louis, &c., Ry. Co., 29 Mo. App. 495; St. Louis, &c., Ry. Co. v. White, 48 Ark. 495; 4 S. W. Rep. 52; Pennsylvania R. Co. v. Lyons, 129 Penn. St. 113; 18 Atl. Rep. 759. When a person is injured in alighting from a moving train, any negligence on his part which contributes to the injury must, of necessity, contribute proximately. Craven v. Cent. Pac. R. Co., 72 Cal. 345; Price v. St. Louis, &c., R. Co., 72 Mo. 414; Doss v. Missouri, &c., R. Co., 59 Mo. 27; 21 Am. Rep. 371; Kelly v. Hannibal, &c., R. Co., 70 Mo. 604; Karle v. Kansas, &c., R. Co., 55 Mo. 476. The failure to stop the train in such case is not the proximate cause of the injury. Schiffler v. Chicago & N. W. Ry. Co., 96 Wis. 71; 71 N. W. Rep. 97. "If in the exercise of due care, she supposed that the train had stopped to enable passengers to leave it, and it did not start until she was in the act of descending the steps, the fact that the train had started before she left it, did not, of itself, prevent her recovery, if she did not know that it had started." Floytrup v. Boston & Maine R. Co., 163 Mass. 152, 155; 39 N. E. Rep. 797. "In many cases there will be found the general statement that it is not necessarily negligence *per se* to alight from a moving train; that this is a question for the jury. But such remarks must always be construed with reference to the particular facts of the case under consideration. Both reason and policy require that the rule as to getting off moving trains shall be much the same as that regarding "looking and listening" at railway crossings, and that the act of commission in one case, like that of omission in the other, should be deemed negligence unless under peculiar and exceptional circumstances." Butler v. St. Paul & Duluth R. Co., 59 Minn. 135, 142-143; 60 N. W. Rep. 1090.

Especially is this true where he is embarrassed in his movements as, for example, where he is encumbered with bundles.[19] Nor will the fact that the passenger is being carried beyond his station,[20] or that by the negligence of the servants of the company he has been led to take a wrong train,[21] justify him in attempting to leave a moving train. "Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers," said Black, C. J., in a leading case,[22] in which it is held that a passenger who jumps from a running train to avoid being carried beyond his destination cannot recover for injuries thereby suffered. This is the doctrine of many other cases.[23]

[19] Toledo, &c., R. Co. v. Wingate, 143 Ind. 125; 37 N. E. Rep. 274; Somerville & N. R. Co. v. Lee, 97 Ala. 325. Care of female passenger in enfeebled condition.

[20] Toledo, &c., R. Co. v. Wingate, 143 Ind. 125; 37 N. E. Rep. 274; McDonald v. Boston & Maine R. Co., 87 Me. 466; 32 Atl. Rep. 1010; Burgin v. Richmond & Danville R. Co., 115 N. C. 673; 20 S. E. Rep. 473; Schiffler v. Chicago & N. W. Ry. Co., 96 Wis. 141; 71 N. W. Rep. 97. His proper course is to be carried on until the train stops, and if he sustain pecuniary or oher loss from being carried beyond his sation, his remedy lies in an action for damages. Jameson v. C. & O. R. Co., 92 Va. 327; 27 S. E. Rep. 758.

[21] Rothstein v. Pennsylvania R. Co., 171 Penn. St. 620; 33 Atl. Rep. 379.

[22] Pennsylvania R. Co. v. Aspell, 23 Penn. St. 147; 62 Am. Rep. 323.

[23] Reibel v. Cincinnati, &c., Ry. Co., 114 Ind. 476; 17 N. E. Rep. 107; Watson v. Georgia Pac. Ry. Co., 81 Ga. 476; 7 S. E. Rep. 854; St. Louis, &c., R. Co. v. Rosenberry (Ark.), 11 S. W. Rep. 212; Walker v. Vicksburg, &c., R. Co., 41 La. Ann. 795; 6 So. Rep. 916; C., B. & Q. R. Co. v. Hyatt, 48 Neb. 161; 67 N. W. Rep. 8. Where the declaration showed that plaintiff, an experienced train hand, jumped off at a crossing from a train running unlawfully at twenty-five miles an hour, a general demurrer was sustained. Jarret v. Atlanta, &c., R. Co., 83 Ga. 347; 9 S. E. Rep. 681; Whelan v. Georgia, &c., R. Co., 84 Ga. 506; 10 S. E. Rep. 1091; Chicago, &c., R. Co. v. Bills, 118 Ind. 221; 20 N. E. Rep. 775; Damont v. New Orleans, &c., R. Co., 9 La. Ann. 441; 61 Am. Dec. 214; Jewell v. Chicago, &c., R. Co., 54 Wis. 610; 41 Am. Rep. 63; Richmond, &c., R. Co. v. Morris, 31 Gratt. 200; Cumberland, &c., R. Co. v. Mangans, 61 Md. 53; Central R. Co. v. Letcher, 69 Ala. 106; 44 Am. Rep. 505. Here plaintiff having boarded a train for a lawful purpose, was detained thereon until after the train had started on its journey. Without giving notice to any of the employees, he jumped off, and was injured. Held, that no recovery could be had, though the defendant was negligent in not giving the signals required by stat-

§ 148. Where the passenger acts upon the advice or direction of the train-men.— The mere fact that the passenger acts upon the advice or command of the train-men would not justify him in alighting from a train, when it was obviously dangerous to do so, and the fault of the train-men in this respect will not relieve the passenger from the consequences of his own reckless acts.[24] But the danger must be so obvious that a reasonable man would not have obeyed the servant, nor accepted his invitation, for the test of negligence in such cases is what, under the circumstances, a reasonable man would ordinarily have done.[25] If the train is moving very slowly, and the passenger,

ute, before and at the time the train left the station. South., &c., R. Co. v. Singleton, 66 Ga. 252; 67 Ga. 306; Jeffersonville, &c., R. Co. v. Hendricks, 26 Ind. 228; Lucas v. New Bedford, &c., R. Co., 6 Gray, 64. Where the facts are undisputed, and where the plaintiff's complete absence of care in alighting from a train in motion is unquestionably patent, the question of contributory negligence need not be given to the jury. Morrison v. Erie Ry. Co., 50 N. Y. 302; Burrows v. Erie Ry. Co., 63 N. Y. 556; Dougherty v. Chicago, &c., R. Co., 86 Ill. 467; Lambeth v. North., &c., R. Co., 66 N. C. 494; Lake Shore, &c., R. Co. v. Bangs, 47 Mich. 470; Mitchell v. Chicago, &c., R. Co., 51 Mich. 236; 47 Am. Rep. 566; Houston, &c., R. Co. v. Leslie, 57 Tex. 83. *Cf.* Illinois, &c., R. Co. v. Green, 81 Ill. 19; 25 Am. Rep. 255, and Commonwealth v. Boston, &c., R. Co., 129 Mass. 500; 37 Am. Rep. 382.

[24] Atchison, &c., R. Co. v. Hughes, 55 Kan. 491; 40 Pac. Rep. 919; South & North Ala. R. Co. v. Schaufler, 75 Ala. 136; Penn. R. Co. v. Lyons, 129 Penn. St. 113; 18 Atl. Rep. 759; Patterson's Ry. Accident Law, p. 288; Chicago, &c., R. Co. v. Randolph, 53 Ill. 510; 5 Am. Rep. 60; Cincinnati, &c., R. Co. v. Peters, 80 Ind. 168; Pennsylvania Co. v. Dean, 92 Ind. 459; Benton v. Chicago, &c., R. Co., 55 Iowa, 496; Southwestern, &c., R. Co. v. Singleton, 66 Ga. 252; 67 Ga. 306. See, also, Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Houston, &c., R. Co. v. Gorbett, 49 Tex. 573; Atchison, &c., R. Co. v. Flinn, 24 Kan. 627; a case of children who had boarded a train without money to pay their fare, and who, being *quasi* trespassers, were ordered to leave the train by the conductor, and did so while the train was in motion, which action on their part, in view of their being on board without right, was held contributory negligence, in an action against the railway for damages sustained by them in leaving the train. See, also, Higley v. Gilmer, 3 Mont. 90; 35 Am. Rep. 450.

[25] Baltimore & Ohio R. Co. v. Myers, 18 U. S. App. 569, 581-582; 62 Fed. Rep. 367; Henshaw v. Raleigh, &c., R. Co., 118 N. C. 1047; 24 S. E. Rep. 426. In the case first cited it was said:—"The duty of the passenger is dictated and measured by the exigency of the occasion. Here the plaintiff in error had announced to him, by

upon the suggestion or request of those in charge of the train, attempts to alight and is injured, it is a proper question for the jury whether it was a prudent or ordinarily careful act, or whether it was a rash and reckless exposure to peril and hazard.[26] When the passenger jumps in spite of the remonstrances and protests of the train-men, it is negligence of an aggravated na-

the act of the brakeman, that the train was about to come to a stop. He was notified and directed to come forward that he might alight as soon as the train had stopped. He had been warned that the train would stop but for a moment, and that he must be in readiness to alight promptly. He was notified to take the position which he did upon the platform of the car. He had a right to presume that the train was abating its speed with a view to stopping. We think it was a proper question to be submitted to the jury whether the defendant in error, under the circumstances, was guilty of an act which a reasonably prudent man, in like situation, would not have done."

[26] Atchison, &c., R. Co. v. Hughes, 55 Kan. 491; 40 Pac. Rep. 919. A brakeman's remark, "Come on, hurry up!" is admissible as part of the *res gestae*, and tending to rebut contributory negligence. Waller v. Hannibal, &c., R. Co., 83 Mo. 608. But such a remark, though repeated several times by a conductor, will not sustain an averment that plaintiff was "compelled and forced" to alight. South & North Ala. R. Co. v. Schaufler, 75 Ala. 136; Bucher v. New York, &c., R. Co., 96 N. Y. 128; Central, &c., R. Co. v. Smith, 69 Ga. 268; St. Louis, &c., R. Co. v. Cantrell, 37 Ark. 519; 40 Am. Rep. 105; Filer v. New York, &c., R. Co., 49 N. Y. 47; 10 Am. Rep. 327. A passenger on a railroad train has a right to expect that the carrier had employed a skilful and prudent conductor who has experience in his business sufficient to correctly advise and direct him as to the proper time and manner of alighting from the train. When, therefore, the motion of the train is so slow that the danger of jumping off would not be apparent to a reasonable person, and a passenger, under the instruction of the conductor, alights, the defense of contributory negligence would be unavailing. Lambeth v. North Carolina, &c., R. Co., 66 N. C. 494; 8 Am. Rep. 508; Georgia, &c., R. Co. v. McCurdy, 45 Ga. 288; 12 Am. Rep. 577. *Cf.* Delamatyr v. Milwaukee, &c., R. Co., 24 Wis. 578; Watkins v. Raleigh, &c., R. Co., 116 N. C. 961; 21 S. E. Rep. 409. It is not negligent *per se* for a passenger to alight from a train after it has stopped and he has been invited to alight, and, while doing so, the train again started, and especially when the brakeman or conductor is standing upon the ground inviting and assisting him, unless the speed of the train was such that the danger was obvious. McCaslin v. Lake Shore, &c., R. Co., 93 Mich. 553, 557-558; 53 N. W. Rep. 724. A passenger is not justified in jumping from a moving train because one of the train-men tells him he is on the wrong train; that it will not stop to let him

ture which as, of course, will prevent a recovery.[27] In Iowa it is a misdemeanor for a passenger to jump from a car in motion without the consent of the person in charge of the train, which operates to prevent recovery in the absence of proof of such consent.[28] It is not, as has already been shown,[29] an act of negligence on the part of a passenger to leap from a train in motion under apprehension of impending peril, and with a reasonable belief that by so doing he is to escape injury.[30]

§ 149. Standing or riding on platforms.— It is not negligent *per se* for a passenger to ride upon the platform of a railway car;[31] nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car;[32] but, as a general rule, voluntarily and unnecessarily to stand or ride upon the platform is such negligence as will prevent a recovery for injuries received while there.[33] If there is even standing room within the car it is negligent to occupy the platform.

off, and that it is going slow and he can jump from it. Rothstein v. Pennsylvania R. Co., 171 Penn. St. 620; 33 Atl. Rep. 379. A passenger invited to alight from a car in a locality where he is a stranger has the right to presume that the place is reasonably safe. Manning v. Michigan Cent. R. Co. (Mich.), 76 N. W. Rep. 98.

27 Pennsylvania R. Co. v. Aspell, 23 Penn. St. 147; 62 Am. Dec. 323; Jewell v. Chicago, &c., R. Co., 54 Wis. 610; 41 Am. Rep. 63.

28 Raben v. Central Iowa Ry. Co., 74 Iowa, 73; 39 N. W. Rep. 621; Acts 16th Gen. Assem. Iowa, chap. 148, § 2.

29 § 40, *supra*.

30 Wilson v. Northern Pacific R. Co., 26 Minn. 278; 37 Am. Rep. 410; Buel v. New York, &c., R. Co., 31 N. Y. 314. Such conduct is but that of a man of ordinary care and prudence under the circumstances. Iron Ry. Co. v. Mowery, 36 Ohio St. 418; 38 Am. Rep. 597; Frink v. Potter, 17 Ill. 406; Eastman v. Sanborn, 3 Allen, 596; Stokes v. Saltonstall, 13 Peters, 181; Jones v. Boyce, 1 Stark. 493; Ingalls v. Bills, 9 Metc. 1; 43 Am. Dec. 346; Patterson's Ry. Accident Law, pp. 14, 62.

31 Zemp v. Wilmington, &c., R. Co., 9 Rich. (Law) 84; Dickinson v. Port Huron, &c., Ry. Co., 53 Mich. 43.

32 Werle v. Long Island R. Co., 98 N. Y. 650; Dewire v. Boston, &c., R. Co., 148 Mass. 343; 19 N. E. Rep. 523. See also Southern Ry. Co. v. Smith, 95 Va. 187; 28 S. E. Rep. 173. Compare with the foregoing cases Snowden v. Boston, &c., R. Co., 151 Mass. 220; 24 N. E. Rep. 40; Willis v. Long Island R. Co., 34 N. Y. 670. But see Graville v. Manhattan R. Co., 105 N. Y. 525. As to children on platforms, see G. C. & N. R. Co. v. Watkins, 97 Ga. 381; Schreiner v. N. Y. C. & H. R. R. Co., 12 App. Div. (N. Y.) 555.

33 Memphis, &c., Ry. Co. v. Salinger, 46 Ark. 528; State v. Maine Cent. R. Co., 81 Me. 84; 16 Atl. Rep. 368; Malcom v. Richmond,

This is the rule in Pennsylvania[34] and in Illinois,[35] and it is commended by Dr. Wharton.[36] But if the accident which caused the injury would have happened and would have been attended with the same results to the passenger if he had been in his proper place on the train, then his negligence is not contributory negligence in a sense that would preclude a recovery, because it in no manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause.[37] And so when one passes on the platform from car to car on a train in motion, with the sanction of the conductor, on a proper errand, it is not an act of contributory negligence.[38]

&c., R. Co., 106 N. C. 63; 11 S. E. Rep. 187; Smotherman v. St. Louis, &c., Ry. Co., 29 Mo. App. 265; Louisville, &c., R. Co. v. Bisch, 120 Ind. 549; 23 N. E. Rep. 662; Camden, &c., R. Co. v. Hoosey, 99 Penn. St. 492; 44 Am. Rep. 120; Hickey v. Boston, &c., R. Co., 14 Allen, 429; McAunich v. Mississippi, &c., R. Co., 20 Iowa, 338; Higgins v. Harlem, &c., R. Co., 2 Bosw. (N. Y.) 131; Fisher v. W. Va. & P. R. Co., 39 W. Va. 366; 19 S. E. Rep. 578; Quinn v. Illinois, &c., R. Co., 51 Ill. 495, holding that where a passenger voluntarily places himself on the platform, with abundant standing room in the cars, and falls to the ground, not in consequence of a collision, or a broken rail, or other fault of the company, but in the endeavor to reach after money that the wind has blown away, the negligence of the passenger is far greater than that of the company. Buel v. New York, &c., R. Co., 31 N. Y. 314; Alabama, &c., R. Co. v. Hawk, 72 Ala. 112; Cannon v. Railway, 6 Ir. L. R. 199.

[34] Camden, &c., R. Co. v. Hoosey, 99 Penn. St. 492; 44 Am. Rep. 120.

[35] Quinn v. Illinois, &c., R. Co., 51 Ill. 495. In Willis v. Long Island R. Co., 34 N. Y. 670, it was held that one might safely stand on the platform if there were no seats inside the car unoccupied; but in Graville v. Manhattan R. Co., 105 N. Y. 525, the court said:—"The fact that there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside [by direction of the train-man]. If he had any well-founded ground of complaint against the company, for not providing adequate accommodations for passengers, this did not, we think, relieve him from the duty of leaving the platform and going inside the car, although there was standing room only."

[36] Wharton on Negligence, § 367.

[37] Kansas, &c., Ry. Co. v. White's Administrator, 32 U. S. App. 192, 194-195; 67 Fed. Rep. 481.

[38] Cotchett v. Savannah, &c., Ry. Co., 84 Ga. 687; 11 S. E. Rep. 553, where the passenger started into another car to get water without express permission. McIntyre v. New York, &c., R. Co., 43 Barb. 532; affirmed, 37 N. Y. 287; Louisville, &c., R. Co. v. Kelly, 92 Ind. 371; 47 Am. Rep. 149, where the passenger was directed by the conductor to a forward car to get a seat. *Cf.* Galena, &c., R. Co. v. Yarwood, 15 Ill. 468; Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323. A passenger on a railroad train, when he has paid his fare, is entitled to a seat, and not

A passenger who passes into another car which he was informed by an employee would be attached to the train is justified in assuming that it is coupled so as to make a safe passage.[39]

§ **149a. Leaving seat while train is in motion.**— It is not negligence *per se* for a passenger in a railway car, as it approaches a station, to leave his seat, and go to the door of the car, in order to alight when it stops;[40] nor to surrender his seat to a person less able to stand than himself.[41] And although he knows that the train is about to be coupled he has the right to presume that the servants of the company will properly discharge their duties, and is not required to rush into the first seat he reaches.[42]

§ **150. Riding in baggage cars, on locomotives, or in other unauthorized positions or places.**—It is contributory negligence on the part of a passenger to ride in a baggage car, contrary to the rules of the company.[43] The contract of carriage must be understood to be a contract to carry the passengers in a passenger car and the baggage in the baggage car. The passenger car is the place the company provides for the passenger. It is his duty to occupy that car, and to keep out of the other cars of the train. A failure to do this is negligence.[44] And the consent or knowledge of the train-men will not alter the case where the known rules of the company forbid passengers to ride in the baggage car.[45] It is sometimes said that riding in a baggage car is such negligence as will prevent a recovery from the railway company only when it appears that the passenger

finding one in the coach which he enters, has the right, while the train is in motion, to pass from one coach to another in search of a seat, provided he does so cautiously and carefully. Chesapeake & Ohio Ry. Co. v. Clowes, 93 Va. 189; 24 S. E. Rep. 833. But see Bemis v. New Orleans, &c., R. Co., 47 La. Ann. 1671; 18 So. Rep. 711.

[39] Hannibal, &c., R. Co. v. Martin, 111 Ill. 219.

[40] Schreiber v. C., St. P., Minn. & O. R. Co., 61 Minn. 499, 501; 63 N. W. Rep. 1034.

[41] Lehr v. Steinway, &c., R. Co., 118 N. Y. 556; 23 N. E. Rep. 889.

[42] Tillett v. Norfolk & Western R. Co., 118 N. C. 1031; 24 S. E. Rep. 111.

[43] Many recent decisions on the subject of the contributory negligence of passengers riding in dangerous places on trains are collected in 39 Am. & Eng. R. Cas. 409, note.

[44] Pennsylvania R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep. 651; Kentucky Central R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208; Houston, &c., R. Co. v. Clemmons, 55 Tex. 88; 40 Am. Rep. 799.

[45] Florida, &c., Ry. Co. v. Hirst, 30 Fla. 1; 11 So. Rep. 506.

would have escaped injury had he been in the passenger car. In such a rule as this the theory is that when being in the baggage car is a proximate cause of the injury, it will prevent a recovery, but when it is not such a cause, that the action will lie. Something may be said in favor of this rule.[46] But, on the other hand, it may be urged that a passenger voluntarily in a baggage car, when he might just as conveniently be in the car provided for his transportation, is a *quasi* trespasser. He plainly has no business in that car, and toward trespassers a carrier is not bound to exercise that high degree of care and circumspection due to his regular passengers.[47]

§ 151. The passenger must comply with the reasonable rules of the company.— If the passenger would hold the carrier to the full measure of his responsibility for safe carriage, he must conform to all the reasonable rules the carrier makes, looking to the passenger's safety and convenience, and if he violates such rules and regulations by riding where he has no right to ride, it is no very harsh rule that requires him to do it at his proper peril. When the conductor or train-men consent, or encourage the passenger to ride in the baggage car, and especially, when they direct him so to do, it is held that then the passenger is not guilty of negligence of such a kind as to prevent his recovery if he sustains injuries while riding there.[48]

[46] Jones v. Chicago, &c., Ry. Co., 43 Minn. 279; 45 N. W. Rep. 444; Webster v. Rome, &c., R. Co., 115 N. Y. 112; 21 N. E. Rep. 725. In the latter case the passenger probably escaped death by being in the baggage car. Kentucky Central R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208. The argument of Chief Judge Cofer is certainly very forcible. In the course of his opinion he pointedly says:—"If a whole train be precipitated down an embankment, and a passenger seated in the express car is drowned, his representative will have the same right to recover as the representative of a passenger seated in a passenger coach. There could be no pretense for saying that, because the passenger in the express car was more exposed to danger in case of a collision than he would have been had he been seated in a passenger coach, that he ought not to recover, when it is clear that, as respects the misfortune which actually occurred, his danger was not at all increased by the fact that he was in the express car." Houston, &c., R. Co. v. Clemmons, 55 Tex. 88; 40 Am. Rep. 799.

[47] Higley v. Gilmer, 3 Mont. 90; 35 Am. Rep. 450. And see, also, Atchison, &c., R. Co. v. Flinn, 24 Kan. 627.

[48] Jones v. Chicago, &c., Ry. Co., 43 Minn. 279; 45 N. W. Rep. 444; Webster v. Rome, &c., R. Co., 40

But it is difficult to see what sound basis such a qualification as this can have. "If the passenger," said the Supreme Court of Pennsylvania, "thus recklessly exposing his life to possible accidents" [referring to a passenger injured while riding in a baggage car with the consent of the conductor], "were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge, or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train, and may assign passengers their seats; but he may not assign a passenger to a seat on the cow-catcher, a position on the platform, or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself" [the printed rules of the company posted in the baggage cars]. "He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so to make the company responsible."[49]

§ 152. Employee's waiver of the rules no defense.— This is sound reasoning. How can an employee authorize a passenger

Hun (N. Y.), 161; Baltimore, &c., R. Co. v. State, 18 Atl. Rep. 1107, in which a postal clerk was not guilty of negligence, *per se*, in riding in the postal car while returning home from duty. Carroll v. New York, &c., R. Co., 1 Duer, 571; O'Donnell v. Allegheny, &c., R. Co., 50 Penn. St. 490; 59 Penn. St. 239. See, also, Dunn v. Grand Trunk Ry. Co., 58 Me. 187; 4 Am. Rep. 267; 10 Am. Law Reg. (N. S.) 615; Edgerton v. New York, &c., R. Co., 39 N. Y. 227, where damages for injuries were recovered by a passenger who was allowed to ride in caboose car. Pool v. Chicago, &c., R. Co., 53 Wis. 657; Rucker v. Missouri, &c., R. Co., 61 Tex. 499; Washburn v. Nashville R. Co., 3 Head, 638; Keith v. Pinkham, 13 Me. 501; Watson v. Northern, &c., R. Co., 24 Upper Can. Q. B. 98; Jacobus v. St. Paul, &c., R. Co., 20 Minn. 125; 18 Am. Rep. 360.

[49] Pennsylvania R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep. 651. And see Florida, &c., Ry. Co. v. Hirst, 30 Fla. 1; 11 So. Rep. 506, where it was held error to submit a case to a jury upon the theory that the virtue or efficiency of a rule prohibiting passengers from riding in express cars is entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement.

to violate, not only the express rules of the company, but also the rules that every prudent man establishes for himself for his own protection, to the extent of rendering the company liable when injury results from the violation of these regulations? Upon what principle of justice or equity can a passenger, who voluntarily leaves his proper place in the passenger car, in violation of the rules of the company, to ride in the baggage car, or other place of known danger, though he have never so much the consent of one of the employees of the company, and who is injured while riding in that exposed and unlawful position, call upon the carrier for damages for such an injury? The baggage cars are known places of especial danger. In this respect they differ from the cow-catcher and the platforms only in degree. They are placed ahead of the passenger cars and next to or near the locomotive, the passenger cars being placed last in order in making up the train, for the express purpose of affording the passengers the utmost safety. An infant or an imbecile might be excused for riding in baggage cars, by reason of their conspicuous lack of mental capacity, but persons of average intelligence may reasonably be presumed to know the danger of such a course, and held to assume the risks involved. The better rule is, that riding in such exposed and unauthorized positions is negligence, and that a passenger who suffers an injury while so exposing himself, whether by the consent of the train-men or not, and whether the injury would have been sustained or not, had the passenger remained in his proper place, can have no action against the carrier for damages so occasioned. The passenger forfeits his right to recover when he violates the rules of the company or fails to avail himself to the full extent of all the protection the carrier provides for him. He may not refuse to be protected and then claim damages.

§ 153. **The rule herein summarized.**— After reviewing the decided cases upon this subject, Paxson, J., of Pennsylvania, in the opinion from which I have already quoted, as the conclusion of the whole matter, said: — "I am not aware that it has been decided, in any well-considered case, that a passenger may, as a matter of right, ride in the baggage car at the risk of the company. In a few cases it has been held that the assent of the

conductor is sufficient to charge the latter with the consequences of such act; that it amounts to a waiver of the rule forbidding passengers to ride in the baggage car. But how can a conductor waive a rule which, by its very terms, he is commanded to enforce? He may neglect to enforce it, and, when the rule is a mere police arrangement of the company, such neglect may, perhaps, amount to a waiver, as between the passenger and the company. But when the rule is for the protection of human life, the case is very different. We are not disposed to encourage conductors, or other railroad officials, in violating reasonable rules which are essential to the protection of the traveling public. If it is once understood that a man who rides in a baggage car, in violation of the rules, does so at his own risk, we shall have fewer accidents of this description."[50]

§ 154. Riding in exposed or unlawful places.— This reasoning applies with equal cogency to the case of passengers riding in any other exposed or unlawful position upon a railway train, and with the greater force in proportion as the risk increases. If it is negligence to ride in baggage cars, it is all the more negligent to ride upon the locomotives, even with the consent of the train-men,[51] or upon freight trains in violation of the

[50] Pennsylvania R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep. 651.

[51] Virginia, &c., Ry. Co. v. Roach, 83 Va. 375; 5 S. E. Rep. 175; Stringer v. Missouri Pac. Ry. Co., 96 Mo. 209; 9 S. W. Rep. 905; Filer v. Boston, &c., R. Co., 149 Mass. 204; 31 N. E. Rep. 311; Robertson v. Erie Ry. Co., 22 Barb. 91; Waterbury v. New York, &c., R. Co., 21 Blatchf. 314; Austin v. Great Western, &c., Ry. Co., L. R. 2 Q. B. 442. *Contra*, Rucker v. Missouri, &c., R. Co., 61 Tex. 499, which was the case of a negro boy, a passenger on the defendant's train, who, doing as he was told to do by the person in charge of the train, rode upon the pilot of the engine, and while there was injured. His conduct, under the circumstances, was held not to have been negligent. This was a hard case, and the conclusion reached is an illustration of the truth of the proverb among lawyers, that hard cases make bad law. The negro did as he was told, as negroes in Texas are expected to do, and he got hurt, without having been personally much at fault. The authority of this case should not, accordingly, count against the rule. *Cf.* Miles v. Atlantic, &c., R. Co., 4 Hughes, 172, and Carter v. Louisville, &c., R. Co., 98 Ind. 552; 49 Am. Rep. 780.

company's rule,[52] or upon hand-cars,[53] or upon the tops of freight cars,[54] or sitting in a loose chair tipped up against a box close

[52] Gulf, &c., Ry. Co. v. Campbell, 76 Tex. 174; 13 S. W. Rep. 19; Houston, &c., R. Co. v. Moore, 49 Tex. 31; 30 Am. Rep. 98; Sherman v. Hannibal, &c., R. Co., 72 Mo. 62; 37 Am. Rep. 423; Eaton v. Delaware, &c., R. Co., 57 N. Y. 382; 15 Am. Rep. 513, where the plaintiff was invited by the conductor of a coal train upon defendant's road to ride upon the train with a promise to get him employment as a brakeman. Being injured through the negligence of the train-hands, he brought action, but was not allowed to recover. The action of the conductor was held beyond the scope of his authority. "The presumption," the court says, "is that a person on a freight train is not, legally, a passenger; and it lies with him who claims to be one to take the burden of proof to show that, under the special circumstances of the case, the presumption has been rebutted." See, also, Elkins v. Boston, &c., R. Co., 23 N. H. 275; Lygo v. Newbold, 9 Exch. 302; Redfield's Am. Ry. Cases, 490.

[53] Hoar v. Maine Central R. Co., 70 Me. 65; 35 Am. Rep. 299; McQueen v. Chicago, &c., R. Co., 30 Kan. 689; Pool v. Chicago, &c., R. Co., 53 Wis. 657; International, &c., R. Co. v. Cock, 68 Tex. 713; 5 S. W. Rep. 635. But see Prince v. International, &c., R. Co., 64 Tex. 144, where it was held that a company may be liable to one permitted to ride free on a hand-car. A written contract with a railway company, signed by the shipper of live stock, providing that said shipper, while being carried upon the train transporting his stock, shall remain in the caboose car attached to the train while the same is moving, is valid and binding between the parties thereto. Such a contract is a reasonable one, intended for the safety and convenience of the shipper, as well as for the protection of the railway company carrying him. It does not contravene any law or a sound public policy. Fort Scott, Wichita & Western Ry. Co. v. Sparks, 55 Kan. 288; 39 Pac. Rep. 1032. The rule as to stock-men in charge of stock on a freight train is very different from that which obtains as to passengers upon a passenger train. Stock-men, charged with the duty of looking after their stock, may ride in places and positions and do many things on the freight train without being guilty of negligence, but, if done by one riding on a passenger train, would undoubtedly constitute negligence. The exigencies of the business of looking after and caring for cattle on a freight train sometimes compel those in charge of them to climb up the ladder of a stock car while the train is in motion, and to get on top of a train and walk back to the caboose, or to ride on top of a car for some distance until the train stops. Kansas & Arkansas Valley Ry. Co. v. White's Admr., 32 U. S. App. 192, 195-196; 67 Fed. Rep. 481. See also Chicago, Milwaukee & St. Paul Ry. Co. v. Carpenter, 12 U. S. App. 392; 56 Fed. Rep. 451; Pacific Mutual Life Ins. Co. v. Snowden, 12 U. S. App. 704; 58 Fed. Rep. 342.

[54] Little Rock, &c., R. Co. v. Miles, 40 Ark. 298; 48 Am. Rep.

to an open side door.[55] With respect, however, to the carriage of passengers upon freight trains, the rule is somewhat modified, to the effect that, whenever the company receives passengers upon those trains, and collects fare from them, although it is done in violation of a rule of the company, it is lawful for the passenger to ride, and if, while so riding, he suffers an injury, due to the company's negligence, he may have his action.[56] When the passenger is received on the freight train, and is al-

10. Shippers of stock are not necessarily negligent in riding in places commonly deemed dangerous. Tibby v. Missouri Pac. Ry. Co., 82 Mo. 292; Union Ry. & Transit Co. v. Shacklett, 19 Ill. App. 145; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394; 5 So. Rep. 714; McCorkle v. Chicago, &c., R. Co., 61 Iowa, 555. *Contra*, Indianapolis, &c., R. Co. v. Horst, 93 U. S. 291, where the defendant in error was riding in a caboose car. It being necessary to detach the latter, he was ordered to the top of the train. Through the negligence of the conductor, he fell, and was severely injured. He was allowed to recover, the court holding it no error to instruct the jury, "that a person taking a cattle-train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes."

55 Norfolk, &c., R. Co. v. Ferguson, 79 Va. 241. In this case, however, the passenger had been drinking. *Cf.* Quackenbush v. Chicago, &c., Ry. Co., 73 Iowa, 458; 35 N. W. Rep. 523, where it was held not to be contributory negligence.

56 International, &c., R. Co. v. Irvine, 64 Tex. 529; Wagner v. Missouri Pac. Ry. Co., 97 Mo. 512; 10 S. W. Rep. 486, 491; Whitehead v. St. Louis, &c., Ry. Co., 99 Mo. 263; 11 S. W. Rep. 751. In the two cases last cited the plaintiff recovered for injuries from lack of ordinary care, though he was riding free. McGee v. Missouri Pac. Ry. Co., 92 Mo. 208; 4 S. W. Rep. 739, where the passenger was ignorant of the prohibitory rule. Hanson v. Mansfield Ry., &c., Co., 38 La. Ann. 111; 58 Am. Rep. 162; St. Joseph, &c., R. Co. v. Wheeler, 35 Kan. 185; Dunn v. Grand Trunk R. Co., 58 Me. 187; 4 Am. Rep. 267; 10 Am. Law Reg. (N. S.) 615; Lawrenceburg, &c., R. Co. v. Montgomery, 7 Ind. 476; Creed v. Pennsylvania R. Co., 86 Penn. St. 139; 27 Am. Rep. 693; Arnold v. Illinois, &c., R. Co., 83 Ill. 273; 25 Am. Rep. 383; Edgerton v. New York, &c., R. Co., 39 N. Y. 227; Chicago, &c., R. Co. v. Hazzard, 26 Ill. 375; Lucas v. Milwaukee, &c., R. Co., 33 Wis. 41; 14 Am. Rep. 735; Murch v. The Concord R. Co., 29 N. H. 9; Ohio, &c., R. Co. v. Muhling, 30 Ill. 9; Ryan v. Cumberland, &c., R. Co., 23 Penn. St. 384; Gillshannon v. Stony Brook R. Co., 10 Cush. 228; Graham v. Toronto, &c., Ry. Co., 23 Up. Can. (C. P.) 514; Sheerman v. Toronto, &c., Ry. Co., 34 Up. Can. (Q. B.) 451. A brakeman on a freight train in charge of a conductor has no authority to permit a person to ride. Candiff v. Louisville, &c., Ry. Co. (La.), 7 So. Rep. 691.

lowed to pay his fare, notwithstanding a rule to the contrary, the relation of carrier and passenger is held to be thereby created, and in case of an injury, the passenger may recover.[57] The discomforts and dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers. And where a person voluntarily takes passage on a freight train he assumes all risks and inconveniences reasonably and necessarily incident to that method of transportation.[57a] Accordingly, it has been held in several cases that a passenger is negligent who unnecessarily stands or leans against the seat and is injured by bumping and jolting in the coupling and management of such trains.[58]

§ **155. Injuries at car windows and doors.**— It is a general rule that a passenger who puts his head, or elbow, or any other part of his body, out of the window of the car in which he is riding, has no cause of action against the railway company for any injury that he may sustain on that account, from contact with outside obstacles or forces. Resting one's arm on the window sill, within the car, is not contributory negligence,[59] but if any part of the passenger's body extends through the open window, beyond the place where the sash would be when

[57] See generally the cases last cited.

[57a] Schilling v. Winona & St. Peter. R. Co., 66 Minn. 252; 68 N. W. Rep. 1083; Olds v. N. Y., N. H. & H. R. Co. (Mass.), 51 N. E. Rep. 450.

[58] Harris v. Hannibal, &c., R. Co., 89 Mo. 233; 1 S. W. Rep. 325; Crine v. East Tenn., &c., Ry. Co., 84 Ga. 651; 11 S. E. Rep. 555; Reber v. Bond, 38 Fed. Rep. 822; Wallace v. Western, &c., R. Co., 98 N. C. 494; 4 S. E. Rep. 503; Smith v. Richmond, &c., R. Co., 99 N. C. 241; 5 S. E. Rep. 896; Chicago, &c., R. Co. v. Hazzard, 26 Ill. 373. *Cf.* with Indianapolis, &c., Co. v. Horst, 93 U. S. 291. On this point, the Supreme Court of Kansas is wide awake and exceedingly discreet. In Missouri Pac. Ry. Co. v. Holcomb, 44 Kan. 332; 24 Pac. Rep. 467, it was held that a railroad company which for years has been in the habit of carrying passengers on one of its local freight trains is required to exercise the highest possible degree of care to which such trains are susceptible, and that in an action for injuries to a passenger caused by the jerking of the train in starting from a station, instructions based upon the assumption that the train was an ordinary freight train were properly refused.

[59] Louisville, &c., Ry. Co. v. Snider, 117 Ind. 435; 20 N. E. Rep. 284; Breen v. New York, &c., R. Co., 99 N. Y. 297; Germantown Pass. R. Co. v. Brophy, 105 Penn. St. 38.

the window is shut, it is sufficient to prevent a recovery of damages by him.[60] The opinion of Thompson, C. J., in the case of Pittsburgh, &c., R. Co. v. McClurg,[61] is often quoted as declaring a sound doctrine in these cases. He said, *inter alia:* — "A passenger on entering a railroad car is to be presumed to know the use of a seat, and the use of a window — that the former is to sit in, and the latter to admit light and air; each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy.[62] Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest it. If, therefore, he sit with his elbow in it, he does so without authority, and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court. * * *

[60] Dun v. Seaboard, &c., R. Co., 78 Va. 645; 49 Am. Rep. 388, in which the court uses the qualifying language, "unless the railroad company, noticing his dangerous position, neglected to warn him." Patterson's Ry. Accident Law, p. 284; Pittsburgh, &c., R. Co. v. McClurg, 56 Penn. St. 294 (overruling New Jersey, &c., R. Co. v. Kennard, 21 Penn. St. 203); Pittsburgh, &c., R. Co. v. Andrews, 39 Md. 329; 17 Am. Rep. 568; Holbrook v. Utica, &c., R. Co., 12 N. Y. 236. "Certainly, if it is a want of due care to attempt to leave a car when the train is in motion, although going at a slow rate of speed, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains or the necessary structures on the side of the tracks," said Bigelow, C. J., in Todd v. Old Colony, &c., R. Co., 3 Allen, 18; 7 Allen, 207; Indianapolis, &c., R. Co. v. Rutherford, 29 Ind. 82; Louisville, &c., R. Co. v. Sickings, 5 Bush, 1; Laing v. Colder, 8 Penn. St. 479; 49 Am. Dec. 533. See, also, Judge Redfield's note to Pittsburgh, &c., R. Co. v. McClurg, 2 Am. Ry. Cases, 552, and *cf.* § 296, *infra.*

[61] 56 Penn. St. 294.

[62] See, on this point, Gee v. Metropolitan, &c., Ry. Co., L. R. 8 Q. B. 165.

In the absence of some justifying necessity, or incapacity to take care of himself, on the part of the passenger, no one can doubt, I think, from the reason of the thing, in view of the nature of the vehicle used, being a railroad car, that to extend an arm or a hand beyond the window sill is dangerous, and is recklessness or negligence. Wherever the facts present such a case, singly and without any controlling or justifying necessity, we think the court ought to declare the act negligence, and as there was nothing like this shown in the case before us, we think the court ought not to have affirmed plaintiff's point. Unconsciously exposing himself did not help the plaintiff's case, as it was not shown that his unconsciousness was not the result of a want of prudent attention to his situation on the part of the plaintiff. It would be a novel answer to the allegation of negligence to allege that the plaintiff had slept in the position he was in when hurt, and that would be a condition of unconsciousness. Sleeping, when due care would require one to be awake, or in dangerous circumstances, is negligence, and no answer to the company can be given to such act. Of course, these views are predicated of a case in which there are no facts to qualify or justify the act. It is possible that a state of facts might be found to show an exception to the rule, and where that occurs, the rule ceases."[63]

§ **156. The same subject continued.**— In another line of authorities it is held that such an act on the part of a passenger is not negligence *per se*, but that, whether or not the mere fact that the plaintiff had his arm outside of the car window contributed to produce the injury complained of, is a proper question for the jury.[64] A consideration of the cases to be cited in support of this view will, however, show that there is but a slight basis for it, and that the weight of authority is decidedly against any such position. The case of New Jersey, &c.,

[63] Wharton on Negligence, § 361; Shearman & Redfield on Negligence (5th ed.), § 281.

[64] Quinn v. South Carolina Ry. Co., 29 S. C. 381; Dahlberg v. Minneapolis St. Ry. Co., 32 Minn. 404; 50 Am. Rep. 585, a street car case; Moakler v. Willamette Valley R. Co., 18 Or. 189; 22 Pac. Rep. 948; Barton v. St. Louis, &c., R. Co., 52 Mo. 253; 14 Am. Rep. 418; Chicago, &c., R. Co. v. Pondrom, 51 Ill. 333; 2 Am. Rep. 306; Spencer v. Milwaukee, &c., R. Co., 17 Wis. 487; New Jersey, &c., R. Co. v. Kennard, 21 Penn. St. 203; Farlow v. Kelly, 108 U. S. 288.

R. Co. v. Kennard,[65] has been expressly overruled, and does not declare the rule now held in Pennsylvania. It was the earliest case in which this question arose, and Chief Justice Gibson, who delivered the opinion, took very extreme ground. It has never been followed. The decision in the Illinois case[66] was reached under the influence of the rule of comparative negligence, which will suffice to destroy its influence as a controlling authority in other jurisdiction. Farlow v. Kelly[67] goes no further than to hold that it is not contributory negligence for a passenger to rest his arm upon the window sill of the car in which he is riding, without having it protrude, which is scarcely the question in issue. In Barton v. St. Louis, &c., R. Co.,[68] the evidence tended to show that the plaintiff, when injured, was sitting in the rear car of the train, at, or near, an open window, and that the injury to his arm was caused by the car coming in contact with a wagon loaded with a skiff. As to the position of his arm at the instant of injury, whether inside or protruded out of the window, the evidence was conflicting. In this state of facts, the court held that, even if the plaintiff had his arm outside the window, still this was not negligent *per se*, under the circumstances, and whether it contributed to the injury was a question for the jury. This case cannot, therefore, count very strongly against the more accepted doctrine.

§ 157. The rule in Wisconsin.— The Supreme Court of Wisconsin, in the case of Spencer v. Milwaukee, &c., R. Co.,[69] considers the question with great ability, and reaches a conclusion contrary to the general rule upon the subject. This is the only case, as far as my reading goes, in which, upon the general question fairly presented, a court of last resort has held that such acts are not negligent, as matter of law. But that the case stands alone, is no conclusive argument against it. It is enti-

[65] 21 Penn. St. 203. It was there held to be the duty of the company to put wire screens to windows wherever there was risk of grazing: and that in default of this the company was liable for injuries produced by such grazing. This case was, however, overruled in Pittsburgh, &c., R. Co. v. McClurg, 56 Penn. St. 294.

[66] Chicago, &c., R. Co. v. Pondrom, 51 Ill. 333; 2 Am. Rep. 306.

[67] 108 U. S. 288.

[68] 52 Mo. 253; 14 Am. Rep. 418.

[69] 17 Wis. 487, which is practically the only case in which the rule that such an act is negligent *per se* is squarely denied.

tled to weight not only as the deliberate judgment of a court of acknowledged ability, but also by reason of the vigor of its reasoning, and the inherent fitness of the position it takes. In the opinion, after reviewing the cases in point, the court said: — "When we consider the manner in which railroad cars are usually constructed, with windows so that they can be opened and arranged at a sufficient height, from the seat, so that passengers will almost unconsciously place their arms upon the sill for support, there being no bars or slats before the window to prevent their doing so, then, to say that, if a passenger's arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and if an injury happens, he cannot recover because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law. It is, probably, the habit of every person while riding in the cars to rest the arm upon the base of the window, and if the window is open, it is liable to extend slightly outside. This, we suppose, is common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must, necessarily, be so to accommodate the motion of the car. Passengers know this, and regulate their conduct accordingly; they do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that, in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence."

§ 158. Notice of the danger.— In some of the cases there is an intimation that the question should turn upon whether or not timely notice of the danger had been given by the company, so that the passenger might have avoided it, and it is an inference that the company might be held liable when the notice is not given.[70] These cases seem to proceed upon the theory that, ordinarily, it may not be especially dangerous to allow the hand or

70 In Houston, &c., Ry. Co. v. Hampton, 64 Tex. 427, it was held that a railroad company may be liable to a mail clerk, if the acts of the company's servants were such as to cause the clerk to believe it safe to put his head out of the car window when it was not safe. Laing v. Colder, 8 Penn. St. 479; 49 Am. Dec. 533; Dun v. Seaboard, &c., R. Co., 78 Va. 645; 49 Am. Rep. 388.

arm to protrude somewhat beyond the outer edge of the open window, and that the passenger is justified in acting upon that supposition. And that whenever, for any reason, the danger in this regard is increased it is the duty of the company to notify their passengers, and to warn them of it, the carrier's failure in the discharge of this duty entitling the injured passenger to his action. It is sometimes a question, when a passenger has sustained an injury in opening or closing the door of a car, or has suffered the injury when an employee of the company opened or shut it, whether or not the passenger's own negligence contributed to the injury. In a recent case, where the plaintiff, who sat near the front door of a dark and crowded car on the defendant's railway, attempted, in passing through a long tunnel, to shut the door, in order to keep out the smoke and cinders, and received an injury in the attempt, there being no servant of the defendant at hand to do it, the Court of Appeals of Maryland held that the plaintiff was not guilty of negligence in so doing, and that the defendant was liable.[71] It is in this case declared to be the duty of the company to provide servants to perform such services for the passengers, and the right of the passenger, in case no servant is at hand, to perform the service for himself, and when the passenger is injured in doing something for himself of this nature, which it is the company's duty to have done for him, the company's plea of contributory negligence as a defense to the action for damages is bad.

§ **159. The English rule.**— "If the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience," said Chief Justice Cockburn.[72] There are several English cases in which this question has been passed upon, but they are not entitled to much weight in this country, by reason of the difference, in very essential particulars, between the railway service in the two countries. In Gee v. Metropolitan Ry. Co.[73] it is held that a passenger may lawfully look out of a win-

[71] Western, &c., R. Co. v. Stanley, 61 Md. 266; 48 Am. Rep. 96; Patterson's Ry. Accident Law, p. 15.

[72] In deciding this very point, in the case of Gee v. Metropolitan, &c., Ry. Co., L. R. 8 Q. B. 161; 5 Eng. Rep. 169.

[73] L. R. 8 Q. B. 161.

dow in a door, and if, in so doing, he leans against the door which is imperfectly and negligently fastened, and which, in consequence, flies open, and he falls out and is hurt, he may have his action. In this case, in the Court of Exchequer Chamber, Cockburn, J., said: — "The passenger did nothing more than that which came within the scope of his enjoyment while traveling, without committing any imprudence. In passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent, but in the ordinary manner of people traveling for pleasure." In the case of Adams v. Lancashire, &c., Ry. Co.,[74] in which it appeared that the plaintiff shut the door of the railway carriage, which flew open through the negligence of the company, three several times, and that, in trying to shut it for the fourth time, he fell out and was hurt, there was evidence that the car was not crowded, that the plaintiff could have found a seat away from the door, and that the train would have stopped at a station in three minutes. Under this state of facts the court held, that, inasmuch as the inconvenience from the open door was slight, and the passenger might have escaped it entirely by moving his seat, while the danger of attempting to close the door was considerable, the conduct of the plaintiff so far contributed to occasion the injury that he could not recover.[75]

§ 160. Injuries at and about railway stations.— It is the plain duty of a railway company, as a common carrier of passengers, to keep its stations, and the approaches thereto, in such a condition that those who have occasion to use these premises for the purposes for which they are designed, may do so with safety. Any failure upon the part of the company to exercise ordinary care to this end is a breach of duty for which an action will lie.[76] Judge Cooley said: — "When one, expressly or by im-

[74] L. R. 4 C. P. 739.

[75] See, also, the following English cases upon this general question: Siner v. Great Western Ry. Co., L. R. 4 Exch. 117; Richardson v. The Metropolitan Ry. Co., L. R. 3 C. P. 374, note; Fordham v. London, &c., Ry. Co., L. R. 4 C. P. 619, where the company was held liable for the negligence of a guard in slamming a door, without warning, on a passenger's hand. Maddox v. Railway Co., 38 L. T. (N. S.) 458 (C. P. Div.); Wharton on Negligence, §§ 363, and note, 632.

[76] Railroad Co. v. Henning, 15 Wall. 659; Sweeney v. Old Colony R. Co., 10 Allen, 373.

plication, invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."[77] The cases are numerous where passengers have recovered for injuries received after alighting from the cars, the carrier having failed to exercise due care in providing means for their safe egress.[78] "Railroad companies," said the Supreme Court of Pennsylvania,[79] "must carry

[77] Cooley on Torts, 604. It is the duty of a railroad company to keep its premises in a safe condition for the use of one who goes to the station to see a friend depart. Hamilton v. Texas, &c., Ry. Co., 64 Tex. 251; 53 Am. Rep. 756; Texas, &c., Ry. Co. v. Best, 66 Tex. 116; but not for one who comes to the station to take a train, and, finding it gone, waits for a horse car. Heinlein v. Boston, &c., R. Co., 147 Mass. 136; 16 N. E. Rep. 608.

[78] Boyce v. Manhattan Ry. Co., 54 N. Y. Super. Ct. 286; Cross v. Lake Shore, &c., Ry. Co., 69 Mich. 363; 37 N. W. Rep. 361; Pennsylvania Co. v. Marion, 123 Ind. 415; 23 N. E. Rep. 973; Delaware, &c., R. Co. v. Trautwein, 52 N. J. Law, 169; 19 Atl. Rep. 178; Ainley v. Manhattan Ry. Co., 47 Hun, 206; Bateman v. New York, &c., R. Co., 47 Hun, 429; Green v. Pennsylvania R. Co., 36 Fed. Rep. 66; Keefe v. Boston, &c., R. Co., 142 Mass. 251; Louisville, &c., Ry. Co. v. Lucas, 119 Ind. 583; 21 N. E. Rep. 968; Lucas v. Pennsylvania Co., 120 Ind. 205; 21 N. E. Rep. 972; Texas, &c., Ry. Co. v. Orr, 46 Ark. 182; Kelley v. Manhattan Ry. Co., 112 N. Y. 443; 20 N. E. Rep. 383; Pennsylvania Co. v. Marion, 104 Ind. 239; Stewart v. International, &c., R. Co., 53 Tex. 289; 37 Am. Rep. 753; Bennett v. Louisville, &c., R. Co., 102 U. S. 577; Gaynor v. Old Colony, &c., R. Co., 100 Mass. 211. Railroad companies are under obligation "to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, as well as all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." McDonald v. Chicago, &c., R. Co., 26 Iowa, 124; Columbus, &c., R. Co. v. Farrell, 31 Ind. 408; Osborne v. Union Ferry Co., 53 Barb. 629; Dice v. Willamette Trans., &c., Co., 8 Or. 60; 34 Am. Rep. 575; Imhoff v. Chicago, &c., R. Co., 20 Wis. 364; Patten v. Chicago, &c., R. Co., 32 Wis. 533; Martin v. Great Northern, &c., Ry. Co., 16 C. B. 179; 81 Eng. Com. Law, 179; Nicholson v. Lancashire, &c., Ry. Co., 3 Hurl. & Colt. 534; Caterham Ry. Co. v. London R., 87 Eng. Com. Law, 410; Hutchinson on Carriers, § 516 *et seq.;* Redfield on Carriers, § 514; Shearman & Redfield on Negligence (5th ed.), § 410.

[79] Pennsylvania R. Co. v. Aspell, 23 Penn. St. 149; 62 Am. Dec. 323.

the passengers to their respective places of destination, *and set them down safely*, if human care and foresight can do it." But when the passenger, on his own part, fails to exercise proper care and prudence, his right of action, upon familiar grounds, is thereby forfeited.[80] A person who goes, in the night-time, in the midst of a car-yard, and at a place where the railroad company is not accustomed to receive passengers, and, without the knowledge of those in charge of a freight train, standing there, attempts to enter the caboose attached to such freight train, and is injured, is guilty of contributory negligence, and cannot recover for such injury.[81] Where one, in order to reach the station to take a train, went across a vacant lot, crawled under a wire fence, crossed a ditch, and climbed an embankment to reach the station platform; and as he stepped on the track at the top of the embankment was struck by a passing train and killed, he was held to be a trespasser, the company incurring no liability.[82] It is the duty of a railroad company to properly light the platform connected with its depot within a reasonable time before the arrival and departure of its trains, so as to insure the safety of persons coming to the depot as passengers.[83] If a passenger alights in the night at a station where he is a stranger, and finds himself in utter darkness by the extinguishment of the light by the agent, it is not negligent for him to seek information or a place of safety by crossing other ground of the company than

[80] Evansville, &c., R. Co. v. Duncan, 28 Ind. 442; Forsyth v. Boston, &c., R. Co., 103 Mass. 510; Commonwealth v. Boston, &c., R. Co., 129 Mass. 500; 37 Am. Rep. 382; Illinois, &c., R. Co. v. Green, 81 Ill. 19; 25 Am. Rep. 255. In Mitchell v. Chicago, &c., R. Co., 51 Mich. 236; 47 Am. Rep. 566, a train approaching a station where there was a crossing of tracks stopped, as required by law, several hundred feet from the crossing before proceeding to cross the track. The name of the station had been called, and a passenger, without the knowledge of the conductor or brakemen, attempted to alight and injured himself. No recovery was allowed. See, also, Sevier v. Vicksburg, &c., R. Co., 61 Miss. 8; 48 Am. Rep. 74.

[81] Haase v. Oregon Ry. & Nav. Co., 19 Or. 354; 24 Pac. Rep. 238.

[82] Conly v. Penn. R. Co. (Penn.), 12 Atl. Rep. 496. See, also, Sturgis v. Detroit, &c., Ry. Co., 72 Mich. 619; 40 N. W. Rep. 914; Missouri Pac. R. Co. v. Texas, &c., Ry. Co., 33 Fed. Rep. 359.

[83] Grimes v. Pennsylvania Co., 36 Fed. Rep. 72; Alabama, &c., R. Co. v. Arnold, 84 Ala. 159; 4 So. Rep. 359; Fordyce v. Merrill, 49 Ark. 277; 5 S. W. Rep. 329; Reynolds v. Texas, &c., Ry. Co., 37 La. Ann. 694; Wallace v. Wilmington, &c., Ry. Co. (Del.), 18 Atl. Rep. 818; Groll v. Prospect Park, &c., R. Co., 4 N. Y. Supl. 80.

that on which the station is actually built.[84] When a passenger intending to board a train finds no one to inform him how to reach the sleeping car, which is left standing outside of the yard, to which a sidewalk maintained by the company and city leads in a direct route, which he follows and from which he falls by reason of insufficient light, he has an action against the company.[85] A person going at dusk upon a defective platform to read a notice which the company was required by law to post there when the stock was killed by its trains was not negligent as a matter of law.[86] On the other hand, where a platform lamp had been temporarily removed to be trimmed and a passenger, while staying over at the station, went out and walked off the end of the platform, she was held guilty of recklessness.[87] And where a passenger, after alighting, chose to leave the station by the only stairway out of four which was unlighted, he was declared wanting in ordinary care.[88] It is not negligence *per se* to board a passenger train at a point elsewhere than at a depot platform.[89] And where a stranger, supposing that a train which stood at a freight platform some distance below the passenger platform would back up to the latter and start from there, waited until he learned that the train was just on the point of starting, and then, running to get aboard, stumbled over a box, the company was held liable for the injuries he sustained.[90] When a train has arrived at the station a passenger in alighting may assume that it will remain stationary for a reasonable time, and whether the company has fulfilled its duty in this regard is a question for the jury.[91] There must be reasonable

84 Wallace v. Wilmington, &c., R. Co. (Del.), 18 Atl. Rep. 818.

85 Moses v. Louisville, &c., R. Co., 39 La. Ann. 649; 2 So. Rep. 567.

86 St. Louis, &c., Ry. Co. v. Fairbairn, 48 Ark. 491; 4 S. W. Rep. 50.

87 Reed v. Axtell, 84 Va. 231; 4 S. E. Rep. 587.

88 Bennett v. New York, &c., R. Co., 57 Conn. 422; 18 Atl. Rep. 668.

89 Stoner v. Pennsylvania Co., 98 Ind. 384; 49 Am. Rep. 764.

90 Maclennan v. Long Island R. Co., 52 N. Y. Super. Ct. 22.

91 Pennsylvania R. Co. v. Lyons, 129 Penn. St. 113; 18 Atl. Rep. 759; Louisville, &c., R. Co. v. Mask, 64 Miss. 738; Gulf, &c., Ry. Co. v. Williams, 70 Tex. 159; 8 S. W. Rep. 78; Norfolk, &c., R. Co. v. Prinnell (Va.), 3 S. E. Rep. 95; Louisville, &c., R. Co. v. Crunk, 119 Ind. 542; 21 N. E. Rep. 31; Jones v. Missouri Pac. Ry. Co., 31 Mo. App. 614; Nance v. Carolina, &c., R. Co., 94 N. C. 619; East Line, &c., Ry. Co. v. Rushing, 69 Tex. 306; 6 S. W. Rep. 834; Hickman v. Missouri Pac. Ry. Co., 91 Mo. 433; 4 S. W. Rep. 127;

facilities for stepping off the train with safety, but if such suitable means are provided and the cars are in proper position, passengers are not entitled as a matter of law to personal assistance in alighting.[92] It is not the duty of a conductor "to know" that a passenger has left the train if he has had a reasonable opportunity to do so.[93] But if the conductor has reason to believe that a passenger, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is thereby injured, the company will be liable.[94] Where a train is so stopped that a lady can alight on the platform only by going forward through the smoker, she is not negligent in getting off from the rear end of the car on which she is.[95] In Pennsylvania it was held contributory negligence as a matter of law to undertake to get off a train after it began to move, and a new trial was granted for error of the court in submitting the question generally instead of giving positive instructions for the defendant.[96] It has also been determined that if the plaintiff was under the influence of liquor which contributed *to any extent* to his injury, it is not merely a circumstance bearing upon the question of reasonable care, but an absolute bar to recovery.[97] It is not negligence *per se* to get off the wrong side of the train, that is, the side opposite the platform.[98] A passenger crossing a railroad track at a station, in order to

Strand v. Chicago, &c., Ry. Co., 64 Mich. 479, and 67 Mich. 380; 31 N. W. Rep. 184, and 34 N. W. Rep. 712; Murphy v. Rome, &c., R. Co., 10 N. Y. Supl. 354; McDonald v. Long Island R. Co., 116 N. Y. 546; 22 N. E. Rep. 1068.

92 Raben v. Central Iowa Ry. Co., 74 Iowa, 732; 34 N. W. Rep. 621; Hurt v. St. Louis, &c., Ry. Co., 94 Mo. 255; 7 S. W. Rep. 1, 5; Raben v. Central Iowa Ry. Co., 73 Iowa, 579; 35 N. W. Rep. 645; Simms v. South C. Ry. Co., 27 S. C. 268; 3 S. E. Rep. 301.

93 Raben v. Central Iowa Ry. Co., 73 Iowa, 579; 35 N. W. Rep. 645; Clotworthy v. Hannibal, &c., R. Co., 80 Mo. 220; Chesapeake, &c., Ry. Co. v. Reeves' Admr. (Ky.), 11 S. W. Rep. 464.

94 Straus v. Kansas, &c., R. Co., 86 Mo. 421.

95 Cartwright v. Chicago, &c., Ry. Co., 52 Mich. 606; 50 Am. Rep. 274. But see Eckerd v. Chicago, &c., Ry. Co., 70 Iowa, 353; 30 N. W. Rep. 615.

96 New York, &c., R. Co. v. Enches, 127 Penn. St. 316; 24 W. N. C. 261; 17 Atl. Rep. 991.

97 Straus v. Chicago, &c., Ry. Co., 67 Mich. 380; 34 N. W. Rep. 712.

98 McQuilken v. Central Pac. R. Co., 64 Cal. 463; Robostelli v. New York, &c., R. Co., 33 Fed. Rep. 796. But see, *contra*, Morgan v. Camden, &c., R. Co. (Penn.), 16 Atl. Rep. 353; 23 W. N. C. 189.

leave or board a train halted for that purpose, is not held to exercise the same care and diligence as persons crossing highway tracks, but may assume that the railroad corporation will so order its trains that he will be safe from harm on the track, which he is thus invited and required to cross in order to secure his passage.[99] But it is otherwise where one attempts to cross in front of cars in motion or which are about to start.[1]

§ 161. The same subject continued.— When the train stops elsewhere than at a station, as at a water tank,[2] or upon a side track, to allow another train to pass, or for any other purpose,[3] or upon approaching the crossing of another railroad,[4] or upon a bridge or culvert,[5] or in a tunnel,[6] or at any other place at which there is no express or implied invitation to the passenger to alight,[7] and where the stop is made for the purpose of the

[99] Weeks v. New Orleans, &c., R. Co., 40 La. Ann. 800; 5 So. Rep. 72; Chicago, St. P. & K. C. Ry. Co. v. Ryan, 165 Ill. 88; 46 N. E. Rep. 208. For case where plaintiff must have known he had no right to cross the tracks, see Riester v. N. Y. C. & H. R. R. Co., 16 App. Div. (N. Y.) 216.

[1] Baltimore & Ohio R. Co. v. State, 63 Md. 135; Pennsylvania R. Co. v. Bell (Penn.), 15 Atl. Rep. 561; Parsons v. New York, &c., R. Co., 37 Hun (N. Y.), 128; Harris v. Central R. Co., 78 Ga. 525; 3 S. E. Rep. 355; DeKay v. Chicago, &c., Ry. Co., 41 Minn. 178; 43 N. W. Rep. 182.

[2] When a railway train stops at a place where it would be dangerous for one to get off, there can be no requirement forcing the company to notify the passenger not to alight. A passenger taking it upon himself to get off is devoid of ordinary prudence, and cannot recover in an action for injuries sustained. Illinois, &c., R. Co. v. Green, 81 Ill. 19; 25 Am. Rep. 255; State v. Grand Trunk Ry. Co., 58 Me. 176; 4 Am. Rep. 258.

[3] Frost v. Grand Trunk, &c., Ry. Co., 10 Allen, 387; Montgomery, &c., R. Co. v. Boring, 51 Ga. 182.

[4] Mitchell v. Chicago, &c., R. Co., 51 Mich. 236; 47 Am. Rep. 566.

[5] Columbus, &c., R. Co. v. Farrell, 31 Ind. 408; Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168. But in Taber v. Delaware R. Co., 71 N. Y. 489, the court says:—"The defendant company was bound to take notice of the circumstances, viz.: that the station had been announced, that passengers would naturally assume that the train, when it stopped, was at the station, and at the place where they were to alight, * * * and that they, in the absence of notice, would start to leave the train as soon as it came to a stand still." Montgomery, &c., R. Co. v. Boring, 51 Ga. 182; Whittaker v. Manchester, &c., Ry. Co., L. R. 5 C. P. 464, note 3.

[6] Bridges v. North London Ry. Co., L. R. 6 Q. B. 377; 24 L. T. Rep. (N. S.) 835.

[7] Hemmingway v. Chicago, &c., Ry. Co., 67 Wis. 668; Lewis v. The London, &c., Ry. Co., L. R. 2 Q. B. 66.

railroad alone, it is generally held that, when the passenger leaves the cars, under these circumstances, he acts at his peril, and that, if he suffers an injury in so doing, his own negligence will prevent a recovery.[8] When, however, the name of the station is announced by the proper employee of the company, the passenger may rightfully infer that the first stoppage of the train will be at that station, and he will not be guilty of such contributory negligence as will bar his recovery by construing such announcement and stoppage as an invitation to him to alight.[9]

§ 162. The English rule.— Upon this point Chief Justice Cockburn well said: — "An invitation to passengers to alight, on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence, * * * and, it appears to us, that the bringing up of a train to a final standstill for the purpose of the passengers' alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out, if he

[8] See generally the cases cited *supra*. "But as the facts and circumstances in cases of this sort are so well night infinite in their variety, and as each case must depend almost entirely upon the facts which appear in connection therewith, authorities, however pertinent, are useful mainly, only in so far as they settle general propositions of law, and assist the court in applying these propositions to the particular facts of the case before it." Boss v. Prov., &c., R. Co., 15 R. I. 149; 4 East. Rep. 490; 32 Alb. Law Jour. 266.

[9] Memphis, &c., Ry. Co. v. Stringfellow, 44 Ark. 322; 51 Am. Rep. 598; Philadelphia, &c., R. Co. v. McCormick, 124 Penn. St. 427; 23 W. N. C. 344; 16 Atl. Rep. 848; Philadelphia, &c.. R. Co. v. Anderson (Md.), 20 Atl. Rep. 2; McNulta v. Eusch, 134 Ill. 46; 24 N. E. Rep. 631. But where a train stopped under such circumstances in broad daylight and all the surroundings indicated that passengers were not expected to alight there, the company was held not liable to one who was injured in getting off. Smith v. Georgia Pac. Ry. Co., 88 Ala. 538; 7 So. Rep. 119. If a passenger is injured by alighting of his own accord from a car at a place where there is no platform, when, by passing forward, he could alight with safety on the platform, he is guilty of negligence, and cannot recover. Eckerd v. Chicago, &c., Ry. Co., 70 Iowa, 353. See, also, Savannah, &c., R. Co. v. Watts, 82 Ga. 229; 9 S. E. Rep. 129; Central, &c., R. Co. v. Van Horn, 38 N. J. Law, 133; Milliman v. New York, &c., R. Co., 66 N. Y. 642; Cockle v. London, &c., Ry. Co., L. R. 7 C. P. 321.

proposes to alight at the particular station."[10] When the train is stopped at any unusual place, and the passenger is either compelled, or advised, to alight by the servants of the carrier, the company will be liable if injury results. An illustration of the application in this rule is found in the case of Memphis & Charleston R. Co. v. Whitfield,[11] where the defendants, having stopped their train several hundred yards from the station, at a point where the land was low, and covered with sleet and ice, compelled the plaintiff, by refusing to back the train up to the platform, to alight upon the ice and snow, whereby he dislocated his knee. The jury found negligence in the defendants, and gave a verdict for the plaintiff, and upon appeal the court held that the judgment should be affirmed, saying: — "A railway company stopping its train for passengers at a place so steep that they could not easily climb upon the train would be bound to assist them to do so, and, most assuredly, not less so to aid a passenger in alighting under similar circumstances. The conductor is bound, upon the request of any passenger, to move the train backward or forward, so as to enable the passenger to step upon the platform."

§ 163. The rule further stated.— In Brown v. Chicago, &c., R. Co.,[12] it is held that where a pregnant woman passenger on a railway train was carelessly directed by one of the train-men to leave the train, on a stormy night, three miles short of her destination, and the exertion of walking home in the night brought on a miscarriage and consequent sickness and distress, the company was liable. This case contains an exhaustive review of the authorities, and states the law in point with great clearness and force.[13] Many cases may be cited in support of

[10] Cockle v. London, &c., Ry. Co., L. R. 7 C. P. 321; 27 L. T. Rep. (N. S.) 320; Praeger v. The Bristol, &c., Ry. Co., 24 L. T. Rep. (N. S.) 105. The burden of proof in such a case is cast upon the carrier to show that there was no negligence. Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168; Mitchell v. Chicago, &c., R. Co., 51 Mich. 236; 47 Am. Rep. 566.

[11] 44 Miss. 466; 7 Am. Rep. 699.

[12] 54 Wis. 342; 31 Am. Rep. 41.

[13] Mr. Irving Browne's learned note to this case, 41 Am. Rep. 53, is a valuable *scholion* upon the general question. Louisville, &c., R. Co. v. Ballard, 88 Ky. 159; 10 S. W. Rep. 429; Winkler v. St. Louis, &c., Ry. Co., 21 Mo. App. 99; Kreuziger v. Chicago, &c., Ry. Co., 73 Wis. 158; 40 N. W. Rep. 657; Galveston, &c., Ry. Co. v. Crispi, 73 Tex. 236; 11 S. W. Rep. 187. See, also, *supra*, § 33, p. 41, note.

the rule that when a railway passenger train is stopped elsewhere than at the platform of a station, and passengers are compelled to alight there, they may lawfully do so without any imputation of negligence, and, if injury results to them, may have an action against the carrier.[14]

§ 164. Where plaintiff is hit by something thrown or dropped from a moving train.— In Carpenter v. Boston & Albany R. Co.[15] it was decided that where a plaintiff, waiting on the plat-

[14] White Water, &c., R. Co. v. Butler, 112 Ind. 598; 14 N. E. Rep. 599; International, &c., R. Co. v. Eckford, 71 Tex. 274; 8 S. W. Rep. 679; Boss v. Providence, &c., R. Co., 15 R. I. 149; 1 Atl. Rep. 9; Warden v. Missouri Pac. Ry. Co., 35 Mo. App. 631; McKimble v. Boston, &c., R. Co., 141 Mass. 463; Louisville, &c., Ry. Co. v. Mask, 64 Miss. 738; 2 So. Rep. 360; Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168. In leaving the place where he has alighted, the passenger must use ordinary care or he cannot recover for subsequent injuries. International, &c., R. Co. v. Folliard, 66 Tex. 603; 1 S. W. Rep. 624; Adams v. Missouri Pac. Ry. Co., 100 Mo. 555; 12 S. W. Rep. 637; Foy v. London, &c., Ry. Co., 18 C. B. (N. S.) 225; Curtiss v. Rochester, &c., R. Co., 20 Barb. 285; Dice v. Williamette Trans., &c., Co., 8 Or. 60; 34 Am. Rep. 575; Fitzpatrick v. Great Western Ry. Co., 12 Up. Can. (Q. B.) 645. Where a passenger is carried several miles beyond his station, and the conductor courteously submits the option to him to leave the train and walk back, or ride to the next station and return free of charge:—*held*, that this amounts to a compulsory choice. Thompson v. New Orleans, &c., R. Co., 50 Miss. 315; 19 Am. Rep. 12; Thompson on Carriers, 228; Angell on Carriers, §§ 559-569; 2 Redfield on Railways, § 176; Hutchinson on Carriers, § 612; Pierce on Railways, 475. *Cf.* Siner v. Great Western Ry. Co., L. R. 3 Exch. 150; Evansville, &c., R. Co. v. Duncan, 28 Ind. 442; Indianapolis, &c., R. Co. v. Birney, 71 Ill. 391. But see Francis v. St. Louis Transfer Co., 5 Mo. App. 7. In this case the carrier, in violation of its contract, set down the plaintiff a mile from her destination, on a frequented street on which street cars passed by which plaintiff could easily have reached her home. She walked the distance, however, and, being in delicate health, contracted such a cold as to permanently injure her health. *Held*, that the injury was too remote, and that the contributory negligence of the plaintiff was too direct to warrant a recovery for loss of health and employment. Only a reasonable cost of a conveyance home could be allowed. Henry v. St. Louis, &c., R. Co., 76 Mo. 288; 43 Am. Rep. 762; Illinois, &c., R. Co. v. Green, 81 Ill. 19; 25 Am. Rep. 255; Commonwealth v. Boston, &c., R. Co., 129 Mass. 500; 37 Am. Rep. 382; Toledo, &c., R. Co. v. Baddeley, 54 Ill. 19; 5 Am. Rep. 71; Sevier v. Vicksburg, &c., R. Co., 61 Miss. 8; 48 Am. Rep. 74.

[15] 97 N. Y. 494; 49 Am. Rep. 540.

form of the defendant's station for the purpose of taking an incoming train, was struck by a mail bag, thrown from the postal car in the approaching train, by a clerk in the employ of the United States government, and it appearing that it had long been the well-known custom to throw off the bags, when passengers were on the platform, and that the defendant took no precautions to prevent injury therefrom, such failure on the part of the company was negligent, and that a recovery might be had. The plaintiff used the platform in a lawful manner without negligence,[16] and was accordingly entitled to protection in this particular. Precisely the same point, coming up in just the same way, was made in the case of Snow v. Fitchburg R. Co.[17] by the Supreme Judicial Court of Massachusetts; but when the bag was thrown off, not upon the platform, but some two hundred feet beyond, and struck the leg of a scaffold upon which the plaintiff was at work, so that it fell, and the plaintiff was injured, the Supreme Court of Wisconsin held that the railway company was not liable, upon the ground that the company could not be charged with notice that the bag was likely to be thrown off at the depot, and hence was not bound to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off as it was upon the occasion in question.[18]

§ 165. Injuries to free passengers.—When an action is brought against a railway company for damages for an injury sustained by a person who was carried gratuitously, two questions are usually presented; (*a*) did the relation of carrier and passenger actually subsist between the parties, and (*b*) was the common law liability of the carrier in any degree limited by special contract? With respect to the first question, it is the general rule that when the carrier receives the passenger and undertakes his transportation, whether upon a consideration or not, he becomes *ipso facto* liable as a carrier for the carriage, and will not be heard to say, when injury results from his carelessness, that the passenger rode gratuitously and, therefore, should not recover.[19]

[16] Upon this point see Weston v. Elevated Ry. Co., 73 N. Y. 595.

[17] 136 Mass. 552; 49 Am. Rep. 40.

[18] Muster v. Chicago, &c., R. Co., 61 Wis. 325; 49 Am. Rep. 41.

[19] Littlejohn v. Fitchburg R. Co., 148 Mass. 478; 20 N. E. Rep. 103. But there must be reasonable proof of negligence. The mere fact that plaintiff was injured on the train by the door being shut against him does not, of itself,

Having undertaken to carry, the duty arises to carry safely. The carrier does not, by consenting to carry a person gratuitously, thereby relieve himself of responsibility for negligence. When the assent to the riding free has been legally and properly given, the person carried is entitled in all respects to the same degree of care as if he had paid for the transportation.[20] "The right which a passenger by a railway has to be carried safely does not depend on his having a contract;" but, "the fact of his being a passenger, casts a duty on the company to carry him safely."[21] But where one rides upon a railway train, without the proper assent of the company, as a free passenger, the rule is otherwise. There must be a true undertaking to carry, or the relation of carrier and passenger will not be held to subsist.[22] So, when the plaintiff rides without the defendant's permission,

prove negligence where the carriage was gratuitous. Hospes v. Chicago, &c., Ry. Co., 29 Fed. Rep. 763; Austin v. Great Western Ry. Co., L. R. 2 Q. B. 442; Waterbury v. New York, &c., R. Co., 21 Blatchf. 314; Blair v. Erie Ry. Co., 66 N. Y. 313; 23 Am. Rep. 55; Todd v. Old Colony, &c., R. Co., 3 Allen, 18. "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy requires that they should be held to the greatest possible care. And whether the consideration be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance." Philadelphia, &c., R. Co. v. Derby, 14 How. (U. S.) 468; Steamboat New World v. King, 16 How. (U. S.) 469; Little Rock, &c., R. Co. v. Miles, 40 Ark. 298; 48 Am. Rep. 10; Nolton v. Western R. Co., 15 N. Y. 444; Perkins v. New York, &c., R. Co., 24 N. Y. 200; Wilton v. Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11; 2 Redfield on Railways, 184, 185, and notes; Jacobus v. St. Paul, &c., R. Co., 20 Minn. 125; 18 Am. Rep. 360.

[20] The cases *supra*.

[21] Blackburn, J., in Austin v. Great Western Ry. Co., L. R. 2 Q. B. 442. *Cf.* Hammond v. North Eastern R. Co., 6 S. C. 130; 24 Am. Rep. 467, holding that a mail agent who is transported by a railroad company under a contract with the government to carry its mail agents free of charge, may maintain an action against the company to recover damages for injuries arising from negligence. Such action is not founded on the contract with the government, but upon the duty which the law imposes upon the company.

[22] In Bricker v. Caldwell (Bricker v. Phila., &c., R. Co.), 132 Penn. St. 1; 18 Atl. Rep. 983, where a passenger was riding without the knowledge or consent of the company, and in Gardner v. N. H., &c., Co., 51 Conn. 143; 5 Am. Rep. 12, where a person was accompanying the owner of stock, no fare having been paid in either of the cases, but both persons intending to do so, it was nevertheless held that they were not passengers toward whom there was any duty of safe car-

as where he is invited or suffered to ride gratuitously by the defendant's employees, who have no right to carry any one free, there can be no recovery in case of injury.[23]

§ 166. The same subject continued.— It is familiar learning that a principal is not liable for the acts of his servant or agent beyond the sphere of his duty, and for the employees of a railway to invite or permit persons to ride gratuitously will, generally, be outside the scope of their employment. The trainmen are not hired for that sort of service, and it is not in their power to impose a burden upon their employers in that respect. It would be a harsh rule that required a carrier to pay damages for the negligent injury of a person upon their train, whose injury was sustained through the negligence of the very employees who wrongfully permitted him to be upon the train as a free passenger.[24] In cases of this kind, the defendant corporation was not a carrier as to the plaintiff, nor under a carrier's obligation as to him. No contract of carriage, express or implied, can be assumed to exist in such a case, and such a passenger must be held to travel at his own proper peril.

riage. It is held in Massachusetts that a person who gets upon a railroad train after it has started does not become a "passenger," within the Pub. Stats., chap. 112, § 212, until he reaches a place of safety inside of the car intended for him to ride in, and no action can be maintained for his death, if he falls off the platform of the car and is killed. Merrill v. Eastern R. Co., 139 Mass. 238; 31 Alb. L. J. 503.

[23] Higgins v. Cherokee R. Co., 73 Ga. 149; Lygo v. Newbold, 9 Exch. 302; Eaton v. Delaware, &c., R. Co., 57 N. Y. 382; 15 Am. Rep. 513; Robertson v. Erie Ry. Co., 22 Barb. 91; Snyder v. Hannibal, &c., R. Co., 60 Mo. 413. To recover, the company must be under a duty to the plaintiff, which makes his protection necessary. But here the employees have no authority general or special. The axiom, *Qui facit per alium facit per se*, cannot apply. Flower v. Pennsylvania R. Co., 69 Penn. St. 210; 8 Am. Rep. 251; Union Pacific Ry. Co. v. Nichols, 8 Kan. 505; 12 Am. Rep. 475; Moss v. Johnson, 22 Ill. 633; Quinn v. Power, 24 N. Y. Sup. Ct. 102; Houston, &c., R. Co. v. Moore, 49 Tex. 31; 30 Am. Rep. 98; Cox v. Railway, 3 Exch. 268; Marvin v. Wilbur, 52 N. Y. 270, 273; Elkins v. Boston, &c., R. Co., 23 N. H. 275. But see Prince v. International, &c., R. Co., 64 Tex. 144; 20 Cent. L. J. 479, where it is held that a person injured through the negligence of the servants of a railroad company while riding gratuitously on a hand-car at the invitation of the company's agent, may recover damages from the company.

[24] Sherman v. Hannibal, &c., R. Co., 72 Mo. 62; 37 Am. Rep. 423; New Orleans, &c., R. Co. v. Harrison, 48 Miss. 112; 12 Am. Rep. 356.

§ 167. Newsboys, peddlers, &c.— A question as to the liability of the railway may arise in cases of injury to persons allowed to be upon the trains of the company in the capacity of newsboys, peddlers and the like. In the case of Commonwealth v. Vermont, &c., R. Co.,[25] in which a person, who furnished the passengers upon the defendants' trains with iced water, under a contract with the company, and was also allowed to ride upon the trains and sell pop-corn, was negligently killed while so riding, it was held that, while traveling under this arrangement, such person was a passenger, and not an employee, and that, consequently, the company might be held responsible for the injury he sustained. And the same rule was declared in Yoemans v. Contra Costa Steam Navigation Co.[26] In this case it appears that the plaintiff kept a bar upon the defendant's steamboat, paying two hundred dollars per month for the privilege. He also acted as agent for an express company which carried on its business over the defendant's lines. The defendant's route consisted partly of a passage by steamer and partly of a passage by railway, and the plaintiff was injured by one of the defendant's locomotives while on his way to the boat on his proper business. The court held him a passenger, and not an employee, and, therefore, entitled to his action.[27] But, on the contrary, a railway company is not liable for the accidental death of a boy, permitted by the conductor, against its rules, to ride gratuitously on the train to sell papers.[28] The duty of the carrier toward express messengers, mail agents, persons riding on drovers' passes, and such other classes of persons as may be denominated *quasi* passengers, has been considered in a preceding section.[29]

[25] 108 Mass. 7; 11 Am. Rep. 301.

[26] 44 Cal. 71.

[27] Brennan v. Fairhaven, &c., R. Co., 45 Conn. 284; 29 Am. Rep. 679, where the plaintiff, a boy ten years old, was riding free on the platform of one of defendant's cars, in the performance of an errand for the driver. Jumping from the car, while in motion, he was severely injured. Held, that the neglect of the employees of the duty to collect fare, did not relieve them of the obligations to use reasonable care not to injure the plaintiff. The latter, because of his tender years, should have been forced to obey the rule of the company not to stand on the platform. The boy, even if regarded as a trespasser, could have his action against the company. Smallman v. Whilter, 87 Ill. 545; 29 Am. Rep. 76; Barry v. Oyster Bay, &c., Steamboat Co., 67 N. Y. 301; 23 Am. Rep. 115.

[28] Duff v. Allegheny R. Co., 91 Penn. St. 458; 36 Am. Rep. 675.

[29] § 144, *supra*.

§ 168. Carrier's liability limited by contract.— It is not uncommon for a common carrier to stipulate, as part of the contract by which he undertakes to transport passengers gratuitously, against liability to such passengers in case of injury. When a pass is issued it generally contains some such exemption clause as this: — "The person accepting and using this pass assumes all risks and damages for any injury to the person, or for any loss or injury to his property, while using or having the benefit of it, and waives all claim on this company therefor,"[30] or, "The person accepting this ticket assumes, in consideration thereof, all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the person using this ticket,"[31] or, "The person accepting and using this pass thereby assumes all risk of accident and damage to person or property."[32] By some such stipulation as this it is generally sought to escape liability in case of injury to free passengers. The courts have, in consequence, been called upon repeatedly to pass upon the question whether, in this or any equivalent way, a common carrier may thus stipulate, and, by special contract, exempt himself, in cases of this kind, from liability for his own or his servant's negligence.

§ 169. The English rule.— The older English authorities answered this question in the negative, holding special stipulations by a public carrier, against liability for negligence or misconduct, illegal and void. Thus, in the Doctor and Student,[33] speaking of a common carrier, it is said: — "If he would *per se* refuse to carry it [article delivered for carriage] unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."[34] This was the law in England until about the year 1832,[35] but from that time, until the passage of the Railway

30 This is the clause inserted in passes issued by the Chicago, Milwaukee & St. Paul R. Co.

31 Old Dominion Steamship Co.'s passes.

32 Upon passes issued by the Louisville & Nashville R. Co.

33 Dial, 2, chap. 38.

34 Quoted in Noy's Maxims, 92. See, also, 2 Stephens' Commentaries, 135.

35 Peek v. North Staffordshire, &c., Ry. Co., 10 H. L. Cas. 494.

and Traffic Acts of 1854, it was held that a carrier might, by a special notice, make a contract limiting his responsibility, even in the case of gross negligence, misconduct or fraud, on the part of his servants."[36] "It is not for us," said Baron Parke, in a case decided in 1852,[37] "to fritter away the true sense and mending these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, this is not a matter for our interference, but it must be left to the legislature, who may, if they please, put a stop to this mode which carriers have adopted of limiting their liability." The railway companies were, therefore, enabled for the most part, "to evade altogether the salutary policy of the common law." In this state of the law, parliament, in 1854, passed the act entitled, "The Railway and Canal Traffic Act,"[38] which made railways liable for the negligence of themselves or their servants, notwithstanding any notice or condition to the contrary, unless the court should adjudge the conditions just and reasonable.[39] Much controversy has arisen in the courts in construing this act;[40] but it seems now to be settled that it amounts, in effect, to a restoration of the common law doctrine as held prior to the year 1832.[41]

§ 170. The rule of the Supreme Court of the United States.— The leading authority in this country upon the question, is

[36] Wyld v. Pickford, 8 M. & W. 443; Walker v. York, &c., Ry. Co., 2 El. & Bl. 750; Hinton v. Dibbin, 2 Q. B. 646; Shaw v. York, &c., Ry. Co., 13 Q. B. 347; Austin v. Manchester, &c., Ry. Co., 16 Q. B. 600; 10 C. B. 454; Chippendale v. Lancashire, &c., Ry. Co., 21 L. J. (N. S.) Q. B. 22; Carr v. Lancashire, &c., Ry. Co., 7 Exch. 707; Great Northern, &c., Ry. Co. v. Morville, 21 L. J. (N. S.) Q. B. 319; York, &c., Ry. Co. v. Crisp, 14 C. B. 527; Hughes v. Great Western, &c., Ry. Co., 14 C. B. 637; Slim v. Great Northern, &c., Ry. Co., 14 C. B. 647.

[37] Carr v. Lancashire, &c., Ry. Co., 7 Exch. 707.

[38] 17 and 18 Vict., chap. 31, § 7.

[39] 1 Fisher's Digest, 1466.

[40] Pardington v. South Wales Ry. Co., 1 Hurl. & N. 392, where Martin, B., and Bramwell, B., indicated that notwithstanding the act, special contracts with railway companies were binding, whether the conditions contained in them were reasonable or not.

[41] Peek v. North Staffordshire, &c., Ry. Co., 10 H. of L. Cas. 473; McManus v. Lancashire, &c., Ry. Co., 4 Hurl. & N. 328. "The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it." Bradley, J., In Railroad Co. v. Lockwood, 17 Wall. 364.

Railroad Co. v. Lockwood, decided by the Supreme Court of the United States, at the October term, in 1873.[42] Mr. Justice Bradley delivered the opinion of the court, which, after a very full and impartial review of the authorities, concludes as follows: — "The conclusions to which we have come are: —

"*First.* That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"*Secondly.* That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servant.

"*Thirdly.* That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

"*Fourthly.* That a drover, traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

"These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment, had we considered the plaintiff a free passenger instead of a passenger of hire."

§ 171. The New York rule.— In some of the earlier decisions of various State courts in this country, there was a tendency, as between what was denominated gross negligence, and what is called ordinary negligence, to hold that, while a carrier might lawfully stipulate, in these cases, against liability for the consequences of ordinary neglect, it was contrary to public policy to permit such a stipulation for the consequences of gross negligence.[43]

[42] 17 Wall. 357; 10 Am. Rep. 366.

[43] Wells v. New York, &c., R. Co., 26 Barb. 641; 24 N. Y. 181; Perkins v. New York, &c., R. Co., 24 N. Y. 196; Smith v. New York, &c., R. Co., 29 Barb. 132; 24 N. Y. 222; Bissell v. New York, &c., R. Co., 29 Barb. 602; 25 N. Y. 442; Poucher v. New York, &c., R. Co., 49 N. Y. 263; 10 Am. Rep. 364. In Ashmore v. Pennsylvania Steam, &c., Co., 28 N. J. Law, 180, Van Dyke, J. (p. 192), lays down the rule that "a carrier taking the exclusive custody and control of the property of another, should be allowed to make no contract by which he can justify himself in or defend himself against his own clear positive wrong, default, or misconduct, whether it arise from his own wilfulness, recklessness, incapacity, want of skill, or the failure to exact it." Kinney v. Central, &c., R. Co., 34 N. J. Law, 513; 3 Am. Rep. 265; Cole v.

But in the case from which I have just quoted,[44] and which is everywhere regarded as a controlling authority, except, possibly, in the State of New York, where the Court of Appeals refuses to be influenced by it, speaking to this point, it is said: — "We have already adverted to the tendency of judicial opinion, adverse to the distinction between gross and ordinary negligence. Strictly speaking, these distinctions are indicative, rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence; if very great care is due, and he fails to come up to the work required, it is called slight negligence; and, if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence, and this seems to be the tendency of modern authority."

§ 172. **The general American rule.**— Aside from New York, where it may now be regarded as settled that a common carrier for hire, or otherwise, may, by special contract, exempt himself from all responsibility for loss or damage, arising from the negligence of his servants, though this negligence be gross,[45] it is

Goodwin, 19 Wend. 251; 32 Am. Dec. 470, and Mr. Freeman's learned note appended, in which the authorities *pro* and *con* are very fully cited; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539; 39 Am. Dec. 398; Lawrence v. New York, &c., R. Co., 36 Conn. 63; Kimball v. Rutland, &c., R. Co., 26 Vt. 247; Mann v. Birchard, 40 Vt. 326; Illinois, &c., R. Co. v. Adams, 42 Ill. 474; Hawkins v. Great Western R. Co., 17 Mich. 57; 18 Mich. 427; Baltimore, &c., R. Co. v. Brady, 32 Md. 328; Levering v. Union, &c., R. Co., 42 Md. 88. Many of these cases were, however, decided by divided courts; some of them limit the exception to cases of slight negligence, some of them to ordinary negligence, and a few of them incline to extend the doctrine to cases of gross negligence.

[44] Railroad Co. v. Lockwood, 17 Wall. 357.

[45] Ulrich v. N. Y. Cent., &c., R. Co., 108 N. Y. 80; 15 N. E. Rep. 60; Poucher v. New York, &c., R. Co., 49 N. Y. 263; 10 Am. Rep. 364; Cragin v. New York, &c., R. Co., 51 N. Y. 61; 10 Am. Rep. 559; Bissell v. New York, &c., R. Co., 25 N. Y. 442. A special contract, exempting a carrier from liability for loss occasioned by negligence of

the general rule in this country, in both State and Federal courts, that, while a common carrier for hire, or otherwise, may, by express agreement, limit his common law liability *as an insurer* of property intrusted to him for transportation, he cannot stipulate for freedom from liability for injury or loss, resulting from the negligence of himself or his servants, nor limit his liability, as a common carrier at common law, to such injuries or losses as are caused by his own, or his agents' gross negligence. Only a very small part of the multitude of decisions of all the courts that insist upon the salutary rule can be cited here.[46] It has been held by some courts, including the

its servants, does not exempt the carrier from liability for its own negligence. Weinberg v. National S. S. Co., 57 N. Y. Super. Ct. 586; 8 N. Y. Supl. 195; Magnin v. Dinsmore, 70 N. Y. 410; 26 Am. Rep. 608; 56 N. Y. 168; Steers v. Liverpool, New York, &c., Steamship Co., 57 N. Y. 1; 15 Am. Rep. 453; Canfield v. Baltimore, &c., R. Co., 93 N. Y. 532; 45 Am. Rep. 268; 75 N. Y. 144; Mynard v. Syracuse, &c., R. Co., 71 N. Y. 183; 27 Am. Rep. 28. Where the contract provided that written losses should be presented within a month, it was held that the month did not run while the carrier was making efforts to trace and find lost goods. Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196. *Cf.* Seybolt v. Erie Ry. Co., 95 N. Y. 562, where a pass issued to a mail agent, containing a clause exempting the company from liability, was held no bar to an action, on the ground that the United States government does not give its agents authority to enter into contracts of this kind. (U. S. R. S. §§ 3997 to 4005.) See, also, Kenney v. New York, &c., R. Co., 7 N. Y. Supl. 255, where a contract between the railroad company and an express company, exonerating the former from liability for any injury to an employee of the latter, was held to confer no immunity for negligence causing the death of an express messenger who was ignorant of the agreement.

[46] Maslin v. Baltimore, &c., R. Co., 14 W. Va. 180; 35 Am. Rep. 748 [entitled to rank as a leading case, the opinion of Green, J., wherein is luminous and exhaustive]; Chicago, &c., Ry. Co. v. Chapman, 30 Ill. App. 504; Ball v. Wabash, &c., Ry. Co., 83 Mo. 574; Little Rock, &c., Ry. Co. v. Talbot, 47 Ark. 97; Missouri Pac. Ry. Co. v. Vandeventer, 26 Neb. 222; 41 N. W. Rep. 998 (Const. Neb., § 4, art. 11); Western Transit Co. v. Hosking, 19 Ill. App. 607; Chicago, &c., Ry. Co. v. Chapman (Ill.), 24 N. E. Rep. 417; Grogan v. Adams Exp. Co., 114 Penn. St. 523; 7 Atl. Rep. 134; Ortt v. Minneapolis, &c., Ry. Co., 36 Minn. 396; 31 N. W. Rep. 519; Wallingford v. Columbia, &c., R. Co., 26 S. C. 258; 2 S. E. Rep. 19; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343; 4 S. W. Rep. 689; Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166; 2 S. W. Rep. 574; Gulf, &c., Ry. Co. v. Trawick, 68 Tex. 314; 4 S. W. Rep. 567. A statute forbidding common carriers to impose restrictions of their liability is not infringed by a provision in

Supreme Court of the United States, that a common carrier may limit the *amount* of his liability for loss occurring even from his own negligence, the contract being fairly made, signed by the shipper, and the rate of freight charged being based on the

a bill of lading that the carrier shall have the benefit of any insurance to the owner on the freight. British, &c., Ins. Co. v. Gulf, &c., Ry. Co., 63 Tex. 475; 51 Am. Rep. 661; East Tenn., &c., R. Co. v. Johnston, 75 Ala. 596; 51 Am. Rep. 489; Pennsylvania R. Co. v. Riordon, 119 Penn. St. 577; 13 Atl. Rep. 324; Alabama, &c., R. Co. v. Thomas, 83 Ala. 343; 3 So. Rep. 802; Missouri Pac. Ry. Co. v. Cornwall, 70 Tex. 611; 8 S. W. Rep. 312. A carrier cannot exempt himself by contract from liability for the wilful misconduct of his servants. Ronan v. Midland Ry. Co., 47 L. R. Ir. 157; Ryan v. Missouri, &c., Ry. Co., 65 Tex. 13; 57 Am. Rep. 589; Louisville, &c., R. Co. v. Oden, 80 Ala. 38. The South Carolina statute prohibiting contracts limiting common law liability does not apply to a contract made in South Carolina by a corporation organized in another State, respecting liability for goods delivered to it in the latter State for transportation therein. Platt v. Richmond, &c., R. Co., 108 N. Y. 358. See, generally on this subject, Taylor on Private Corporations, § 352 *et seq.*; Laing v. Colder, 8 Penn. St. 479; 49 Am. Dec. 533; Empire Trans. Co. v. Wamsutta Oil Co., 63 Penn. St. 14; 3 Am. Rep. 515; Pennsylvania R. Co. v. Henderson, 51 Penn. St. 315; Jones v. Voorhees, 10 Ohio, 145; Cleveland, &c., R. Co. v. Curran, 19 Ohio St. 1; 2 Am. Rep. 362; Knowlton v. Erie Ry. Co., 19 Ohio St. 260; 2 Am. Rep. 395. Sayer v. Portsmouth, &c., R. Co., 31 Me. 228, holding that the common law liability of a common carrier may be restricted by a notice from him, brought home to the knowledge of the customer, as to the extent of the liability to be borne by the carrier. But no notice or contract can exonerate the carrier from liability for damage occasioned by his negligence or misconduct. School District v. Boston, &c., R. Co., 102 Mass. 552; 3 Am. Rep. 502; Galt v. Adams Express Co., MacArth. & Mack. 124; 48 Am. Rep. 742; Kansas, &c., R. Co. v. Simpson, 30 Kan. 645; 46 Am. Rep. 104; Chicago, &c., R. Co. v. Moss, 60 Miss. 1003; 45 Am. Rep. 428; Black v. Goodrich Trans. Co., 55 Wis. 319; 42 Am. Rep. 713. Where there is a contract limiting the liability of a common carrier of goods, the burden is on the carrier, and not on the owners, to show from what cause a loss or injury occurs. Shriver v. Sioux City, &c., R. Co., 24 Minn. 506; 31 Am. Rep. 353; Virginia, &c., R. Co. v. Sayres, 26 Gratt. 328; New Orleans, &c., Ins. Co. v. Railroad Co., 20 La. Ann. 302; Merchants', &c., Co. v. Cornforth, 3 Colo. 280; 25 Am. Rep. 757; Erie Ry. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Orndorff v. Adams Express Co., 3 Bush, 194. Express companies, so far as they are common carriers, may reasonably limit their liabilities, but public policy will not permit them, even by special contract, to be exempted for losses occasioned by the negligence

agreed valuation.[47] Whether a carrier may lawfully stipulate for exemption from liability for injuries to free passengers, and if so, to what extent, are questions concerning which the decisions are not in accord. In Pennsylvania, Ohio, Alabama, Delaware, Missouri, and Texas, such a stipulation, so far as it exempts the carrier from the consequences of his own or his servants' negligence, is invalid.[48] In Illinois, Indiana, Minnesota, and Wisconsin, the carrier may relieve himself from ordinary, but not from gross negligence.[49] In England, Canada, New York, New Jersey, Georgia, Connecticut, West Virginia, and Massachusetts, the carrier, in consideration of free passage, may contract for exemption from all liability for negligence of every kind, provided the exemption is clearly and explicitly stated.[50] The fact that a person is traveling on a free pass does

or misfeasance of themselves, or their servants. Southern Express Co. v. Crook, 44 Ala. 468; 4 Am. Rep. 140; Swindler v. Hilliard, 2 Rich. (Law) 286; 45 Am. Dec. 732; Flinn v. Phila., &c., R. Co., 1 Houst. (Del.) 472; Ohio, &c., R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; Ohio, &c., R. Co. v. Nichols, 71 Ind. 271; Graham v. Pacific R. Co., 66 Mo. 536; Rose v. Des Moines, &c., R. Co., 39 Iowa, 246; Jacobus v. St. Paul, &c., R. Co., 20 Minn. 125; 18 Am. Rep. 360; Railroad Co. v. Stevens, 95 U. S. 655.

47 Hart v. Pennsylvania R. Co., 112 U. S. 331, where the authorities *pro* and *con* are collected. We do not regard a contract limiting the right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped as a contract in any degree exempting the carrier from the consequences of his own negligence. Brown v. Wabash, &c., Ry. Co., 16 Mo. App. 568.

48 Camden, &c., R. Co. v. Bausch (Penn.), 7 Atl. Rep. 731; Penn. R. Co. v. Butler, 57 Penn. St. 335; Penn. R. Co. v. Henderson, 51 Penn. St. 315; Cleveland, &c., R. Co. v. Curran, 19 Ohio St. 1; Mobile, &c., R. Co. v. Hopkins, 41 Ala. 486; Flinn v. Phila., &c., R. Co., 1 Houst. (Del.) 469; Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228; Gulf, &c., Co. v. McGown, 65 Tex. 640.

49 Ill. Cent. R. Co. v. Read, 37 Ill. 484; Ill. Cent. R. Co. v. Morrison, 19 Ill. 136; Ind. Cent. R. Co. v. Mundy, 21 Ind. 48; O. & M. R. Co. v. Selby, 47 Ind. 471; Jacobus v. St. Paul, &c., Ry. Co., 20 Minn. 125; Annas v. Milwaukee, &c., R. Co., 67 Wis. 46; 57 Am. Rep. 388, and the note.

50 McCawley v. Furness R. Co., L. R. 8 Q. B. 57; Hall v. N. E. R. Co., 10 Q. B. 437; Duff v. G. N. R. Co., 4 L. R. Ir. 178; Alexander v. Toronto, &c., Ry. Co., 33 Upper Canada, 474. See New York cases cited in § 172, *supra;* Kinney v. Cent. R. Co., 32 N. J. Law, 407; 34 N. J. Law, 513; Western, &c., R. Co. v. Bishop, 50 Ga. 465; Griswold v. N. Y., &c., R. Co., 53 Conn. 371, case of a minor; B. & O. R. Co. v. Skeels, 3 W. Va. 556; Quimby v. Boston & A. R. Co.,

not necessarily subject him to conditions of this kind contained therein. A drover traveling free for the purpose of caring for stock for the transportation of which freight is paid, has been uniformly held to be a passenger for hire.[51]

§ 173. Passenger's negligence as to baggage.—The common law makes the carrier an insurer of the passenger's baggage, and he is answerable for all loss or damage to it, not occasioned by act of God or the public enemy, although the owner accompanies the property.[52] But in order to this liability there must be a delivery of the baggage to the carrier — a real bailment. The passenger must wholly part with the possession of his lug-

150 Mass. 365. Children of such an age that they are carried free, if accompanied by adults, are within 1 Pub. Stats. Mass., chap. 112, § 212, making a railroad company liable in damages to passengers whose lives are lost in railroad accidents, etc., though the accompanying adults are riding on free passes. Littlejohn v. Fitchburg R. Co., 148 Mass. 478; 20 N. E. Rep. 103. See an essay, "The Rights of Gratuitous Passengers on Railways," by H. Campbell Black, Esq., 20 Cent. L. J. 485. See further, other articles on the same subject in 30 Cent. L. J. 397, note; and 29 Am. Law Reg. (N. S.) 391, note.

51 Maslin v. Baltimore, &c., R. Co., 14 W. Va. 180; 35 Am. Rep. 748; Penn. R. Co. v. Henderson, 51 Penn. St. 315; Knowlton v. Erie Ry. Co., 19 Ohio St. 260; 2 Am. Rep. 395; Railroad Co. v. Lockwood, 17 Wall. 357; 10 Am. Rep. 366; Ohio, &c., R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; Flinn v. Phila., &c., R. Co., 1 Houst. (Del.) 472; Ohio, &c., R. Co. v. Nichols, 71 Ind. 271; Railroad Co. v. Stevens, 95 U. S. 655. See, also, Camden, &c., R. Co. v. Bausch (Penn.), 7 Atl. Rep. 731.

52 Cole v. Goodwin, 19 Wend. 251; 32 Am. Dec. 470, and the note; Bomar v. Maxwell, 9 Humph. (Tenn.) 620; 51 Am. Dec. 682; Peixotti v. McLaughlin, 1 Strobh. 468; 47 Am. Dec. 563; Tower v. Utica, &c., R. Co., 7 Hill, 47; 42 Am. Dec. 36; Logan v. Pontchartrain, 11 Robinson (La.) 24; 43 Am. Dec. 199. By baggage is understood such articles of necessity or personal convenience as are usually carried by passengers for their own use. The question of what is baggage is one for the jury, under the direction of the court, based on the traveler's condition in life. Dibble v. Brown, 12 Ga. 217; 56 Am. Dec. 560. Money to the amount of $90,000 is not "luggage," which a railroad company is compelled to carry with or for a passenger. The company may insist that the money shall go *via* an express company, for which, under a special contract, the railroad company furnishes facilities. Pfister v. Central Pac. R. Co., 70 Cal. 169; Camden, &c., R. Co. v. Baldauf, 16 Penn. St. 67; 55 Am. Dec. 481; Woods v. Devin, 13 Ill. 741; 56 Am. Dec. 483.

gage, or the carrier will not be liable.[53] It is accordingly held that sleeping and parlor car companies are not, in respect of their passenger's luggage, either inn-keepers or common carriers, because the passenger in those cars does not surrender the possession of his goods.[54] This rule ceases, however, with the reason for it, and if a sleeping car company renders service similar in kind to an inn-keeper, as when a passenger places wearing apparel in the care of the porter, the company is liable if it is stolen.[55] The sleeping car company is bound to use reasonable care to guard a passenger from theft, and if, through want of such care, personal effects such as he may reasonably carry with him are stolen, the company is liable.[56] It cannot avoid liability by posting in a car a notice disclaiming

[53] Wilkins v. Earl, 3 Rob. 369; 19 Abb. Pr. 196; Tower v. Utica, &c., R. Co., 7 Hill, 47; 42 Am. Dec. 36; Weeks v. New York, &c., R. Co., 9 Hun, 671; 72 N. Y. 50; The R. E. Lee, 2 Abb. (U. S.) 49. Thus, a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person or placed under his pillow, is not so intrusted to the custody and control of the carrier as to make the latter liable for its loss. Clark v. Burns, 118 Mass. 275; Bergheim v. Great Eastern Ry. Co., 3 C. P. D. 221; Shirley's Leading Cases, 59; Merriam v. Hartford, &c., R. Co., 20 Conn. 354; 52 Am. Dec. 344; Railroad Co. v. Barrett, 36 Ohio St. 452.

[54] Thompson on Carriers, 530, § 20; Welch v. Pullman Palace Car Co., 16 Abb. Pr. (N. S.) 352; Pullman Palace Car Co. v. Smith, 73 Ill. 365. See, also, Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 236; Morris v. Third Ave. R. Co., 23 How. Pr. 345, and "The Responsibility of the Pullman Palace Car Company for Thefts from Passengers," by the Hon. Sterling B. Toney, of the Louisville Law & Equity Court, 19 Am. Law Rev. (N. S.) 204, in which this question is thoroughly and learnedly discussed.

[55] Pullman Palace Car Co. v. Lowe, 28 Neb. 239; 44 N. W. Rep. 226; Louisville, &c., R. Co. v. Katzenberger, 16 Lea (Tenn.) 380; 57 Am. Rep. 232. The liability of a sleeping car company for loss of property intrusted to its porter by a passenger, and whether the company is liable therefor as an inn-keeper is discussed, and many American decisions and citations from text-books bearing upon the subject are collected by W. F. Elliott, Esq., in 30 Cent. L. J. 248, note.

[56] Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267; 56 Am. Rep. 852, note; Pullman Palace Car Co. v. Pollock, 69 Tex. 120; 5 S. W. Rep. 814; Root v. N. Y. Cent. Sleeping Car Co., 28 Mo. App. 199. The company is liable only for an amount necessary for the reasonable expenses of the passenger's journey. Illinois Cent. R. Co. v. Handy, 63 Miss. 609; Wilson v. Baltimore, &c., R. Co., 32 Mo. App. 682.

responsibility for property in the berths, if the notice is not known to the passenger.[57] If a passenger retires from the car, even for a few minutes, leaving valuable property exposed to theft, without notice to the company's servants,[58] or goes to another part of the car for a necessary purpose, leaving a large sum of money in his vest pocket under his pillow,[59] it is such contributory negligence as will defeat a recovery for its loss; unless it be stolen by one of the company's servants, in which case the company is liable to a reasonable amount regardless of contributory negligence.[60]

§ 174. Conditions stamped or printed on checks.— Notices or conditions, stamped or printed upon a baggage check, have no effect to limit the carrier's liability, the check being no evidence of any contract. Such notices do not bind the passenger, unless his assent to the condition is shown, and accepting the check is no evidence of such assent.[61] It is not contributory negligence on the part of a passenger to take the checks that a baggage-master gives him, without examining them.[62] If the baggage miscarries and the passenger is thereby injured, he may

57 Lewis v. N. Y. Cent. Sleeping Car Co., 143 Mass. 267; Louisville, &c., R. Co. v. Katzenberger, 16 Lea (Tenn.) 380.

58 Whitney v. Pullman's Palace Car Co., 143 Mass. 243.

59 Wilson v. Baltimore, &c., R. Co., 32 Mo. App. 682. See, also, Root v. N. Y. Cent. Sleeping Car Co., 28 Mo. App. 199.

60 Root v. N. Y. Cent. Sleeping Car Co., 28 Mo. App. 199. In Florida v. Pullman Palace Car Co., 37 Mo. App. 598, it was held not negligent for a passenger to leave clothing and other property in a vacant berth directly above him, though he had not purchased or secured the use of the berth.

61 Wilson v. Chesapeake, &c., R. Co., 21 Gratt. 654; Mauritz v. N. Y., &c., R. Co., 23 Fed. Rep. 765. The ticket or check is not a written contract signed by the parties. It is, at most, evidence of some existing contract, and merely goes to show that its possessor has paid the required stipend. Burnham v. Grand Trunk R. Co., 63 Me. 298; 18 Am. Rep. 220. The railroad company cannot limit its liability as an insurer of baggage by any special arrangement with the sleeping car company, because, so long as the sleeper forms part of the train, negligence on the part of the sleeping car agents is the negligence of the railway company running the train. Louisville, &c., R. Co. v. Katzenberger, 16 Lea, 380; 1 S. W. Rep. 44; Brown v. Eastern R. Co., 11 Cush. 97; Rawson v. Penn. R. Co., 48 N. Y. 212; 8 Am. Rep. 543; Madan v. Sherard, 73 N. Y. 329; 29 Am. Rep. 153.

62 Isaacson v. New York, &c., R. Co., 94 N. Y. 278; 46 Am. Rep. 142.

have his action,[63] and, when a passenger leaves the train without claiming his baggage, such an act on his part is not negligence which absolves the carrier from liability;[64] and, upon the other hand, when a passenger upon arriving at his destination, instead of trusting the carrier, as he might lawfully do, under the doctrine of the case just cited, goes forward to the baggage car, immediately upon alighting from the train, in order to look up his luggage, and assist about it, and while so engaged, is run over and killed by the negligence of the defendant's servants, it is held that an action will lie against the company, and that a plea of contributory negligence is bad. Negligence is not imputable to one who looks after his property in a lawful manner in such a case as this.[65]

§ 175. **Traveling on Sunday.**— In some of the New England courts it has been held that when one travels on Sunday, in violation of a statute which prohibits traveling on the Lord's day, except from necessity or charity, no action can be maintained for an injury thereby sustained. The violation of law involved in traveling on Sunday is, in those States, a sufficient defense to an action for damages for an injury resulting from the defendant's negligence. In Massachusetts the courts seem to proceed upon the theory of contributory negligence. Nothing could, however, be more illogical or judicially absurd. "The Massachusetts decisions upon the Sunday law," said Mr. Justice Grier, "depend upon the peculiar legislation and customs of that State more than upon any general principles of justice or law."[66] In actions of this kind, the violation of the Sunday law is, upon familiar grounds, to be regarded as an entirely collateral violation of law. It is, in no proper sense, a proximate cause of the injury complained of, and upon the general principles of law applicable to these cases, is no more a defense to an action for negligence than that the plaintiff is guilty of violating the revenue laws, or has been a smuggler, or is, upon general principles, a bad and unworthy person. It is not generally necessary for the plaintiff to establish the fact that he is a nice man, when he has been hurt through the carelessness of

[63] Estes v. St. Paul, &c., R. Co., 7 N. Y. Supl. 863.

[64] Cary v. Cleveland, &c., R. Co., 29 Barb. 47.

[65] Ormond v. Hayes, 60 Tex. 180.

[66] Philadelphia, &c., R. Co. v. Towboat Co., 23 How. (U. S.) 209.

a railway company; and that his character is not what it might be, is just as good a defense to such an action, in justice and right reason, as that he is riding in the cars on a Sunday.[67] But, notwithstanding the indefensibility of such a rule, it is, nevertheless, stoutly maintained.

§ 176. **Bosworth v. Inhabitants of Swansey.**— The earliest case in which it was declared is Bosworth v. Inhabitants of Swansey,[68] wherein the opinion was written by Chief Justice Shaw. In this case it is held that a person who is injured by reason of a defect in a highway, over which he is traveling on secular business, on Sunday, cannot recover of the town, without proof that he is traveling from necessity or charity, the burden being on him to show that his own fault did not concur in causing the injury.[69] In Stanton v. Metropolitan Street Railway Co.,[70] the rule was applied to the case of one riding upon a street car upon the Sabbath day; and it was held that such a passenger, who was riding for the purpose of making a visit, was violating the law, and therefore was not entitled to redress for an injury which he would not have received but for such violation.[71] So, also, in cases of accident to persons traveling, on Sunday, upon railway trains, unless the plaintiff can make it appear that his errand was one of necessity or charity, he cannot recover.[72] The logic of these cases is, that a person who receives an injury while traveling, which he could not have re-

[67] Sutton v. Town of Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534; Schmid v. Humphrey, 48 Iowa, 652; 30 Am. Rep. 414; Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670; Cooley on Torts, § 157; Wharton on Negligence, § 331.

[68] 10 Metc. 363; 43 Am. Dec. 441.

[69] In Jones v. Inhabitants of Andover, 10 Allen, 18, a similar case was similarly decided.

[70] 14 Allen, 485.

[71] See, also, Hamilton v. Boston, 14 Allen, 475, for an extended discussion of this rule, and a history of the Massachusetts legislation in point.

[72] Feital v. Middlesex R. Co., 109 Mass. 398; 12 Am. Rep. 720. *Cf.* with this case, Bennett v. Brooks, 9 Allen, 118; Commonwealth v. Sampson, 97 Mass. 407; Hamilton v. Boston, 14 Allen, 475. In this last case it was held that a person walking a short distance in a public highway, simply for exercise and to take the air, on the evening of the Sabbath, was not violating the statutes, and could maintain an action for injuries sustained because of a defect in the highway. Doyle v. Lynn, &c., R. Co., 118 Mass. 195; 19 Am. Rep. 431; Bucher v. Fitchburg R. Co., 131 Mass. 156; 41 Am. Rep. 216; Day v. Highland St. R. Co., 135 Mass. 113; 46 Am. Rep. 447.

ceived if he had not been traveling, contributes[73] to the injury by the act of traveling, and that he is, therefore, bound to show his right to travel, in order to show that his own fault did not concur in causing his injury. The validity of this reasoning depends on the validity of the assumption that the act of traveling is a contributory or concurring cause of injury. Is the assumption just? Is not the act of traveling to be regarded rather as a condition than as a cause of the injury? or, to state the question in another way, is not the injury to be regarded rather as an incident than as an effect of the traveling?[74]

§ 177. Rule in Vermont, Maine, and elsewhere.— This is peculiarly a Massachusetts doctrine,[75] but it also obtains in Vermont[76] and in Maine.[77] It is, however, denied with emphasis in Rhode Island,[78] and in New Hampshire,[79] and finds no countenance outside of New England.[80] The question of the effect of Sunday traveling upon the plaintiff's right to recover in case of

[73] In Hall v. Corcoran, 107 Mass. 251, it is expressly declared that the illegal traveling of the plaintiff on Sunday "necessarily contributed" to his injury. But see, also, McGrath v. Merwin, 112 Mass. 467; 17 Am. Rep. 119.

[74] Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670.

[75] Phila., &c., R. Co. v. Phila., &c., Towboat Co., 23 How. (U. S.) 209. Where the cause of action arises in Massachusetts the adjudications of the Supreme Court of that State are followed by the Supreme Court of the United States as the local law, regardless of its own views on the subject. Bucher v. Cheshire R. Co., 25 U. S. 555.

[76] Johnson v. Irasburgh, 47 Vt. 28; 19 Am. Rep. 111.

[77] Hinckley v. Penobscot, 42 Me. 89; Cratty v. Bangor, 57 Me. 423; Morton v. Gloster, 46 Me. 420; Bryant v. Biddeford, 39 Me. 193; Davidson v. Portland, 69 Me. 116; 31 Am. Rep. 253.

[78] Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670.

[79] Dutton v. Weare, 17 N. H. 34; 43 Am. Dec. 590; Corey v. Bath, 35 N. H. 351; Norris v. Litchfield, 35 N. H. 271; Frost v. Hull, 4 N. H. 153; Allen v. Deming, 14 N. H. 133.

[80] Phila., &c., R. Co. v. Phila., Towboat Co., 23 How. (U. S.) 209; Smith v. New York, &c., R. Co., 46 N. J. Law, 7; Delaware, &c., R. Co. v. Trautwein, 52 N. J. Law, 169; 19 Atl. Rep. 178; Sutton v. Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534; Mohney v. Cook, 26 Penn. St. 342; Schmid v. Humphrey, 48 Iowa, 652; 30 Am. Rep. 414; Carroll v. Staten Island R. Co., 58 N. Y. 126; 17 Am. Rep. 221; Platz v. City of Cohoes, 89 N. Y. 219; 42 Am. Rep. 286. *Cf.* State v. Railroad Co., 24 W. Va. 783; 49 Am. Rep. 290; State v. Baltimore, &c., R. Co., 15 W. Va. 362; 36 Am. Rep. 803; Commonwealth v. Louisville, &c., R. Co., 80 Ky. 291; 44 Am. Rep. 475; Phila., &c.,

injury through the negligence of another, has, in the courts of New England, very frequently arisen in actions brought against towns or cities for defects in highways. These cases are considered in the following chapter.[81] This defense has also occasionally availed the railway corporations of New England in actions brought against them for injuries to persons at railway crossings.[82] Mr. Irving Browne, in his Humorous Phases of the Law,[83] has set forth the law upon this general question in an entertaining and instructive fashion. The industrious reader will refer to it.

R. Co. v. Lehman, 57 Md. 409; 40 Am. Rep. 415; Yonoski v. State, 79 Ind. 393; 47 Am. Rep. 614; McGatrick v. Wason, 4 Ohio St. 566; State v. Goff, 20 Ark. 289; Whitcomb v. Gilman, 35 Vt. 297; Connolly v. City of Boston, 117 Mass. 64; 19 Am. Rep. 396; Gorman v. Lowell, 117 Mass. 65; Smith v. Boston & Maine R. Co., 120 Mass. 490; 21 Am. Rep. 538; McClary v. Lowell, 44 Vt. 116; 8 Am. Rep. 366; Crossman v. City of Lynn, 121 Mass. 301.

81 *Vide, infra,* § 261 *et seq.*

82 Smith v. Boston, &c., R. Co., 120 Mass. 490. See *infra,* § 299, note, as to the right of a servant to maintain an action against the master for injuries suffered while laboring on Sunday.

83 Chap. II. See, also, an essay on "Rights of a Person Suffering Injury when Violating the Sunday Law," 21 Cent. L. J. 525.

CHAPTER VIII.

THE RAILWAY COMPANY IN ITS RELATION TO STRANGERS.

§ 178. Duty of a public carrier to persons lawfully upon its premises but who are neither passengers nor employees.
179. The rule further stated.
180. Duty of the public at railway crossings.
181. The duty to look and listen.
182. Rule of "stop, look and listen."
183. Where the view is obstructed.
184. Duty of one riding with another.
184a. Irregular trains.
184b. Application of rule to passengers.
184c. Rule as to bicyclists.
185. Failure of the railway company to give signals — Duty of person crossing track.
186. Right of traveler to assume that signals will be given.
187. Right of a trespasser.
188. Plaintiff's ignorance no justification for his carelessness.
189. The rule illustrated.
190. Flagmen, gatemen, &c.
191. Care required of railroad when view is obstructed.
192. Crossings at grade.
193. Duty of care.
194. Duty of the railway.
195. Vigilance of one crossing a track must be proportionate to the danger.
§ 196. The rule summarized.
197. Plaintiff deaf or intoxicated.
198. Trespassers on a railway track—The Pennsylvania rule.
199. Judge Gibson's statement of the rule.
200. The Pennsylvania rule further stated.
201. The modified rule as to trespassers.
202. Duty of trespasser.
203. The rule summarized.
204. Children as trespassers on railroad property.
205. The general rule.
206. The rule illustrated.
207. The turn-table cases.
208. The Minnesota case.
209. Other cases which follow this rule.
210. The contrary rule.
210a. Same subject — Cars left across street.
211. Walking along a railway track.
212. Where the track is a *quasi* public way.
213. The English rule.
214. Further statement of the rule in the United States.
215. The duty of the railway to the trespasser after the injury.
216. Various other acts of trespass upon railway property.
217. Flying switches.

§ 178. Duty of a public carrier to persons lawfully upon its premises, but who are neither passengers nor employees.—The common carrier of passengers is, as we have seen,[1] bound to

[1] § 144, *supra*.

exercise great or extraordinary care to the end that those who entrust themselves to him as his passengers may be safe, but as to all other persons with whom he deals, the carrier is not held to so high a degree of responsibility. Toward them he must exercise that measure of circumspection which we call ordinary care, and which, as a rule, all men are held bound to exercise toward all other men with whom they come in contact. When one comes lawfully upon my premises, I owe him the duty of ordinary care;[2] but I owe but slight care to mere trespasser.[3]

§ 179. The rule further stated.— A railway company, accordingly, is bound to exercise ordinary care toward all persons who

[2] Foss v. Chicago, &c., Ry. Co., 33 Minn. 392; Watson v. Wabash, &c., Ry. Co., 66 Iowa, 164; Chicago, &c., Ry. Co. v. Goebel, 119 Ill. 515; 10 N. E. Rep. 369. Cases where teamsters recovered for injuries suffered while unloading cars. Shelley's Admr. v. Cincinnati, &c., R. Co., 85 Ky. 224; 3 S. W. Rep. 157; Hollender v. New York, &c., R. Co., 14 Daly, 219; 19 Abb. N. C. 18; Owens v. Pennsylvania R. Co., 41 Fed. Rep. 187; Pennsylvania Co. v. Backes, 133 Ill. 255; 24 N. E. Rep. 563. One who, having business with the company's freight department, is struck by a car while he is standing on a track in the drilling-yard with his back toward the only direction of danger, is guilty of contributory negligence. Diebold v. Pennsylvania R. Co., 50 N. J. Law, 478; 14 Atl. Rep. 576; Toledo, &c., R. Co. v. Grush, 67 Ill. 262; 16 Am. Rep. 618; Tobin v. Portland, &c., R. Co., 59 Me. 183; 8 Am. Rep. 415; McDonald v. Chicago, &c., R. Co., 26 Iowa, 124 (by Dillon, C. J.); Caswell v. Boston, &c., R. Co., 98 Mass. 194. "This is not a question of privity of contract, but of obligation, under which the owners of real estate lie to all who are induced by the use which such owners make of their property to enter upon it for the transaction of business," said Barrows, J., in Campbell v. Portland Sugar Co., 62 Me. 552, 564; 16 Am. Rep. 503; Wendell v. Baxter, 12 Gray, 494; Pittsburgh v. Grier, 22 Penn. St. 54; 60 Am. Dec. 65; McKone v. Michigan, &c., R. Co., 51 Mich. 601; 47 Am. Rep. 596; Doss v. Missouri, &c., R. Co., 59 Mo. 27; 21 Am. Rep. 371; Louisville, &c., R. Co. v. Wolfe, 80 Ky. 82; Cooley on Torts, 604-607; Bennett v. Louisville, &c., R. Co., 102 U. S. 577.

[3] Pittsburgh, &c., R. Co. v. Bingham, 29 Ohio St. 365; 23 Am. Rep. 751; Sweeny v. Old Colony, &c., R. Co., 10 Allen, 372; Gillis v. Pennsylvania R. Co., 59 Penn. St. 129; Severy v. Nickerson, 120 Mass. 306; 21 Am. Rep. 514, where a laborer, employed in loading ice on board a vessel, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway, and broke his leg. Held, that he was a mere intruder, and that the owners of the vessel, not having been guilty of any active misconduct, were not liable. Illinois, &c., R. Co. v. Godfrey, 71 Ill. 500; 22 Am. Rep. 112. See, also, § 50, *supra*.

come about its premises, upon their proper business. There is an implied invitation to the public to do business with the railroad, and out of this implied invitation arises, on the one hand, the right which the public has to go upon the premises of the railway company, in the usual manner, for purposes of business, and, on the other hand, the duty of the company toward persons of this description.[4] When persons cross a railway track at a regular crossing upon the highway, they are neither passengers nor employees, nor are they upon the premises of the railway company by virtue of the implied invitation to which I have just referred, and under which persons so upon the company's premises are protected, but, nevertheless, they are lawfully upon the track, and the railway company is bound to exercise toward them the full measure of ordinary care. This is a duty not springing out of any contract, express or implied, as in the relations to which I have referred, but an obligation imposed upon the railway company by the rules of civil society. The passenger has his action for breach of contract, and so has the employee, when either of them suffer by reason of the company's neglect,[5] but, when one is carelessly run down at a crossing, by a railway train, he brings an action sounding in tort, because the company has, by its negligence, violated one of the rules of civil order. The railway company owes him the duty of ordinary care,[6] and when it fails to exercise that measure of carefulness, the injured person may have his action.

§ 180. Duty of the public at railway crossings.— A railroad crossing is itself a notice of danger,[7] and any person approaching it is bound to exercise that degree of care which the dan-

[4] See, also, generally, the cases cited *supra*.

[5] Each may, moreover, of course, have an action in tort.

[6] The care and skill required in handling an engine at a crossing are not such as the "most" prudent, but such as the "mass" of prudent persons are accustomed to use in like business. Houston, &c., Ry. Co. v. Brin, 77 Tex. 174; 13 S. W. Rep. 886; Gulf, &c., Ry. Co. v. Hodges, 76 Tex. 90; 13 S. W. Rep. 64. See, also, International, &c., R. Co. v. McDonald, 75 Tex. 41; 12 S. W. Rep. 860. Where a team is frightened by the needless and reckless, willful or wanton sounding of the whistle, the negligence of the traveler in driving so close to the track as to cause his team to be frightened by the cars in no way affects his right to recover. Wabash R. Co. v. Speer, 156 Ill. 244, 251-252.

[7] Pyle v. Clark, 49 U. S. App. 476; 79 Fed. Rep. 744; Missouri Pacific Ry. Co. v. Moseley, 12 U. S. App. 601; 57 Fed. Rep. 921; Warner v. B. & O. R. Co., 7 App. D. C. 79.

gerous character of the place requires of a person of ordinary prudence.[8] When a diligent use of the senses would have avoided the injury, a failure to use them is, under ordinary circumstances, contributory negligence, and will be so declared by the court.[9] And this general rule demands that a vigilant use be made of the sense of sight and the sense of hearing.[10] If a

[8] Clark v. Boston & Maine R. Co., 164 Mass. 434, 438; 41 N. E. Rep. 666; Omaha, &c., Ry. Co. v. Talbot, 48 Neb. 627; 67 N. W. Rep. 599; Lake Shore, &c., Ry. Co. v. McIntosh, 140 Ind. 261; 38 N. E. Rep. 476; Butcher v. W. Va. & P. R. Co., 37 W. Va. 180; 16 S. E. Rep. 457.

[9] Pyle v. Clark, 49 U. S. App. 476; 79 Fed. Rep. 744.

[10] C., N. O. & T. P. Ry. Co. v. Farra, 31 U. S. App. 306, 316; 66 Fed. Rep. 496; Chase v. Maine Central R. Co., 167 Mass. 383, 387; 45 N. E. Rep. 911; Wagner v. Truesdale, Minn. 436, 438; Missouri Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. Rep. 857; Wichita, &c., R. Co. v. Davis, 37 Kan. 743; 16 Pac. Rep. 78; Daniel v. Metropolitan Ry. Co., 5 H. L. 45; L. R. 3 C. B. 591; State v. Maine Central R. Co., 76 Me. 357; 49 Am. Rep. 622; Phila., &c., R. Co. v. Stebbing, 62 Md. 504; Cleveland, &c., R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. Rep. 633; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; 42 Am. Rep. 227; Karle v. Kansas, &c., R. Co., 55 Mo. 476; Kennedy v. North Mo. R. Co., 36 Mo. 351; Whalen v. St. Louis, &c., R. Co., 60 Mo. 323; McGrath v. Hudson River R. Co., 32 Barb. 144; 19 How. Pr. 211; 59 N. Y. 468; 17 Am. Rep. 359; Bernhardt v. Rensselaer, &c., R. Co., 1 Abb. App. Dec. 131; 32 Barb. 165; 18 How. Pr. 427; 19 How. Pr. 199; Beisegel v. New York, &c., R. Co., 14 Abb. Pr. (N. S.) 29; 40 N. Y. 9; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. New York, &c., R. Co., 52 N. Y. 215; Central, &c., R. Co. v. Moore, 24 N. J. Law, 824; Indianapolis, &c., R. Co. v. Stout, 53 Ind. 143; Chicago, &c., R. Co. v. Jacobs, 63 Ill. 178; Chicago, &c., R. Co. v. Kusel, 63 Ill. 180; Continental Improvement Co. v. Stead, 95 U. S. 161; Cooley on Torts, 673. In Giberson v. Bangor & Aroostook R. Co., 89 Me. 337, 343-344; 36 Atl. Rep. 400, it was said:—"The obvious peril of collision at such crossings requires that the traveler upon the common road, when approaching a railroad crossing, should exercise a degree of care commensurate with the peril. He should bear in mind that he is approaching a railroad crossing, and that a train or locomotive may also at the same time be approaching the same crossing at great speed. He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near. He should, when near or at the crossing, look and listen,— not simply with physical eyes and ears but with alert and intent mind,— that he may actually see or hear if a train or locomotive be approaching. He should not venture upon the track or crossing until it is made reasonably plain that he can go over without risk of collision. Persons operating the railroad upon their

crossing is peculiarly dangerous a corresponding increase of caution is required.[11] Negligence on the part of the railroad company will not excuse the traveler for failure to use proper

part are required to give suitable signals or warnings as their trains approach crossings over common roads, and their omission to do so may subject them to penalties and damages; but the traveler upon the common road must not trust his safety entirely to the care and thoughtfulness of the railroad men. He must still exercise due care upon his own part, — must still use his own faculties to apprehend and avoid the danger. If he fail to do so and thereby plunge into a danger that he could have avoided by such care and precaution, he has no legal redress with others who were only negligent with himself. In all actions for negligence like this, the plaintiff must affirmatively prove his own freedom from contributory negligence. The mere collision is *prima facie* evidence of the plaintiff's want of due care." "A young woman in full possession of all her faculties, on a clear, bright morning, attempted to walk across a public street, where she had passed many times before. She had the right to rely upon the presence of the flagman to warn her of any danger, and she had a right to assume that trains would not be operated at such a place with such an unusual rate of speed, and that proper signals would be given to persons using the street of the approach of a train by ringing the bell and sounding the whistle. It is obvious that the conduct of the deceased in attempting to cross under such circumstances must be judged by a different rule than was applied to an aged person crossing at a private way without any assurance of safety except his ability to hear and to see, which it appears was much impaired. It cannot, we think, be said as matter of law that the deceased failed to observe ordinary care and prudence in attempting to cross under the circumstances disclosed by this record." McNamara v. N. Y. C. & H. R. R. Co., 136 N. Y. 650, 653; 32 N. E. Rep. 765. The fact that the team of the deceased was running away at the time he was struck and killed on a railroad crossing by a locomotive will not render the company liable for his death, in the absence of evidence to show that the team was frightened by any act or omission on the part of the company's servants. Lane v. Missouri Pacific Ry. Co., 132 Mo. 4; 33 S. W. Rep. 645, 1128. In case of a death by accident at a railroad crossing it must often happen that the circumstances immediately preceding it, and the acts and conduct of the deceased are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify. Rodrian v. N. Y., N. H. & H. R. Co., 125 N. Y. 526, 529; 26 N. E. Rep. 741. See Southern Ry. Co. v. Bryant's Admr., 95 Va. 212; 28 S. E. Rep. 183.

[11] C., N. O. & T. P. Ry. Co. v. Farra, 31 U. S. App. 306, 316-317; 66 Fed. Rep. 496.

care, and if his failure to do so in any way contributes to the injury, he cannot recover.[12] Any qualification of this rule pertains only to cases where the company has notice of the dangerous situation of the party injured in time to avoid the collision by exercising ordinary care, and is guilty of such conduct as will imply an intent or willingness to cause an injury.[13]

§ 181. The duty to look and listen.— In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track; and a failure to do so is contributory negligence which will bar a recovery. A multitude of decisions of all the courts enforce this reasonable rule.[14] It is also consonant with right reason and the dic-

[12] See cases above cited. The fact that the train was running at an unusual rate of speed or was late does not affect the question of contributory negligence. Pepper v. Southern Pacific R. Co., 105 Cal. 389; 38 Pac. Rep. 974.

[13] Chicago, Rock Island & Pacific Ry. Co. v. Crisman, 19 Colo. 30; 34 Pac. Rep. 286; St. L., I. M. & S. Ry. Co. v. Taylor, 64 Ark. 364, 367; 42 S. W. Rep. 831.

[14] Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308; 26 N. E. Rep. 916; Rodrian v. N. Y., N. H. & H. R. Co., 125 N. Y. 526; 26 N. E. Rep. 741; Scott v. Pennsylvania R. Co., 130 N. Y. 679; 29 N. E. Rep. 289; Martin v. Little Rock & Fort Smith R. Co., 62 Ark. 156; 34 S. W. Rep. 545; St. Louis & S. W. Ry. Co. v. Dingman, 62 Ark. 245; 35 S. W. Rep. 219; C. H. & I. Ry. Co. v. Duncan, 143 Ind. 524; 42 N. E. Rep. 37; Chase v. Maine Central R. Co., 167 Mass. 383, 387; 45 N. E. Rep. 911; Romeo v. Boston & Maine R. Co., 87 Me. 540; 33 Atl. Rep. 24; Smith v. Maine Central R. Co., 87 Me. 339; 32 Atl. Rep. 967; Smith v. Norfolk & Western R. Co., 114 N. C. 728; 19 S. E. Rep. 863; Warner v. B. & O. R. Co., 7 App. D. C. 79; Pife v. Clark, 49 U. S. App. 476; Grand Trunk R. Co. v. Cobleigh, 51 U. S. App. 15, 21; 78 Fed. Rep. 784; N. Y., N. H. & H. R. Co. v. Blessing, 35 U. S. App. 208, 213; 67 Fed. Rep. 277; Clark v. Missouri Pac. Ry. Co., 35 Kan. 350; Schilling v. Chicago, &c., R. Co., 71 Wis. 255; 37 N. W. Rep. 414; Bomboy v. New York Cent., &c., R. Co., 47 Hun, 425; Pence v. Chicago, &c., Ry. Co., 63 Iowa, 746; Nosler v. Chicago, &c., Ry. Co., 73 Iowa, 268; 34 N. W. Rep. 850. The rule applies to pedestrians as well as to others. Pennsylvania R. Co. v. Aiken (Penn.), 18 Atl. Rep. 619; 25 W. N. C. 13; Pennsylvania R. Co. v. Mooney, 126 Penn. St. 244; 17 Atl. Rep. 590; 24 W. N. C. 40; Hamilton v. Delaware, &c., R. Co., 50 N. J. Law, 263; 13 Atl. Rep. 29; Howard v. Northern Cent. Ry. Co., 1 N. Y. Supl. 528. It is proper to charge that when a horse car crosses the track of a steam railroad the driver is bound to exercise the highest degree of care and prudence, the utmost skill and foresight. Coddington v. Brooklyn Crosstown R. Co., 102 N. Y. 66;

tates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in the law courts. As a general rule the omission of the traveler to look and listen is so clearly

Harris v. Minneapolis, &c., R. Co., 37 Minn. 47; 33 N. W. Rep. 12; Pennsylvania R. Co. v. Peters, 116 Penn. St. 206; 9 Atl. Rep. 317; Union Pac. Ry. Co. v. Adams, 33 Kan. 427; Lesan v. Maine Cent. R. Co., 77 Me. 85; State v. Maine Cent. R. Co., 77 Me. 538. The rule is now different in Illinois, where the question of contributory negligence is one of fact for the jury. Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. Rep. 20; Chicago, &c., Ry. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. Rep. 15; Chicago, &c., Ry. Co. v. Wilson, 133 Ill. 55; 24 N. E. Rep. 555; Griffin v. Chicago, &c., Ry. Co., 68 Iowa, 638; Chicago, &c., R. Co. v. Hedges, 105 Ind. 398; Wichita & W. R. Co. v. Davis, 37 Kan. 743; 16 Pac. Rep. 78; Dunning v. Bond, 38 Fed. Rep. 813; Guta v. Lake Shore, &c., Ry. Co., 81 Mich. 291; 45 N. W. Rep. 821; Union R. Co. v. State, 72 Md. 153; 19 Atl. Rep. 449; Clark v. Missouri Pac. Ry. Co., 35 Kan. 350; 11 Pac. Rep. 134; Reading, &c., R. Co. v. Ritchie, 102 Penn. St. 425; Gothard v. Ala., &c., R. Co., 67 Ala. 114; Chicago, &c., R. Co. v. Dimick, 96 Ill. 42; Renn. R. Co. v. Rudel, 100 Ill. 603; Peoria, &c., R. Co. v. Clayberg, 107 Ill. 644; Terre Haute, &c., R. Co. v. Clark, 73 Ind. 168; Pittsburgh, &c., R. Co. v. Martin, 82 Ind. 476; Saverenz v. Chicago, &c., R. Co., 56 Iowa, 689; Funston v. C. & C. R. Co., 61 Iowa, 452; Wheelwright v. Boston, &c., R. Co., 135 Mass. 225; Johnson v. Chicago, &c., R. Co., 77 Mo. 546. A person who voluntarily exposes himself to such dangers as this, from which he might have saved himself by the proper use of his senses, contributes directly to his own death, and no cause of action lies for the injury. Galveston R. Co. v. Bracken, 59 Tex. 71; Galveston, &c., R. Co. v. Graves, 59 Tex. 330; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; Field v. Chicago, &c., R. Co., 4 McCrary, 593; Tully v. Fitchburg R. Co., 134 Mass. 499; Kelly v. Hannibal, &c., R. Co., 75 Mo. 138; Powell v. Missouri Pac. R. Co., 76 Mo. 80; Randall v. Conn., &c., R. Co., 132 Mass. 499; Schofield v. Chicago, &c., R. Co., 2 McCrary, 268; Plummer v. Eastern R. Co., 73 Me. 591; Haas v. Grand Rapids, &c., R. Co., 47 Mich. 401; Penn., &c., R. Co. v. Rathgeb, 32 Ohio St. 66; Henze v. St. Louis, &c., R. Co., 71 Mo. 636. When, however, the plaintiff has looked and listened for a train, the duty he owes to the railroad company is performed. He need not, even if the information is easily available, inquire as to the schedules or the time when trains are expected to pass. South. Ala. R. Co. v. Thompson, 62 Ala. 494; Baltimore, &c., R. Co. v. Whiteacre, 35 Ohio St. 627; Dublin, &c., Ry. Co. v. Slattery, 3 L. R. App. Cas. 1155; Stubley v. London Ry. Co., L. R. 1 Exch. 13; Cliff v. Midland Ry. Co., 5 Q. B. 258; Telfer v. North, &c., R. Co., 30 N. J. Law, 138; State v. Manchester R. Co., 52 N.

a want of ordinary care, that it constitutes contributory negligence as a matter of law,[15] but it cannot be said that such failure will always defeat a recovery, for circumstances may, and sometimes do, exist which excuse the omission.[16]

H. 258; Webb v. Portland, &c., R. Co., 57 Me. 117; McCall v. Railroad Co., 54 N. Y. 642; Gillespie v. City, 54 N. Y. 468; Belton v. Baxter, 54 N. Y. 245; Penn. R. Co. v. Beale, 73 Penn. St. 504; 13 Am. Rep. 753; Wilson v. Charlestown, 8 Allen, 138; Allyn v. Boston, &c., R. Co., 105 Mass. 77; DeArmand v. New Orleans, &c., R. Co., 23 La. Ann. 264. So, if the plaintiff thoroughly knew the time-table, and had every reason to believe that no train was due for an hour at least, still he would be required to make use of his eyes and ears so far as he had an opportunity to do so. Wilcox v. Rome, &c., R. Co., 39 N. Y. 358; Baxter v. Troy, &c., R. Co., 41 N. Y. 502; North Penn. R. Co. v. Heileman, 49 Penn. St. 60; Hanover, &c., R. Co. v. Coyle, 55 Penn. St. 396; St. Louis, &c., R. Co. v. Manly, 58 Ill. 300; Illinois, &c., R. Co. v. Baches, 55 Ill. 379; Chicago, &c., R. Co. v. Sweeney, 52 Ill. 325; Chicago, &c., R. Co. v. Gretzner, 46 Ill. 74; Penn. Canal Co. v. Bentley, 66 Penn. St. 30; Lehigh Valley R. Co. v. Hall, 61 Penn. St. 361; Baltimore, &c., R. Co. v. Breinig, 25 Md. 378; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 274; Kelly v. Hendrie, 26 Mich. 255. A plaintiff so failing to make use of his senses, can only recover when the railroad company has been guilty of such conduct as to imply an intent or willingness to cause the injury. Bellefontaine R. Co. v. Hunter, 33 Ind. 335; Brown v. Milwaukee, &c., R. Co., 22 Minn. 165; Ernst v. Hudson, &c., R. Co., 39 N. Y. 61; Stackus v. New York, &c., R. Co., 79 N. Y. 464; Chicago, &c., R. Co. v. Kusel, 63 Ill. 180, note; Chicago, &c., R. Co. v. McKean, 40 Ill. 218; Chicago, &c., R. Co. v. Still, 19 Ill. 499; Railroad Co. v. Houston, 95 U. S. 697; Linfield v. Old Colony R. Co., 10 Cush. 562; Chicago, &c., R. Co. v. Hatch, 79 Ill. 137; Whitney v. Maine, &c., R. Co., 69 Me. 208; Grows v. Maine, &c., R. Co., 67 Me. 412; Bohan v. Milwaukee, &c., R. Co., 58 Wis. 30. But see Copley v. New Haven, &c., R. Co., 136 Mass. 6, where the party injured, being a girl sixteen years of age, the court held that the burden of proof was on the defendant to show that the girl was guilty of gross negligence. Wendell v. New York, &c., R. Co., 91 N. Y. 420; Baughman v. Shenango, &c., R. Co., 92 Penn. St. 335; 37 Am. Rep. 690; Schofield v. Chicago, &c., R. Co., 114 U. S. 615; Moore v. C., St. P. & K. C. Ry. Co., 102 Iowa, 595; 71 N. W. Rep. 569.

[15] It is now considered that it is not necessary to leave it to the jury whether a prudent man would look and listen before attempting to cross a railroad track, and it is the duty of the court to declare that a failure to look and listen is negligence. Pyle v. Clark, 49 U. S. App. 476; 79 Fed. Rep. 744.

[16] Clark v. Boston & Maine R. Co., 164 Mass. 434, 438-439; 41 N. E. Rep. 666; Banning v. Chicago, R. I. & P. Ry. Co., 89 Iowa, 74; 56 N. W. Rep. 277; Feeny v. Long Island R. Co., 116 N. Y. 375, 380;

§ 182. Rule of "Stop, look and listen."— In Pennsylvania the traveler is not only required to look and listen, but must come

22 N. E. Rep. 402; Van Auken v. C. & W. M. Ry. Co., 96 Mich. 307; 55 N. W. Rep. 071. Plummer v. East., &c., R. Co. 73 Me. 591; Shaber v. St. Paul, &c., R. Co., 28 Minn. 103; Omaha, &c., R. Co. v. O'Donnell, 22 Neb. 475; 35 N. W. Rep. 235; Kimball v. Friend's Exr., 95 Va. 125; 27 S. E. Rep. 901. "It does not follow absolutely, and under every circumstance, that because a person could, by looking and listening, see a train, he is negligent in not seeing or hearing it, if there are surrounding circumstances that may prevent him from seeing or hearing." Chicago, St. Louis & Pittsburgh R. Co. v. Spilker, 134 Ind. 380; 33 N. E. Rep. 280; 34 N. E. Rep. 218. "We do not hold that in every case where a traveler fails to look and listen, and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only where it appears from the evidence that he might have seen had he looked, and might have heard had he listened, that his failure to look and listen, will necessarily constitute negligence." Martin v. Little Rock & Fort Smith Ry. Co., 62 Ark. 156-159; 34 S. W. Rep. 545. "Failure to 'look and listen' may sometimes amount to a want of ordinary care. In some circumstances, it may be so pronounced by the court, if the case is sufficiently plain; but the standard by which such action or non-action is to be measured is that degree of care which, in the opinion of the court, should characterize a person of ordinary prudence in the same situation. That care obviously varies with the circumstances, and is generally to be ascertained by the aid of that common experience which the triers of fact bring to bear upon it. In the case at bar the court was right in leaving it to the jury to say whether plaintiff's conduct was or was not consistent with ordinary prudence." Easley v. Missouri Pacific Ry. Co., 113 Mo. 236, 245; 20 S. W. Rep. 1073. "These obligations to stop and look and listen must receive a reasonable construction and interpretation. It cannot be required that a person shall always stop, or always look, or always listen; but the requirement is that these precautions shall be so observed as to free the party from all negligence. A party cannot be required, for instance, to stop or listen when, on approaching a crossing, he can see a reasonable distance up or down the track, so as to be certain he runs no risk in crossing. He cannot be required to listen if he is deaf, or the noise of the surroundings is so great as to preclude all possibility of hearing. He cannot be held liable for negligence in failing to look when his view is absolutely cut off or so obstructed as that he can see nothing until he is entering or has entered on the track. A person cannot be deemed negligent because he fails to stop at each track where there is a series of parallel tracks so near to each other that he can see as effectually by stopping once, or by not stopping at all, as by making continuous or repeated stops. So, too, it could not be deemed negligence for a traveler to fail to observe any of these

to a halt for this purpose.[17] In a late case it was said by the Supreme Court of that State, "The rule of 'stop, look and

cautions in cases where a railroad has a flagman at a crossing, and he gives the signal for crossing in safety, nor when in other ways the railroad throws him off his guard, by failing to exercise legal requirements and usual observances and ordinary cautions, and thus leads him into real danger under an apparent aspect of safety." Iron Mountain R. Co. v. Dies (Tenn.), 41 S. W. Rep. 860. "The same author says that the overwhelming weight of authority affirms the duty to look and listen as a rule of law, and if this duty is omitted the court is bound to instruct, as matter of law, that a verdict be returned in favor of the railroad company, except in cases of a peculiar nature, where there are facts excusing the performance of the duty. 3 Elliott on Railroads, § 1166. And, formerly, this court, in passing upon questions both of law and fact, frequently prescribed the same duty; but it has since been repeatedly held that it cannot be said, as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances excusing him from doing so. A rule of law must necessarily be fixed and certain, so as to constitute a guide for the conduct of the traveler and enable him to know exactly what he must do, and also a certain rule for the court; but there can be no such certain guide in each case if there may be facts which will excuse the traveler or justify a different course of conduct from that fixed by the rule. The traveler may not be in fault in failing to look or listen if misled without his fault, or the view may be obstructed by objects or by darkness, and other and louder noises may interfere with his hearing. It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact. Pennsylvania Co. v. Frana, 112 Ill. 398; Chicago & Northwestern Ry. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. Rep. 15; Terre Haute & Indianapolis R. Co. v. Voelker, 129 Ill. 540; 22 N. E. Rep. 20. The same rule, we think, should apply to an attempt to cross in smoke or dust, since it cannot be denied that there may be circumstances where a person may be misled by a gateman or flagman, or by some negligence of the railway company, or some other circumstance may excuse the attempt to cross." Chicago & Northwestern R. Co. v. Hansen, 166 Ill. 623, 627-628; 46 N. E. Rep. 1071. The trend of judicial authority in this State, except where proof of misconduct is clear and decisive, requires the court, in cases of this character, to submit to the jury the question of contributory negligence, as matter of fact, instead of deciding it as matter of law. House v. Erie R. Co., 26 App. Div. (N. Y.) 559, 560. "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remedi-

listen' before attempting to cross the tracks of a steam rail-

less because he did not look at the precise place and time, when and where looking would have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation. The presence of other and imminent dangers, the raising of gates erected by the company to guard the highway, giving assurance that the crossing was safe; these, and similar circumstances appearing, they may be considered in determining whether the person injured, who did in fact look and listen before attempting to cross the track, fairly discharged the duty imposed upon him, although it should appear that if he had looked at another instant of time, or had looked last in the direction from which the train was approaching, he would have seen it." Rodrian v. N. Y., N. H. & H. R. Co., 125 N. Y. 526, 529; 26 N. E. Rep. 741. Whether the duty imposed upon the traveler has been discharged may, and often is, a question involved in doubt. The evidence may justify opposing inferences. In such case the question is for the jury. Rodrian v. N. Y., N. H. & H. R. Co., 125 N. Y. 526, 529; 26 N. E. Rep. 741. See, also, Gulf, &c., Ry. Co. v. Anderson, 76 Tex. 244; 13 S. W. Rep. 196; International & G. N. R. Co. v. Dyer, 76 Tex. 156; 13 S. W. Rep. 377; Texas, &c., R. Co. v. Chapman, 57 Tex. 75; Houston, &c., R. Co. v. Wilson, 60 Tex. 142; Zimmerman v. Hannibal, &c., R. Co., 71 Mo. 476; Richmond & D. R. Co. v. Howard, 79 Ga. 44; 3 S. E. Rep. 426. Is a traveler precluded from recovery for an injury sustained from a collision while crossing a railroad track, unless he stops, looks and listens?" Bailey's Conflict of Judicial Decisions, 263, where the authorities on the question are collected. Decisions on failure to look and listen when crossing a railway track, and whether it is negligence as a question of law, or a question for the jury, are also collected in 39 Am. & Eng. R. Cas. 624, note, See, also, Patterson's Ry. Accident Law, p. 168.

[17] Pennsylvania R. Co. v. Beale, 73 Penn. St. 504; 13 Am. Rep. 753. In this case it was said by Sharswood, J.:—"There never was a more important principle settled than the fact of the failure to stop immediately before crossing a railroad track is negligence." See, also, Lehigh, &c., Coal Co. v. Lear (Penn.), 9 Atl. Rep. 267; Schulz v. Penn. R. Co., 5 Reporter, 376; Penn. Canal Co. v. Bentley, 66 Penn. St. 30; Penn. R. Co. v. Beale, 73 Penn. St. 504; 13 Am. Rep. 753; Penn. R. Co. v. Weber, 76 Penn. St. 157; Kelly v. Chicago, &c., R. Co., 88 Mo. 534; Baughman v. Shenango, &c., R. Co., 92 Penn. St. 335; 37 Am. Rep. 690. "The rule is now well settled in this State that one approaching a railroad crossing upon a public highway must stop, look and listen at a convenient distance from the railroad track, before venturing to go upon it. This rule is imperative. If one disregards it and suffers injury in attempting to cross, the presumption of negligence on his part is a presumption. *juris et de jure.* Having contributed to his own injury he is remediless. If the traveler complies

road is inflexible and non-observance of it is negligence *per se*."[18] But this rule has not met with general acceptance,[19] though

with the rule, and can see or hear a moving train approaching the crossing, what must he do? It follows logically from the rule now so firmly established that he must wait for the approaching train to pass. If he does not do so, he crosses at his peril. He has notice that the train is coming, he knows, he is bound to know, that trains are moved at a high rate of speed reaching and sometimes exceeding a mile in a minute. He is without exact knowledge of the actual rate at which the train he sees or hears is coming, and the only safe thing he can do is to wait. If he does not wait, but risks his safety on his own calculation of the chances that he will be able to cross the track before the train can reach him, he must not complain of the consequences if his calculation fails and disaster overtakes him. It will not do to say that a jury may review his calculation and pass upon its reasonableness. That would destroy the rule and leave the question of contributory negligence to depend upon a measure that would change with every change of jurors, and with the exigencies of every case. Seeing or hearing the approaching train the traveler is warned of his danger. To wait is safe. It is the only course he can take that is free from danger. If he goes on in the face of a known danger, without an imperious necessity compelling it, negligence is a presumption of law." Davidson v. L. S. & M. S. Ry. Co., 171 Penn. St. 3. It is a question for the jury whether he stopped at a proper place. Pennsylvania, &c., R. Co. v. Huff (Penn.), 8 Atl. Rep. 789. One who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look and listen, must be conclusively presumed to have disregarded that rule of law and common prudence, and to have gone negligently into an obvious danger. Sullivan v. New York, Lake Erie & Western R. Co., 175 Penn. St. 361; 34 Atl. Rep. 798. Where a person goes on the track of a railroad immediately in front of an approaching train at a point where nothing intervenes to obstruct his view, the court will say as matter of law that he was guilty of negligence, notwithstanding his assertion that he stopped, looked and listened, before going upon the track. Shehan v. Philadelphia & Reading R. Co., 166 Penn. St. 354; 31 Atl. Rep. 120.

[18] Omslaer v. Traction Co., 168 Penn. St. 519, 521; 32 Atl. Rep. 50.

[19] C., N. O. & T. P. Ry. Co. v. Farra, 31 U. S. App. 306, 316-317; 66 Fed. Rep. 496. In this case it was said that this rule "seems much calculated to condone carelessness and recklessness by railroad companies at public crossings where the rights and duties of the public and of the company are reciprocal. Nor are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances, as in the case at bar, where the duty is debatable and proper for the consideration of the jury." The Pennsylvania rule does not prevail in New York. Davis v. N. Y. C. & H. R. R. Co.,

some courts apply it where there is an obstruction to the view.[20] The Pennsylvania rule requires that when the traveler cannot see the track by looking out, whether from fog or other cause, he should get out, and, if necessary, lead his horse and wagon.[21]

47 N. Y. 400; Newdoerffer v. Brooklyn Heights R. Co., 9 App. Div. 66. In this case it was said: —"This hard and fast rule is justly criticised by M. C. Stuart Patterson, himself a Pennsylvanian, in his careful and useful treatise on Railway Accident Law (§ 170), where he says:—'The Pennsylvania rule goes further than that in most other jurisdictions in that it requires the person injured not only to 'look and listen' but also to 'stop,' yet in most cases one who approaches the crossing of a railway line can effectually care for his safety by looking and listening without stopping.'" In Leavenworth, &c., R. Co. v. Rice, 10 Kan. 426, it was said by Kingman, C. J.:—"The traveler on the highway is no more bound to stop when he approaches a railroad than the managers of the train are bound to stop when they approach a highway. It may be the imperative duty of either to stop when the conditions require it. * * * In most cases, as the traveler can arrest his progress easier than the railway train, it would be his duty to stop on the approach of danger. But this obligation does not arise from the superior right of the railroad, but from the conditions of the parties." See, also, Clark v. Boston & Maine R. Co., 164 Mass. 434, 438-439; 41 N. E. Rep. 666; Cleveland, &c., R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. Rep. 633; Cosgrove v. New York, &c., R. Co., 87 N. Y. 88; 41 Am. Rep. 355.

[20] C., N. O. & T. P. Ry. Co. v. Farra, 31 U. S. App. 308, 316-317; 66 Fed. Rep. 496; Chase v. Maine Central R. Co., 167 Mass. 383, 387; 45 N. E. Rep. 911; Grows v. Maine Central R. Co., 67 Me. 100; State v. Maine Central R. Co., 76 Me. 357; State v. Boston & Maine R. Co., 80 Me. 430; 15 Atl. Rep. 36; Smith v. Maine Central R. Co., 87 Me. 339; 32 Atl. Rep. 967.

[21] The recent decisions or presumptions as to stopping, looking and listening at railroad crossings are collected in 39 Am. & Eng. R. Cas. 615, note. Butler v. Gettysburg, &c., R. Co., 126 Penn. St. 160; 19 Atl. Rep. 37; Ormsbee v. Boston, &c., R. Co., 14 R. I. 102; 51 Am. Rep. 354; Brown v. Texas, &c., Ry. Co., 42 La. Ann. 350; 7 So. Rep. 682; Maryland v. Pittsburgh, &c., R. Co., 123 Penn. St. 487; 23 W. N. C. 95; 16 Atl. Rep. 623, 624; Glascock v. Central Pac. R. Co., 73 Cal. 137; 14 Pac. Rep. 518; Powell v. New York, &c., R. Co., 109 N. Y. 613; 15 N. E. Rep. 891; Harder v. Rome, &c., R. Co., 2 N. Y. Supl. 70; Bloomfield v. Burlington, &c., Ry. Co., 74 Iowa, 607; 38 N. W. Rep. 431; Freeman v. Duluth, &c., Ry. Co., 74 Mich. 86; 41 N. W. Rep. 872; Weyl v. Chicago, &c., Ry. Co., 40 Minn. 350; 42 N. W. Rep. 24; Tolman v. Syracuse, &c., R. Co., 98 N. Y. 198; 50 Am. Rep. 649; Damrill v. St. Louis, &c., Ry. Co., 27 Mo. App. 202; Irey v. Pennsylvania R. Co., 132 Penn. St. 563; 26 W. N. C. 58; 19 Atl. Rep. 341; Kohler v. Pennsylvania R. Co. (Penn.), 19 Atl. Rep. 1049; 26 W. N. C. 176;

§ 183. Where the view is obstructed.— Where the view is obstructed, or where for any other reason, it is difficult for the traveler to assure himself that no train is approaching, he is

Cones v. Cincinnati, &c., Ry. Co., 114 Ind. 328; 16 N. E. Rep. 638; Straugh v. Detroit, &c., R. Co., 65 Mich. 706; 36 N. W. Rep. 161; Chicago, &c., R. Co. v. Damerell, 81 Ill. 450; Rockford, &c., R. Co. v. Byam, 80 Ill. 528; Morse v. Erie Ry. Co., 65 Barb. 490; Haring v. N. Y., &c., R. Co., 13 Barb. 9; Benton v. Central R. Co., 42 Iowa, 192; Haines v. Illinois, &c., R. Co., 41 Iowa, 227; New Orleans, &c., R. Co. v. Mitchell, 52 Miss. 808; Gordon v. Erie Ry. Co., 45 N. Y. 660; Reynolds v. N. Y., &c., R. Co., 58 N. Y. 248; Cleveland, &c., R. Co. v. Elliott, 28 Ohio St. 340; Baltimore, &c., R. Co. v. Whittaker, 24 Ohio St. 642; Marietta, &c., R. Co. v. Picksley, 24 Ohio St. 654. The excuse that the plaintiff was absent-minded, will not avail him. His failure to look and listen will be pronounced negligence by the court. Lake Shore, &c., R. Co. v. Miller, 25 Mich. 274; Lake Shore, &c., R. Co. v. Sunderland, 2 Bradw. 307; Wilcox v. Rome, &c., R. Co., 39 N. Y. 359; Griffin v. N. Y., &c., R. Co., 40 N. Y. 34; Davis v. N. Y., &c., R. Co., 47 N. Y. 400; Butterfield v. West, &c., Ry. Co., 10 Allen, 532; Allyn v. Boston, &c., R. Co., 105 Mass. 77; Wheelock v. Boston, &c., R. Co., 105 Mass. 203; Fletcher v. Atlantic, &c., R. Co., 64 Mo. 484; Toledo, &c., R. Co. v. Goddard, 25 Ind. 185; Bellefontaine, &c., R. Co. v. Hunter, 33 Ind. 356; North Penn. R. Co. v. Heileman, 49 Penn. St. 60; Penn. R. Co. v. Beale, 73 Penn. St. 504; Baltimore, &c., R. Co. v. State, 29 Md. 252; McCall v. Railroad Co., 54 N. Y. 642; Johnson v. Chicago, &c., R. Co., 77 Mo. 546. Where, however, there is no evidence that the party injured stopped and listened, the court will not presume that he did not stop, and adjudge him guilty of negligence, but will leave the question to the jury. Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; 42 Am. Rep. 227; Schum v. Penn. R. Co., Sup. Ct. Penn. 19 Am. Law Rev. 823, 824; State v. Maine Central R. Co., 76 Me. 357; 49 Am. Rep. 622; Daniel v. Metropolitan Ry. Co., L. R. 3 C. B. 591; 5 H. L. 45. But see, *contra*, McBride v. Northern Pac. R. Co., 19 Or. 64; 23 Pac. Rep. 814, which holds that in the absence of evidence one way or the other, the presumption is that the traveler looked and listened. Guggenheim v. Lake Shore, &c., Ry. Co., 66 Mich. 150; 33 N. W. Rep. 161; Lehigh, &c., R. Co. v. Hall, 61 Penn. St. 361, where the court, *inter alia*, said:— "It is true that it was the duty of the deceased, before he attempted to cross the railroad, to stop and look both ways, and listen for approaching trains, but it does not follow that there can be no recovery for his death, in the absence of direct and positive evidence that he observed these precautions." Penn. R. Co. v. Weber, 76 Penn. St. 157; 18 Am. Rep. 407; Weiss v. Penn. R. Co., 79 Penn. St. 387; Cassidy v. Angell, 12 R. I. 447; 34 Am. Rep. 690, and the note; Railroad Co. v. Gladmon, 15 Wall. 401; Railroad Co. v. Houston, 95 U. S. 607; Dublin, &c., Ry. Co. v. Slattery, 3 App. Cas. 1155; Lewis v. New York, &c., R. Co.,

required to be particularly careful.[22] Thus if the tracks are covered by smoke which would render it impossible to distinguish an approaching train or engine, he must wait until the smoke rises before venturing to cross.[23] So, if it is raining and the noise of the vehicle, and of the rain pattering upon its top, render it difficult to distinguish the sounds, the occupant must stop and obtain a better opportunity to hear.[24] But it has been held that the omission to let down a buggy top in looking about at a crossing is not necessarily negligence.[25] Where a

5 N. Y. Supl. 313; Kain v. New York, &c., R. Co., 3 N. Y. Supl. 311. See, also, 18 Albany Law Jour. 144, 164, 184, 204; Cooley on Torts, 673; Pennsylvania R. Co. v. Beale, 73 Penn. St. 504; 13 Am. Rep. 753. In doing this, he would be acting as any prudent man under such circumstances. See, also, Shaber v. St. Paul R. Co., 28 Minn. 103.

22 Pennsylvania R. Co. v. Beale, 73 Penn. St. 504; C., H. & I. Ry. Co. v. Duncan, 143 Ind. 524; 42 N. E. Rep. 447; Clark v. Boston & Maine R. Co., 167 Mass. 383, 388; 41 N. E. Rep. 666; Chicago, &c., R. Co. v. Unney, 19 Colo. 36; 34 Pac. Rep. 288; Hayden v. M. K. & T. Ry. Co., 124 Mo. 566; 28 S. W. Rep. 74; Pepper v. Southern Pacific R. Co., 105 Cal. 389; 38 Pac. Rep. 974; Butterfield v. Western, &c., R. Co., 10 Allen, 532; Steves v. Oswego, &c., R. Co., 18 N. Y. 442; Gunn v. Wisconsin, &c., Ry. Co., 70 Wis. 203; 35 N. W. Rep. 281. Chicago, &c., R. Co. v. Still, 19 Ill. 499, holding that a person crossing a track, who could have seen the cars approach, but turned his back in that direction, and who had his ears so bandaged that he could not hear, is guilty of such negligence as will prevent his recovery for injuries, unless [here the doctrine of comparative negligence enters] he can prove a greater degree of negligence on the part of the railroad company. Hanover, &c., R. Co. v. Coyle, 54 Penn. St. 396; Elkins v. Boston, &c., R. Co., 115 Mass. 190; Harlan v. St. Louis, &c., R. Co., 64 Mo. 480; 65 Mo. 22; Moran v. Nashville, &c., R. Co., 58 Tenn. 379; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300.

23 Vahne v. N. Y. C. & H. R. R. Co., 18 App. Div. (N. Y.) 447, 457; Heaney v. Long Island R. Co., 112 N. Y. 122; 19 N. E. Rep. 422; Lortz v. N. Y. C. & H. R. R. Co., 83 Hun, 271; Manley v. N. Y. C. & H. R. R. Co., 18 App. Div. (N. Y.) 420; Piper v. N. Y. C. & H. R. R. Co., 156 N. Y. 224, 230; Oleson v. Lake Shore & Michigan Southern Ry. Co., 143 Ind. 405; 42 N. E. Rep. 736. A traveler about to cross a railroad at a public crossing is excused from the d ty of looking for approaching trains when looking would be unavailing on account of obstructions to the view. If injured in attempting to cross under such circumstances the propriety of his going upon the track is a question for the jury to determine. Southern Ry. Co. v. Bryant's Admr., 95 Va. 212; 28 S. E. Rep. 183.

24 Smith v. Maine Central R. Co., 87 Me. 339; 32 Atl. Rep. 967.

25 Stackus v. N. Y. C. & H. R. R. Co., 79 N. Y. 464.

person crossing a railroad track in a covered wagon, and having an umbrella hoisted inside as an additional protection, looked only straight ahead, he was held guilty of contributory negligence.[26] And where a traveler was so wrapped up, to protect himself from cold, that he could not hear distinctly, he was held under obligation to exercise especial care to overcome the temporary disability.[27] If either the sense of sight or hearing is impaired, or for any reason cannot be exercised to advantage, the traveler must be more vigilant in the use of the other.[28]

§ 184. Duty of one riding with another.— The rule which requires the traveler to have his senses alert to discover and avoid danger from an approaching train is not relaxed in favor of one who is being carried in a vehicle owned and driven by another; and it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if possible.[29] Thus, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, it was held, in an action brought by the administratrix of the wife, that "she had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that

[26] Allen v. Maine Central R. Co., 82 Me. 111; 19 Atl. Rep. 105.

[27] Illinois, &c., R. Co. v. Ebert, 74 Ill. 399.

[28] C., R. I. & P. Ry. Co. v. Pounds, 49 U. S. App. 476; 82 Fed. Rep. 217.

[29] Brickell v. N. Y. C. & H. R. R. Co., 120 N. Y. 290; 24 N. E. Rep. 449; Smith v. N. Y. C. & H. R. R. Co., 4 App. Div. (N. Y.) 493; Smith v. Maine Central R. Co., 87 Me. 339; 32 Atl. Rep. 967. But see Howe v. M. S. P. & S. S. M. Ry. Co., 62 Minn. 71, 81; 64 N. W. Rep. 102. In this case it was said: —"Some courts make a distinction between private conveyances and public conveyances operated by common carriers, but it seems to us that any distinction based on this ground alone is wholly indefensible on principle. Others seem to make the position of the passenger the test, holding, impliedly at least, that when he is seated away from the driver, by being separated from him by an inclosure, or by being inclosed in the carriage, is without opportunity to discover the danger, or to inform the driver of it, the rule of 'looking and listening' does not apply to the passenger, but that otherwise it does. The presence or absence of these circumstances may be, and usually would be, material evidence upon the question of law, and as a rule of universal or even general application, that in their absence the passenger is guilty of contributory negligence if he does not 'look and listen,' is in our opinion not justifiable upon either principle or reason."

the crossing was safe," and that "she was bound to look and listen."[30] But this rule is not applicable where the passenger is seated away from the driver or is separated from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it.[31]

§ 184a. Irregular trains.— The rule that a person before attempting to cross a track must look and listen is not confined to certain hours of the day or to particular hours.[32] He is required to take these precautions even though it be a time when no regular train is expected.[33]

§ 184b. Application of rule to passengers.— A passenger or intending passenger is equally with other persons bound by this rule, except where by the action of the common carrier he has been reasonably induced to believe that there is no occasion for its observance.[34]

§ 184c. Rule as to bicyclists.— In a recent case it was held by the Supreme Court of Pennsylvania, that a "bicycler's stop" by circling on a bicycle is not a stop within the meaning of the rule which requires a person approaching a railroad at a public crossing to stop, look and listen before going upon the tracks.[34a]

[30] Hoag v. N. Y. C. & H. R. R. Co., 111 N. Y. 199; 18 N. E. Rep. 648. The fact that another person who was in company with the deceased looked and listened, but did not hear or see the approaching train, does not establish that he would have failed also had he looked and listened. Wiwirowskl v. Lake Shore & Michigan Southern Ry. Co., 124 N. Y. 420; 26 N. E. Rep. 1023. Where a person approaching a railroad track in a wagon asks one on foot to go on the track and see if the track is clear, he thereby makes such person his agent, and is chargeable with his negligence. Bronson v. N. Y. C. & H. R. R. Co., 24 App. Div. (N. Y.) 262.

[31] Brickell v. N. Y. C. & H. R. R. Co., 120 N. Y. 290, 293; 24 N. E. Rep. 449.

[32] Vincent v. Morgan's Louisiana & Texas R. & SS. Co., 48 La. Ann. 933; 20 So. Rep. 207.

[33] Gilmore v. Cape Fear, &c., R. Co., 115 N. C. 657; 20 S. E. Rep. 371; Judson v. Great Northern Ry. Co., 63 Minn. 248, 254; 65 N. W. Rep. 447.

[34] Warner v. B. & O. R. Co., 7 App. D. C. 79.

[34a] Robertson v. Pennsylvania R. Co., 180 Penn. St. 43; 36 Atl. Rep. 403. In this case the court said:—"He (the decedent) was riding a bicycle, and when he came to defendant's road, which at that point had four tracks, a freight train was passing, for

§ 185. Failure of the railway company to give signals — Duty of person crossing track.—Statutes and municipal ordinances in every jurisdiction prescribe specifically the duty of railway corporations in respect to railway crossings,[35] but due care requires

which he had to wait. He did not dismount, but made what the appellant calls a "bicycler's stop" by circling on his wheel round and round at a distance of five to ten yards from the track, and when the freight train had passed he started across without dismounting, and was struck by a train coming in the opposite direction on another track. Passing by the question raised as to his ability to see the coming train from other points, it is admitted that before reaching a position of actual danger there was a space of not less than seven feet between the tool-house and the nearest track, from which an unobstructed view of the train could have been had. It was the duty of the deceased to stop there and to dismount in order to make his stop effective for the purpose of looking and listening. The real contention of the appellant is embodied in the proposition that the circling round and round constituted a legal as well as a "bicycler's stop." No such proposition can be entertained for a moment. In so circling the rider must to some extent have his attention fixed on his wheel, and at parts of the circle must have his back to the track which he is professing to watch. The law requires a full stop, not only for the sake of time and opportunity for observation, but to secure undivided attention, and the substantial and not merely perfunctory performance of the duty to look and listen. Riding round and round in large or small circles, waiting for a chance to shoot across, is not a stop at all, either in form or substance. Considering the ease of dismounting and the control of the rider over his instrument, a bicycler must under all ordinary circumstances be treated as subject to the same rules as a pedestrian. We do not say that there may not be cases of accident by broken gearing, or steep grade or other casualty which will require a modification of the application of such rules, but these cases will be exceptional, and must be decided on their own facts when they arise. The general rule to be applied requires that a bicycler must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen, in the manner required of a pedestrian." See also Sewell v. N. Y., N. H. & H. R. Co. (Mass.), 50 N. E. Rep. 541.

[35] When city ordinances prescribe certain precautions to be observed by railway companies at public crossings, they do not relieve the companies from the observance of ordinary care in particulars not mentioned in the ordinances. Wilkins v. St. Louis, &c., Ry. Co., 101 Mo. 93; 13 S. W. Rep. 893. See, also, Peoria, &c., R. Co. v. Clayberg, 107 Ill. 644; Pittsburgh, &c., R. Co. v. Yundt, 78 Ind. 373; Railroad Co. v. Lowrey, 61 Tex. 149. When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point,

a traveler or pedestrian, before crossing a railroad track, to look in each direction to ascertain whether a train is approaching, and the mere omission of the statutory signals by the trainmen does not relieve him from the imputation of negligence, if he fails on his part to look and listen. He cannot omit such a reasonable precaution in reliance upon the performance by the railroad company of its obligation to give reasonable notice of the approach of the train.[36]

not in itself a public crossing, those using the crossing are not trespassers, and the company owes the duty of reasonable care toward them. Whether such reasonable care has been exercised or not is ordinarily a question for the jury, under all the evidence. Taylor v. Del., &c., Canal Co., 113 Penn. St. 162; 8 Atl. Rep. 43; Harriman v. Pittsburgh, &c., R. Co., 45 Ohio St. 11; 12 N. E. Rep. 451; Nichols' Admr. v. Washington, &c., R. Co., 83 Va. 99; 5 S. E. Rep. 171; St. Louis, &c., Ry. Co. v. Crosnoe, 72 Tex. 79; 10 S. W. Rep. 342; Troy v. Cape Fear, &c., R. Co., 99 N. C. 298; 6 S. E. Rep. 77; Virginia M. Ry. Co. v. White's Admr., 84 Va. 498; 5 S. E. Rep. 573; Nuzan v. Pittsburgh, &c., Ry. Co., 30 W. Va. 228; 4 S. E. Rep. 242; Byrne v. N. Y., &c., R. Co., 104 N. Y. 362; 58 Am. Rep. 512. Highway by dedication. Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. Rep. 857. Non-user of legal highway an abandonment. Washburn v. Chicago, &c., Ry. Co., 68 Wis. 474; 32 N. W. Rep. 234. Where a company abandons its custom of giving statutory signals at a private crossing, after it has put up usual sign-posts, it is negligence *per se* if an accident is caused thereby. Nash v. New York, &c., R. Co., 4 N. Y. Supl. 525; 51 Hun, 594; Hanks v. Boston, &c., R. Co. (Mass.), 18 N. E. Rep. 218; Phila., &c., R. Co. v. Frank, 67 Md. 339; 10 Atl. Rep. 204. *Contra*, on the effect of use by public without objection. Blanchard v. Lake Shore, &c., Ry. Co., 126 Ill. 416; 18 N. E. Rep. 799; Wright v. Boston & A. R. Co., 142 Mass. 296; Memphis, &c., R. Co. v. Womack, 84 Ala. 149; 4 So. Rep. 618.

[36] Rodrian v. New York, New Haven & Hartford R. Co., 125 N. Y. 526, 528; 26 N. E. Rep. 741; Cullen v. D. & H. C. Co., 113 N. Y. 668; 21 N. E. Rep. 716; Miller v. Terre Haute, &c., Ry. Co., 144 Ind. 323; 43 N. E. Rep. 257; Payne v. Chicago & Alton R. Co., 136 Mo. 562; 38 S. W. Rep. 308; McManamee v. Missouri Pacific Ry. Co., 135 Mo. 440, 449; 37 S. W. Rep. 119; Sullivan v. Missouri Pacific Ry. Co., 117 Mo. 214; 23 S. W. Rep. 149; Pepper v. Southern Pacific Co., 105 Cal. 389; 38 Pac. Rep. 974; Judson v. Great Northern Ry. Co., 63 Minn. 248, 254; 65 N. W. Rep. 447; St. L., I. Mt. & S. Ry. Co. v. Leathers, 62 Ark. 235; Crowley v. Richmond & Danville R. Co., 70 Miss. 340; 13 So. Rep. 74; D., L. & W. R. Co. v. Hefferan, 57 N. J. Law, 149, 153-154; 30 Atl. Rep. 578; Davey v. London, &c., Ry. Co., 12 Q. B. D. 70; 53 L. J. (Q. B.) 58; 49 L. T. 749; Cincinnati, &c., R. Co. v. Butler, 103 Ind. 31; Atchison, &c., R. Co. v. Townsend, 39 Kan. 115; 17 Pac. Rep. 804;

§ 186. Right of traveler to assume that signals will be given.— But it has been held in some cases that a person approaching a crossing may assume that the statutory signals of an approaching train will be given; and if, having exercised due care and

Nosler v. Chicago, &c., Ry. Co., 73 Iowa, 268; 34 N. W. Rep. 850; Donnelly v. Boston, &c., R. Co., 151 Mass. 210; 24 N. E. Rep. 38; Petty v. Hannibal, &c., R. Co., 88 Mo. 306; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643; 11 S. W. Rep. 127; Guenther v. St. Louis, &c., Ry. Co., 95 Mo. 286; 8 S. W. Rep. 371; Strong v. Canton, &c., R. Co. (Miss.), 3 So. Rep. 465; Matti v. Chicago, &c., Ry. Co., 69 Mich. 109; 37 N. W. Rep. 54; Yancy v. Wabash, &c., Ry. Co., 93 Mo. 433; 6 S. W. Rep. 272; Kwiotkowski v. Chicago, &c., Ry. Co., 70 Mich. 549; 38 N. W. Rep. 463; Indiana, &c., Ry. Co. v. Hammock, 113 Ind. 1; 14 N. E. Rep. 737; Greenwood v. Philadelphia, &c., R. Co., 124 Penn. St. 572; 23 W. N. C. 425; 17 Atl. Rep. 188, a strong case; New York, &c., R. Co. v. Kellam's Admr., 83 Va. 851; 3 S. E. Rep. 703; Schofield v. Chicago, &c., Ry. Co., 114 U. S. 615; Mynning v. Detroit, &c., R. Co., 64 Mich. 93; 31 N. W. Rep. 147. *Cf.* Omaha, &c., R. Co. v. O'Donnell, 22 Neb. 475; 35 N. W. Rep. 235; Field v. Chicago, &c., R. Co., 4 McCrary, 573; Brendell v. Buffalo, &c., R. Co., 27 Barb. 534; Bellefontaine, &c., R. Co. v. Hunter, 33 Ind. 335; Toledo, &c., R. Co. v. Schuckman, 50 Ind. 42; St. Louis, &c., R. Co. v. Mathias, 50 Ind. 65; Chicago, &c., R. Co. v. Notzki, 66 Ill. 455. "If there be negligence, the company would be liable for all consequent injury to any one who had not deprived himself of his remedy by some default or misconduct of his own." Moore v. Central R. Co., 24 N. J. Law, 268; Runyon v. Central R. Co., 25 N. J. Law, 557; Artz v. Chicago, &c., R. Co., 34 Iowa, 160; Havens v. Erie Ry. Co., 41 N. Y. 296; Ernst v. Hudson, &c., R. Co., 39 N. Y. 61; 35 N. Y. 9; Wilcox v. Rome, &c., R. Co., 39 N. Y. 358; Baxter v. Troy, &c., R. Co., 41 N. Y. 502; Nicholson v. Erie Ry. Co., 41 N. Y. 525; Gorton v. Erie Ry. Co., 45 N. Y. 660; Harlan v. St. Louis, &c., R. Co., 64 Mo. 480, holding that while the failure of the engineer to ring the bell was negligence in law, yet, since the deceased could nevertheless have heard the locomotive had he stopped to listen, there could be no recovery. 55 N. Y. 22; Chicago, &c., R. Co. v. Fears, 53 Ill. 115; LaFayette, &c., R. Co. v. Huffman, 28 Ind. 287; Pittsburgh, &c., R. Co. v. Vining, 27 Ind. 573; Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570; North Penn. R. Co. v. Heileman, 49 Penn. St. 60; Toledo, &c., R. Co. v. Riley, 47 Ill. 514; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Zeigler v. Railroad Co., 5 S. C. 221; 7 S. C. 402. See, also, *supra*, § 49. In Miller v. Terre Haute & Indianapolis Ry. Co., 144 Ind. 323, 327-328; 43 N. E. Rep. 257, it was said:—"We have adhered to the rule that it was contributory negligence for one to go upon a railway crossing without looking or listening for the approach of trains. If the only question as to such contributory negligence were the safety of the person crossing the railway, there is no reason to favor

employed his senses of sight and hearing, he can neither see nor hear an approaching train, he may presume that he can safely pass over.[37] But he must prove that the failure to give the sig-

the rule just stated. The railway is entitled to precedence in the use of the crossing, the great welght and momentum of its moving trains render it impracticable to run at a slow rate of speed or to stop at highway crossings for the safety of travelers, and the known danger from a collision with passing trains suggests the importance as well as the necessity for care, not only by the company, but by the traveler. There are other interests, however, which add to the demand for this care. That portion of the traveling public using the railways would meet with increased hazards if those using the highways might do so without care as to the approach of trains. The collision at the cro sing often results in the loss of life to those upon the trains, and as frequently do shippers suffer from the delays or losses of property resulting from such collisions. Certainly the enactment of a statute defining the degree of care to be exercised by railway companies alone should not be construed to relieve the travelers upon the highway from the care which, in the absence of the statute, he would owe to himself, to those traveling or shipping upon the railways, and to the railway companies. Nothing in the terms of our statute suggests an intention on the part of the legislature to lessen the duties of those crossing railways."

[37] Baltimore & Ohio R. Co. v. Conoyer (Ind.), 48 N. E. Rep. 352; Richmond v. Railway Co., 87 Mich. 374; 49 N. W. Rep. 621; Evans v. Railroad Co., 88 Mich. 442; 50 N. W. Rep. 386; Dawe v. Flint & Pere Marquette R. Co., 102 Mich. 307, 308; 60 N. W. Rep. 838. See, also, Brunswick, &c., R. Co. v. Hoover, 74 Ga. 426; Nash v. New York, &c., R. Co., 4 N. Y. Supl. 525; 51 Hun, 594; Missouri Pac. R. Co. v. Lee, 70 Tex. 496; 7 S. W. Rep. 857; Baltimore, &c., R. Co. v. Trainor, 33 Md. 542; Cliff v. Midland Ry. Co., L. R. 5 Q. B. 258; Wakefield v. Railroad Co., 37 Vt. 330; Ernst v. Hudson, &c., R. Co., 35 N. Y. 9; 39 N. Y. 61; 32 Barb. 159; 19. How. Pr. 205; 24 How. Pr. 97, and 32 How. Pr. 262; Renwick v. New York, &c., R. Co., 36 N. Y. 132; Steves v. Oswego, &c., R. Co., 18 N. Y. 422. See, also, § 49, *supra*, and note; St. Louis, &c., R. Co. v. Manly, 58 Ill. 97; Reynolds v. Hindman, 32 Iowa, 146; Artz v. Chicago, &c., R. Co., 34 Iowa, 153; Ohio, &c., R. Co. v. Eaves, 42 Mo. 288; St. Louis, &c., R. Co. v. Terhune, 50 Ill. 151; Chicago, &c., R. Co. v. Adler, 56 Ill. 344. A person approaching a railroad crossing should diligently look out for approaching trains. A failure so to do constitutes contributory negligence. But a failure to be on the lookout because of the omission of the servants of the railroad to give the usual and proper signals is not contributory negligence. Russell v. Carolina Central R. Co., 118 N. C. 1098; 24 S. E. Rep. 518. The mere fact that one saw or heard a train which approached a highway crossing without giving the statutory signals, in time

nal was the proximate cause of the injury.[38] And such failure is not *prima facie* evidence of negligence.[39]

§ 187. Right of a trespasser.—Neither does the negligence of a plaintiff constitute a defense when the injury might have been avoided by the exercise of ordinary care and caution on

to have avoided the accident, will not prevent a recovery for his death, under S. C. Rev. Stat., § 1692, providing that a railway company which neglects to give the statutory signals on approaching a crossing shall be liable for all damages caused by a collision to which said negligence contributed, unless the person injured was guilty of "gross or wilful negligence" — which contributed to the injury. Strother v. South Carolina & G. R. Co., 47 S. C. 375; 25 S. E. Rep. 272.

[38] Baltimore & Ohio R. Co. v. Conoyer (Ind.), 48 N. W. Rep. 352; Butcher v. West Va. & P. R. Co., 37 W. Va. 180; 16 S. E. Rep. 457.

[39] C., St. P., M. & O. Ry. Co. v. Brady (Neb.), 71 N. W. Rep. 721. In Galena, &c., R. Co. v. Loomis, 13 Ill. 548, it is held that the *onus* is not thrown on the railway company, until some proof has been given, tending to show that the injury complained of resulted from the want of a signal. In Kentucky it is held to be the duty of a railway company to give signals of warning to travelers on public highways at crossings, although none are required by statute. Louisville, &c., R. Co. v. Commonwealth, 13 Bush, 388; 26 Am. Rep. 205. See, upon this point, for modified views, Winstanley v. Chicago, &c., Ry. Co., 72 Wis. 375; 39 N. W. Rep. 856, where it is said that a railway company may be guilty of negligence by not placing a sign of warning, or sounding a whistle at a crossing, though not required to do so by statute. Johnson v. Baltimore, &c., R. Co., 6 Mackey, 232. A statutory requirement that a bell should be rung and a whistle blown on the approach of a train to a highway crossing, if neglected, makes the company liable to one traveling on a highway parallel to the track, whose horse took fright because of the approach of the train without warning. Ransom v. Chicago, &c., R. Co., 62 Wis. 178; 51 Am. Rep. 718. But compare, on this point, Missouri Pac. Ry. Co. v. Pierce (Mo.), 5 Pac. Rep. 378; Clark v. Missouri Pac. Ry. Co., 35 Kan. 350; 11 Pac. Rep. 134, where it was held that the statutory requirement was for the benefit only of those who might be traveling on the street for the crossing of which the whistle should have been blown. See, also, Pike v. Chicago, &c., R. Co., 39 Fed. Rep. 754; Moore v. Phila. R. Co., 108 Penn. St. 349; 32 Alb. Law Jour. 98; Longnecker v. Pennsylvania R. Co., 105 Penn. St. 328; McGrath v. New York, &c., R. Co., 59 N. Y. 468; 17 Am. Rep. 359, and the note thereto; Hart v. Chicago, &c., R. Co., 56 Iowa, 166; 41 Am. Rep. 93; Houghkirk v. President, &c., 92 N. Y. 219; 44 Am. Rep. 370; Welsch v. Hannibal, &c., R. Co., 72 Mo. 451; 37 Am. Rep. 440.

the part of the railway company. Even a trespasser cannot be run down with impunity simply because he is a trespasser.[40] But it is not negligence for an engineer not to stop his train to avoid a collision with one crossing the track, in case the train cannot be brought to a halt in time to prevent the accident, except at risks which a prudent engineer would not assume.[41]

§ 188. Plaintiff's ignorance no justification for his carelessness.— Where the plaintiff had no previous knowledge of the crossing and failed to learn of it in time to avoid the collision,

[40] § 50, *supra;* Piper v. Chicago, &c., Ry. Co., 77 Wis. 247; 46 N. W. Rep. 165; Donohue v. St. Louis, &c., Ry. Co., 91 Mo. 357; 2 S. W. Rep. 424; 3 S. W. Rep. 848. It is the duty of those in charge of a train to be watchful; and, if they see that an accident has happened to a traveler at a crossing, they should use reasonable efforts to stop the train in season to avoid a collision. Purinton v. Maine Cent. R. Co., 78 Me. 569; 7 Atl. Rep. 707; State v. Baltimore, &c., R. Co., 69 Md. 339; 14 Atl. Rep. 685, 688; Louisville, &c., R. Co. v. Schuster (Ky.), 7 S. W. Rep. 874; Kelley v. Union Ry., &c., Co., 18 Mo. App. 151; Conley v. Cincinnati, &c., Ry. Co. (Ky.), 12 S. W. Rep. 764; Virginia M. Ry. Co. v. White's Admr., 84 Va. 598; 5 S. E. Rep. 573; Brown v. Hannibal, &c., R. Co., 50 Mo. 461. While it is true that an engineer has no right to wilfully run over a man, yet where he sees a person on or near the track in a position of danger, he has a right, in the absence of contrary evidence, to believe that such person is in possession of his faculties, and that he will step off the track and avoid injury. Moore v. Phila. R. Co., 108 Penn. St. 349, and *infra*, § 203; Gray v. Scott, 66 Penn. St. 345; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Columbus, &c., R. Co. v. Terry, 8 Ohio St. 570; Louisville, &c., R. Co. v. Collins, 2 Duv. (Ky.) 114; Railroad Co. v. State, 36 Md. 366; Rothe v. Milwaukee, &c., R. Co., 21 Wis. 256; Macon, &c., R. Co. v. Davis, 18 Ga. 672; Lackawanna, &c., R. Co. v. Chendworth, 52 Penn. St. 382; Daley v. Norwich, &c., R. Co., 26 Conn. 591. Where the trains run through populous portions of the country, the care which must be exercised by the company's servants is very greatly increased. Butler v. Milwaukee, &c., R. Co., 28 Wis. 487; Railroad Co. v. Whitton, 13 Wall. 270; Louisville, &c., R. Co. v. Burke, 6 Cold. 45; Bridge v. Grand Junc., &c., Ry. Co., 3 M. & W. 244; Bunting v. Central R. Co., 16 Nev. 277; Holstine v. Oregon, &c., R. Co., 9 Or. 163; Meyers v. Chicago, &c., R. Co., 59 Mo. 223; Ream v. Pittsburgh, &c., R. Co., 49 Ind. 93; Wasmer v. Delaware, &c., R. Co., 80 N. Y. 212; 36 Am. Rep. 608.

[41] Chicago, &c., R. Co. v. Gretzner, 46 Ill. 74; Jones v. North Car., &c., R. Co., 67 N. C. 125; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300; Telfer v. Northern R. Co., 30 N. J. Law, 188.

merely because he did not look out, his ignorance was held no defense,[42] but where a traveler is a stranger, the question of his negligence at a crossing may go to the jury.[43] And, where one supposed a regular train had passed, when, in fact, being behind time, it had not passed, a failure to look out was still held negligence.[44] And trying to cross a track when a train is known to be due, and when the slightest delay in getting across would probably be fatal, is negligence.[45] If the traveler rushes forward at such a high rate of speed as to be unable to stop in time to avoid a collision at a crossing, he will be regarded negligent,[46] and this negligence may be so gross as to operate to excuse even the gross negligence of the railway company.[47] And if, with an approaching train in full view, he undertakes to reach the crossing and get over in advance of the train by fast driving, it is negligence.[48]

[42] Allyn v. Boston, &c., R. Co., 105 Mass. 77.

[43] Cohen v. Eureka, &c., R. Co., 14 Nev. 376, where this fact had no little bearing on the case, and was held to be an important issue to be determined by the jury. King v. Missouri Pac. Ry. Co., 98 Mo. 235; 11 S. W. Rep. 563. In Gulf, &c., Ry. Co. v. Greenlee, 70 Tex. 553; 8 S. W. Rep. 129, it was held that one who is driving on a road parallel to a railway track, is not negligent in not looking for approaching trains before he discovers a crossing, but it is sufficient if, after discovering the crossing, he uses ordinary diligence to avoid danger.

[44] Cincinnati, &c., Ry. Co. v. Howard, 124 Ind. 280; 24 N. E. Rep. 892; Howard v. Northern Cent. Ry. Co., 1 N. Y. Supl. 528. But he is not held to so high a degree of care in such a case as if the train were just due, especially where the view is obstructed. Bower v. Chicago, &c., Ry. Co., 61 Wis. 457; Toledo, &c., R. Co. v. Jones, 76 Ill. 311; Mahlen v. Lake Shore, &c., R. Co., 49 Mich. 585. See, also, Phila., &c., R. Co. v. Carr, 99 Penn. St. 505.

[45] Palys v. Erie Ry. Co., 30 N. J. Eq. 604; Brooks v. Buffalo, &c., R. Co., 1 Abb. App. Dec. 211; Reynolds v. N. Y., &c., R. Co., 58 N. Y. 248.

[46] Mantel v. Chicago, &c., R. Co., 33 Minn. 62. He should listen and look before getting so near that he cannot check his horses in case of their becoming frightened. Rhoades v. Chicago, &c., Ry. Co., 58 Mich. 263; Grippen v. New York, &c., R. Co., 40 N. Y. 34; Salter v. Utica, &c., R. Co., 13 Hun, 197; Kelly v. Hannibal, &c., R. Co., 75 Mo. 138; Powell v. Missouri, &c., R. Co., 76 Mo. 80.

[47] Haring v. New York, &c., R. Co., 13 Barb. 9; Grows v. Maine, &c., R. Co., 67 Me. 100. But see Hackford v. New York, &c., R. Co., 53 N. Y. 654; 43 How. Pr. 222.

[48] Allen v. Pennsylvania R. Co. (Penn.), 12 Atl. Rep. 493; International, &c., Ry. Co. v. Kuehn, 70 Tex. 582; 8 S. W. Rep. 484; Underhill v. Chicago, &c., Ry. Co., 81 Mich. 43; 45 N. W. Rep. 508; Rigler v. Charlotte, &c., R. Co.,

§ **189. The rule illustrated.**— So, it is held negligence to attempt to drive a frightened horse toward a crossing where an engine is standing.[49] But if, having approached the crossing without negligence so near as to render retreat apparently impossible, the driver resorts to fast driving as the only practicable means of extricating himself from the danger of his situation, such a course may be justifiable on the ground of prudence,[50] even though had he not been overcome with terror at the sudden peril in which he found himself, he might have acted more wisely.[51]

§ **190. Flagmen, gatemen, &c.**— Failure to comply with a statute or ordinance requiring a flagman or watchman to be stationed at a crossing, is held to be negligence *per se*.[52] In the absence of such regulations the omission to employ any one to warn passers by of danger is admissible in connection with other

94 N. C. 604; Neier v. Missouri Pac. Ry. Co. (Mo.), 1 S. W. Rep. 387; State v. Maine Central R. Co., 76 Me. 357; 49 Am. Rep. 622. The rule applies to pedestrians as well as to persons driving. Pennsylvania R. Co. v. Aiken (Penn.), 18 Atl. Rep. 619; 25 W. N. C. 13; Baltimore, &c., R. Co. v. Mah, 66 Md. 53; Fox v. Missouri Pac. Ry. Co., 85 Mo. 679; Collins v. Long Island R. Co., 10 N. Y. Supl. 701; Kelly v. Pennsylvania R. Co. (Penn.), 8 Atl. Rep. 856; Grows v. Maine, &c., R. Co., 67 Me. 100; Pittsburgh, &c., R. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580. One who takes this risk, and miscalculates, must bear the consequences of his imprudence. Chicago, &c., R. Co. v. Jacobs, 63 Ill. 178; Chicago, &c., R. Co. v. Kusel, 63 Ill. 180, note; Stout v. Indianapolis, &c., R. Co., 1 Wils. (Ind'pls.) 80; *sub nom.* Indianapolis, &c., R. Co. v. Stout, 41 Ind. 149, and 53 Ind. 143.

[49] Louisville, &c., R. Co. v. Schmidt, 81 Ind. 264; Pittsburgh, &c., R. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580. But see Turner v. Buchanan, 82 Ind. 147; 42 Am. Rep. 485, where it was held that though plaintiff's horses had on a previous occasion run away, he was not negligent in driving near an engine again. It could not be foreseen or predetermined whether the team would at all times take fright at the obstruction, though the latter was calculated to frighten teams. See, also, on the same point, Missouri Pac. Ry. Co. v. Hill (Tex.), 9 S. W. Rep. 351.

[50] Macon, &c., R. Co. v. Davis, 27 Ga. 113; Donohue v. St. Louis, &c., Ry. Co., 91 Mo. 357; 2 S. W. Rep. 424; 3 S. W. Rep. 848.

[51] But see Wright v. Great Northern R. Co., 8 Ir. L. R. (C. P. Div.) 257.

[52] Western, &c., R. Co. v. Young, 81 Ga. 397; 7 S. E. Rep. 912; Murray v. Missouri Pac. Ry. Co., 101 Mo. 236; 13 S. W. Rep. 817; Wilkins v. St. Louis, &c., Ry. Co., 101 Mo. 93; 13 S. W. Rep. 893; Curley v. Illinois Cent. R. Co., 40 La. Ann. 810; 6 So. Rep. 103.

facts touching the prudence or negligence of the company.[53] And the withdrawal of a flagman from a crossing where he has been voluntarily kept, is deemed an act of negligence.[54] Flagmen or other servants of the company are presumed to act as agents in giving notice, and where a person attempts to cross the track, having been notified or invited to cross by such an agent, even though it may be in view of an approaching train, he may, in case he is injured, recover damages therefor from the company.[55] Conversely, it is contributory negligence to

[53] Patterson's Railway Accident Law, p. 163; Chicago, &c., R. Co. v. Perkins, 26 Ill. App. 67; Lesan v. Maine Central R. Co., 77 Me. 85; Hoye v. Chicago, &c., Ry. Co., 67 Wis. 1; Dwinnell v. Abbott, 74 Wis. 514; 43 N. W. Rep. 496; Chicago, &c., R. Co. v. Perkins, 125 Ill. 127; 17 N. E. Rep. 1; Heddles v. Chicago, &c., Ry. Co., 74 Wis. 239; 42 N. W. Rep. 237; Carraher v. San Francisco Bridge Co., 81 Cal. 98; 22 Pac. Rep. 480; Lesan v. Maine Central R. Co., 77 Me. 85. Although under 1 How. Anot. Stat. Mich. § 3365, it is for the railroad commissioner to determine the necessity for having a flagman at a crossing, yet when the railroad so obstructs its tracks that its trains cannot be seen by those approaching the crossing, and so that the signals required by statute, the bell and whistle, are not sufficient, some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence. Guggenheim v. Lake Shore, &c., Ry. Co. (Mich.), 33 N. W. Rep. 161. A railroad company is not necessarily chargeable with negligence in not keeping a watchman at a switch. Sellars v. Richmond, &c., R. Co., 94 N. C. 654. Omission to provide a flagman, &c., do not constitute negligence as to a person who is walking along the track. Roden v. Chicago, &c., R. Co., 133 Ill. 72; 24 N. E. Rep. 425.

[54] State v. Boston, &c., R. Co., 80 Me. 430; 15 Atl. Rep. 36; Burns v. North Chicago R. M. Co., 65 Wis. 312. See, also, § 67, *supra*.

[55] Kane v. New York, &c., R. Co., 9 N. Y. Supl. 879; Callaghan v. Del., &c., R. Co., 5 N. Y. Supl. 285; 52 Hun, 276; Lunt v. London, &c., Ry. Co., L. R. 1 Q. B. 277; Chaffee v. Boston, &c., R. Co., 104 Mass. 108; Wheelock v. Boston, &c., R. Co., 105 Mass. 203; Warren v. Fitchburg R. Co., 8 Allen, 227; Spencer v. Illinois, &c., R. Co., 29 Iowa, 55. See, for a full discussion on this point, Sweeny v. Old Colony, &c., R. Co., 10 Allen, 368, placing the ground of the decision on the rule already noticed — that an occupant expressly or impliedly inviting persons to enter his premises, must see to it that they are reasonably safe. Northeastern Ry. Co. v. Wanless, 43 L. J. (Q. B.) 185; L. R. 7 H. L. 12; 30 L. T. (N. S.) 275; Wanless v. Northeastern Ry. Co., 25 L. T. (N. S.) 103; L. R. 6 Q. B. 481; L. R. 1 Q. B. 277; Dublin, &c., R. Co. v. Slattery, 3 App. Cas. 1213. See, also, § 67, *supra*. But see Culbertson v. Metropolitan St. Ry. Co., 140 Mo. 35; 36 S. E. Rep. 834.

attempt to pass over in opposition to the plain remonstrance of the person attending the crossing.[56] An open gate is notice of a clear track and that it is safe to cross without taking the precautions usually required to discover approaching trains, and negligence is not imputed to one who acts upon that assurance.[57]

[56] Baltimore & O. R. Co. v. Colvin, 118 Penn. St. 230; 12 Atl. Rep. 337; Salmon v. New York, &c., R. Co., 5 N. Y. Supl. 225. But it should appear that the watchman's signal was understood. Union R. Co. v. State, 72 Md. 153; 19 Atl. Rep. 449. It is not prudent to cross after the gates are lowered. Granger v. Boston, &c., R. Co., 146 Mass. 276; 15 N. E. Rep. 619; Allerton v. Boston, &c., R. Co., 146 Mass. 241; 15 N. E. Rep. 621.

[57] Alabama Great Southern R. Co. v. Anderson, 109 Ala. 299; 19 So. Rep. 516; Russell v. Carolina Central R. Co., 118 N. C. 1098; 24 S. E. Rep. 518; Cleveland, &c., Ry. Co. v. Schneider, 45 Ohio St. 678; 17 N. E. Rep. 321; State v. Boston & M. R. Co., 80 Me. 430; 15 Atl. Rep. 36; Pennsylvania Co. v. Stegmeier, 118 Ind. 305; 20 N. E. Rep. 843; Whelan v. N. Y., &c., R. Co., 38 Fed. Rep. 15; Central Trust Co. v. Wabash, &c., Ry. Co., 27 Fed. Rep. 159; Lake Shore, &c., Ry. Co. v. Franz, 127 Penn. St. 297; 24 W. N. C. 321; 18 Atl. Rep. 22. See, also, Peck v. Michigan Cent. R. Co., 57 Mich. 3. Some of the courts state the rule more guardedly. Thus, the New York Court of Appeals have said:—"It is well settled that a traveler approaching a crossing guarded by gates is not required to exercise the same vigilance to look and listen as when he approaches one not so guarded." Kane v. N. Y., N. H. & H. R. Co., 132 N. Y. 160, 164; 30 N. E. Rep. 256. "Acts of a gateman or signal-man which tend to mislead a traveler into the belief that he may cross with safety, and invitations, express or implied, are to be taken into account in determining whether an attempt to cross is negligence." Conaty v. N. Y., N. H. & H. R. Co., 164 Mass. 572, 573; 42 N. E. Rep. 103. Safety gates which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross, and while this fact does not relieve the traveler from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances. Roberts v. Delaware & Hudson Canal Co., 177 Penn. St. 183; 35 Atl. Rep. 723. "While the fact of open gates is a circumstance which a traveler may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care. This rule is especially applicable to the facts of this case, where the plaintiff was walking with a generally unobstructed view of the track, and the slightest exercise of care upon her part would have prevented the accident." Romeo v. Boston & Maine R. Co., 87 Me. 540; 33 Atl. Rep. 24. See also Kimball v. Friend's Exr., 95 Va. 125; 27 S. E. Rep. 901. "The degree of care required of a person approaching a dangerous place should be proportioned to the degree of danger, known or appar-

But a flagman, stationed at a crossing to look out for trains, and give warning of their approach, if run over by a train cannot recover.[58] It is not *per se*, however, contributory negligence to attempt to cross a track after a notice that it is not safe,[59] nor is it negligence on the part of a pedestrian to cross the track anywhere at a regular crossing, whether on the sidewalk or in the roadway.[60]

§ 191. Care required of railroad when the view is obstructed.— When the view of the track is obstructed, or when, for any reason, there is an inadequate outlook, this is a circumstance which demands of the employees of the railway company the

ent, to be encountered. Weber v. N. Y. C. & H. R. R. Co., 58 N. Y. 451, 456. In crossing the tracks of a railroad operated by steam, more care is required than in crossing a railroad operated by horses, because the cars upon the former move more rapidly and cannot be so readily stopped as those upon the latter. Barker v. Savage, 45 N. Y. 193. There is still less danger in passing under safety gates, as they need not be lowered rapidly and should at all times be under the control of the gateman." Feeny v. Long Island R. Co., 116 N. Y. 375, 379; 22 N. E. Rep. 402. In an action by the passenger against a railway company to recover damages for injuries so received, and where it is shown that the company, although not required by law to do so, with the knowledge of the public maintained platform gates, and usually kept the gate closed on the side of the car next to the parallel track as matter of precaution, it is for the jury to say whether the failure of the company's servants to close such gate upon a certain occasion is negligence, and to determine the probable effect of such failure as contributing to the accident. Adams v. Washington & Georgetown R. Co., 9 App. D. C. 26. Safety gates on a city street at a railroad crossing are a warning of the passing of trains, not only to vehicles but to pedestrians; and if, in disregard thereof, a pedestrian passes a gate which is closed, in broad daylight, to enter upon the crossing, and while watching one train is struck by another and killed, his contributory negligence will prevent a recovery of damages. In such case it is matter of no moment whether the gates were always down or not, as it appeared that a train was approaching at the time, and the gate was down. Shehan v. Philadelphia & Reading R. Co., 166 Penn. St. 354; 31 Atl. Rep. 120.

58 This is virtually a failure to do what he is bound to do. Clark v. Boston, &c., R. Co., 128 Mass. 1. See, also, Rolland v. Chicago, &c., R. Co., 5 McCrary, 549.

59 Kelly v. Southern, &c., R. Co., 28 Minn. 98.

60 Louisville, &c., R. Co. v. Herd, 80 Ind. 117.

exercise of increased vigilance.[61] But by this is meant the requisite degree of care, due care, under the circumstances; the railroad need not anticipate circumstances that are extraordinary in their nature.[62] And where the dangerous character of the crossing is enhanced by its negligent construction, or where the track is so laid as to render it difficult for loaded vehicles to cross, the railway company, in case of an injury therefrom, is held liable.[63] When the track is obscured by smoke or fog, a

[61] Chicago, &c., R. Co. v. Payne, 59 Ill. 534; 49 Ill. 499; Indianapolis, &c., R. Co. v. Stables, 62 Ill. 313; Richardson v. N. Y., &c., R. Co., 45 N. Y. 846; Illinois, &c., R. Co. v. Benton, 69 Ill. 174; Artz v. Chicago, &c., R. Co., 44 Iowa, 284; Pennsylvania R. Co. v. Matthews, 36 N. J. Law, 531, where it was held that the fact of an obstruction on the track made it obligatory on the company to keep a flagman at the dangerous point. Dimick v. Chicago, &c., R. Co., 80 Ill. 338; Craig v. N. Y., &c., R. Co., 118 Mass. 431; Cordell v. N. Y., &c., R., Co., 70 N. Y. 119; Indianapolis, &c., R. Co. v. Smith, 78 Ill. 112; Ohio, &c., R. Co. v. Clutter, 82 Ill. 123. But see Dyson v. N. Y., &c., R. Co., 57 Conn. 9; 17 Atl. Rep. 137, where it was held sufficient to give the statutory signals without slackening speed or providing other signals.

[62] Shaw v. Boston, &c., R. Co., 8 Gray 45; Balto., &c., R. Co. v. Breinig, 25 Md. 378; Grippen v. N. Y., &c., R. Co., 40 N. Y. 34.

[63] Kimes v. St. Louis, &c., Ry. Co., 85 Mo. 611; Bullock v. Wilmington, &c., R. Co., 105 N. C. 180; 10 S. E. Rep. 988; Tetherow v. St. Joseph, &c., Ry. Co., 98 Mo. 74; 11 S. W. Rep. 310; Dallas, &c., Ry. Co. v. Able, 72 Tex. 150; 9 S. W. Rep. 871. The traveler's knowledge of the defect does not bar a recovery. He has a right, notwithstanding, to use the highway. Maltby v. Chicago, &c., Ry. Co., 52 Mich. 108; St. Louis, &c., Ry. Co. v. Box, 52 Ark. 368; 12 S. W. Rep. 757. See, also, Spooner v. Delaware, &c., R. Co., 115 N. Y. 22; 21 N. E. Rep. 896; Brown v. Hannibal, &c., R. Co., 99 Mo. 310; 12 S. W. Rep. 655; Phelps v. Winona, &c., Ry. Co., 37 Minn. 485; 35 N. W. Rep. 273; Evansville, &c., R. Co. v. Carvener, 113 Ind. 51; 14 N. E. Rep. 738; Moberly v. Kansas City, &c., R. Co., 17 Mo. App. 518; Gulf, &c., Ry. Co. v. Walker, 70 Tex. 126; 7 S. W. Rep. 831; Indianapolis, &c., R. Co. v. Stout, 53 Ind. 143; Payne v. Troy, &c., R. Co., 9 Hun, 526; Richardson v. N. Y., &c., R. Co., 45 N. Y. 846; Milwaukee, &c., R. Co. v. Hunter, 11 Wis. 160. In Mann v. Central, &c., R. Co., 55 Vt. 484; 45 Am. Rep. 628, the defendant company set up the defense that it was the duty of the municipality to keep the intersections of the track and highway in order. But the court held that the right of the company to construct its railroad across the highway carried with it the duty of keeping the crossings in good and sufficient repair. To the same point, Scanlan v. Boston, 140 Mass. 84; Pittsburgh, &c., R. Co. v. Dunn, 56 Penn. St. 280; Gramlick v. Railroad Co., 9 Phila. 78;

failure to sound the whistle, even in the absence of any statutory duty, is evidence of negligence,[64] so, also, where the railroad company permitted corn-cribs to stand near the tracks in such a way as to cut off the view of the crossings,[65] or where piles of lumber operated in the same way to obstruct the view.[66] Where the traveler is misled by appearances, seeing a train with the rear toward him, and believing it to be receding, when in fact it is approaching, it is a question for the jury whether under the circumstances in continuing to cross he exercises proper care.[67]

§ 192. **Crossings at grade.**— A railway consisting of several lines, crossed a public foot-path on a level at a point near a station, but the foot-path was not in other respects dangerous. On each side of the railway was a good and sufficient swing-gate. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. B., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was

Dimick v. Chicago, &c., R. Co., 80 Ill. 338; Ingersoll v. N. Y., &c., R. Co., 6 N. Y. Supr. Ct. 416; Artman v. Kansas, &c., R. Co., 22 Kan. 296.

64 Prescott v. Eastern, &c., R. Co., 113 Mass. 370, note; James v. Great Western Ry. Co., L. R. 2 C. P. 635, note. And see Keim v. Union Ry., &c., Co., 90 Mo. 314; 2 S. W. Rep. 427. But in Heaney v. Long Island R. Co., 112 N. Y. 122; 19 N. E. Rep. 422, the company was held free from negligence, no municipal or statutory regulation having been violated, and the plaintiff was pronounced guilty of contributory negligence for not waiting until the smoke cleared away.

65 Rockford, &c., R. Co. v. Hillmer, 72 Ill. 235. Box car. Perkins v. Buffalo, &c., R. Co., 10 N. Y. Supl. 356. Buildings. Chicago, &c., R. Co. v. Starmer, 26 Neb. 630; 42 N. W. Rep. 706.

66 Mackay v. N. Y., &c., R. Co., 35 N. Y. 75; Cordell v. N. Y., &c., R. Co., 70 N. Y. 123; 26 Am. Rep. 550 (distinguishing Mackay v. N. Y., &c., R. Co.), and holding that a railway company does not render itself liable to an action for negligence in depositing lumber on its land to be used in the preparation of additional tracks.

67 Bonnell v. Delaware, &c., R. Co., 39 N. J. Law, 189. It is gross negligence to assume without stopping that a locomotive headlight is stationary. Haycroft v. Lake Shore, &c., R. Co., 64 N. Y. 636; New Jersey Trans. Co. v. West, 32 N. J. Law, 91; Penn. R. Co. v. Matthews, 36 N. J. Law, 531; Ohio, &c., Ry. Co. v. Maisch, 29 Ill. App. 640.

killed by a passing train. If he had looked up the line he would have seen the train coming, in time to stop and avoid the accident. In an action against the company by B.'s administratrix, it was held, in the English common pleas, that B. contributed to the accident by his negligence. It was argued that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to B. to come on to the track, and that, therefore, even if B. were not guilty of contributory negligence, the company was not liable.[68]

§ 193. Duty of care.— But, in Pennsylvania, it is held not contributory negligence *per se* to attempt to cross a railway track at a regular crossing without waiting until a train that has just passed is far enough away to allow sight of a train coming up in a contrary direction.[69] Said the Court of Appeals of New York: — "The law requires care at all times when in a situation of danger; and mental absorption or reverie, from business, grief, etc., will not excuse its omission. The inquiry is whether, from the evidence, it satisfactorily appears that the plaintiff, by looking, could have seen the train in time to have avoided the collision. If so, the plaintiff should have been nonsuited."[70] And Bramwell, B., in a carefully considered case, said: — "The track is, of itself, a warning of danger to

[68] Skelton v. London, &c., Ry. Co., L. R. 2 C. P. 631; Fletcher v. Fitchburg R. Co., 149 Mass. 127; 21 N. E. Rep. 302; Marty v. Chicago, &c., Ry. Co., 38 Minn. 108; 35 N. W. Rep. 670; Young v. N. Y., &c., Ry. Co., 107 N. Y. 500; Butts v. St. Louis, &c., Ry. Co., 98 Mo. 272; 11 S. W. Rep. 754; Gebhard v. Detroit, &c., R. Co., 79 Mich. 586; 44 N. W. Rep. 1045. But where a train passed and a person crossing immediately was killed by detached cars following, which he might have seen by looking, the question of contributory negligence was left to the jury. Breckenfelder v. Lake Shore, &c., Ry. Co., 79 Mich. 560; 44 N. W. Rep. 957. See, also, Oldenburg v. N. Y., &c., R. Co., 9 N. Y. Supl. 419; Sherry v. N. Y., &c., R. Co., 104 N. Y. 652; 10 N. E. Rep. 128.

[69] Phila., &c., R. Co. v. Carr, 99 Penn. St. 505. Nor is one chargeable with contributory negligence in proceeding to cross after a train has passed on out of his sight so as to induce the belief that it is to continue on, and where he has no reason to suppose that it will immediately return. Duane v. Chicago, &c. Ry. Co., 72 Wis. 523; 40 N. W. Rep. 394. It is otherwise if he knows the train is likely to back. Kennedy v. Chicago, &c., Ry. Co., 68 Iowa 559.

[70] Baxter v. Troy, &c., R. Co., 41 N. Y. 502.

those about to go upon it, and cautions them to see whether a train is coming. Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that way to see if danger is to be apprehended.[71]

§ 194. Duty of the railway.— When a train is backed over a crossing, or cars are pushed ahead in front of an engine, it is held evidence of negligence not to employ a lookout and all available means to avoid accidents to travelers at the crossing,[72] and merely ringing the bell or blowing the whistle upon a locomotive attached to a freight train standing with its rear end partially across a street, is not proper notice to the passer-by of an intention to back the train over the crossing. Without other notice, the company in such a case will be held negligent.[73]

[71] Stubley v. London, &c., Ry. Co., L. R. 1 Exch. 13. It is the duty of one about to cross a railroad track to select, if he can safely do so, such a point as will enable him to see along the track, both ways; and the fact that cars are left in such a position as to obstruct the view of the track in one direction does not excuse him from looking in that direction. Owens v. Pennsylvania R. Co., 41 Fed. Rep. 187. The rule of law that a railroad track is in itself a warning of danger applies as well to a side track as to a main line. Mynning v. Detroit, &c., R. Co., 59 Mich. 257.

[72] It is gross negligence to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village when there is no flagman at the crossing, even at a rate but little faster than a person walks. Cooper v. Lake Shore, &c., Ry. Co., 66 Mich. 261; 33 N. W. Rep. 306; Duane v. Chicago, &c., Ry. Co., 72 Wis. 523; Fisher v. Monongahela, &c., R. Co., 131 Penn. St. 292; 18 Atl. Rep. 1016; Atchison, &c., R. Co. v. Morgan, 43 Kan. 1; 22 Pac. Rep. 995; O'Connor v. Missouri Pac. Ry. Co., 94 Mo. 150; 7 S. W. Rep. 106. Sending a car forward, through a town or other such place, of its own impetus, without any one in charge to control it, is negligence. Shelby's Admr. v. Cincinnati, &c., Ry. Co., 85 Ky. 224; 3 S. W. Rep. 157. See, also, Palmer v. Detroit, &c., R. Co., 56 Mich. 1; Howard v. St. Paul, &c., Ry. Co., 32 Minn. 214; Bailey v. New Haven, &c., R. Co., 107 Mass. 496; Show v. Boston, &c., R. Co., 8 Gray, 45, 66; Bradley v. Boston, &c., R. Co., 2 Cush. 539; Grippen v. N. Y., &c., R. Co., 40 N. Y. 34; Leavenworth, &c., R. Co. v. Rice, 10 Kan. 426; Kennedy v. North Mo. R. Co., 36 Mo. 351; Hathaway v. Toledo, &c., R. Co., 46 Ind. 25; Young v. Detroit, &c., R. Co., 56 Mich. 430, a case of negligence in the company for allowing a train to stand across a highway for more than five minutes, the time allowed by a statutory rule.

[73] Linfield v. Old Colony R. Co., 10 Cush. 564; Chicago, &c., R. Co.

§ 195. Vigilance of one crossing a track must be proportionate to the danger.— The Supreme Court of Iowa declared the law upon this point in the following language: — "If the view of the railroad, as the crossing is approached upon the highway, is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of the plaintiff or the person injured, under the particular circumstances of the case, is a question of fact for the jury."[74]

§ 196. The rule summarized.— In proportion as the danger increases must the vigilance of the person who attempts the crossing be increased. A railway crossing should, at all times and under all circumstances, be approached with caution; but, at an obstructed crossing, it is the duty of a traveler to exercise a greater degree of care and caution than is incumbent upon him usually.[75] He is not, however, required to show that he took

v. Garvey, 58 Ill. 85; Illinois, &c., R. Co. v. Ebert, 74 Ill. 399; Eaton v. Erie Ry. Co., 51 N. Y. 544; Maginnis v. N. Y., &c., R. Co., 52 N. Y. 215; McGovern v. N. Y., &c., R. Co., 67 N. Y. 417.

[74] Artz v. Chicago, &c., R. Co., 34 Iowa, 160; Laverenz v. Chicago, &c., R. Co., 56 Iowa, 689; Reed v. Chicago, &c., Ry. Co., 74 Iowa, 188; 37 N. W. Rep. 149; Schum v. Pennsylvania R. Co., 107 Penn. St. 8; 52 Am. Rep. 468; Cleaves v. Pigeon Hill Granite Co., 145 Mass. 541; 14 N. E. Rep. 646; Hanks v. Boston, &c., R. Co., 147 Mass. 495; 18 N. E. Rep. 218; McNeal v. Pittsburgh, &c., R. Co., 131 Penn. St. 184; 18 Atl. Rep. 1026; Dwinnell v. Abbott, 74 Wis. 514; 43 N. W. Rep. 496; Chicago, &c., R. Co. v. Tilton, 26 Ill. App. 362; Oldenberg v. New York, &c., R. Co., 9 N. Y. Supl. 419; Parsons v. N. Y., &c., R. Co., 113 N. Y. 355; 21 N. E. Rep. 145; Nosler v. Chicago, &c., Ry. Co., 73 Iowa, 268; 34 N. W. Rep. 850; Anderson v. New York, &c., R. Co., 6 N. Y. Supl. 182; Hooper v. Boston, &c., R. Co., 81 Me. 260; 17 Atl. Rep. 64; Lake Shore, &c., Ry. Co. v. Franz, 127 Penn. St. 297; 18 Atl. Rep. 22; Tabor v. Missouri, &c., R. Co., 46 Mo. 353; 2 Am. Rep. 517; Kennayde v. Pacific, &c., R. Co., 45 Mo. 255; Milwaukee, &c., R. Co. v. Hunter, 11 Wis. 160; Kelly v. Minneapolis, &c., R. Co., 29 Minn. 1; Faber v. St. Paul, &c., R. Co., 29 Minn. 465; Abbett v. Chicago, &c., R. Co., 29 Minn. 482; Strong v. Sacramento, &c., R. Co., 61 Cal. 326.

[75] Atchison, &c., R. Co. v. Townsend, 39 Kan. 115; 17 Pac. Rep. 804; Durbin v. Oregon Ry. & Nav. Co., 17 Or. 5; 17 Pac. Rep. 5; Thompson v. New York Cent., &c., R. Co., 33 Hun (N. Y.) 16. The care must be in proportion to the increase of the danger that may come from the use of the highway at such a place. Cincinnati, &c.,

precautions which the surrounding circumstances would have rendered unavailing.[76] When the train came from a direction where it could not have been seen in time, one crossing is not required to look in that direction,[77] and when there was noise sufficiently loud to drown the rumbling sound of a train in motion, the fact that the injured party did not listen, when there was no signal by either bell or whistle of the approaching train, was held not negligence.[78] When a train obstructs a crossing

Ry. Co. v. Howard, 124 Ind. 280; 24 N. E. Rep. 892; Sabine, &c., Ry. Co. v. Dean, 76 Tex. 73; 13 S. W. Rep. 45; McCrory v. Chicago, &c., Ry. Co., 31 Fed. Rep. 531; Thomas v. Delaware, &c., R. Co., 19 Blatchf. 533; Strong v. Sacramento, &c., R. Co., 61 Cal. 326; Laverenz v. Chicago, &c., R. Co., 56 Iowa, 689. When, however, one about to cross the track has carefully listened and has heard no indications of an approaching train, he has a perfect right to assume that the statutory requirements of ringing a bell or sounding a whistle will be complied with, and is then warranted in endeavoring to cross. Johnson v. Chicago, &c., R. Co., 77 Mo. 546; Bunting v. Central R. Co., 14 Nev. 351; Davey v. London, &c., Ry. Co., 11 L. R. (Q. B. Div.) 213; Lehey v. Hudson River R. Co., 4 Robt. 204; Schaick v. Hudson River R. Co., 43 N. Y. 527.

[76] Norfolk, &c., R. Co. v. Burge, 84 Va. 63; 4 S. E. Rep. 21; McWilliams v. Philadelphia, &c., R. Co. (Penn.), 15 Atl. Rep. 654; Chicago, &c., R. Co. v. Starmer, 26 Neb. 630; 42 N. W. Rep. 706; Davis v. N. Y., &c., R. Co., 47 N. Y. 400; Hackford v. N. Y., &c., R. Co., 6 Lans. 381; 53 N. Y. 654; 43 How. Pr. 222; Leonard v. N. Y., &c., R. Co., 10 J. & S. 225.

[77] Cranston v. New York, &c., R. Co., 39 Hun (N. Y.) 308. Where one, about to cross a railroad, could not see if he had stopped to look, and could not have heard because the train made so little noise, he is not chargeable with negligence in not stopping to look and listen. Donohue v. St. Louis, &c., Ry. Co., 91 Mo. 357; Northern Pac. R. Co. v. Holmes (Wash. T.), 18 Pac. Rep. 76; McGuire v. Hudson River R. Co., 2 Daly, 76; Chicago, &c., R. Co. v. Lee, 87 Ill. 454; Phila., &c., R. Co. v. Carr, 99 Penn. St. 505; Strong v. Sacramento, &c., R. Co., 61 Cal. 326; Davey v. London, &c., Ry. Co., 11 L. R. (Q. B. Div.) 213.

[78] Jones v. East Tenn., &c., R. Co., 128 U. S. 443; Rodrian v. New York, &c., R. Co., 7 N. Y. Supl. 811; Chicago, &c., R. Co. v. Lane, 130 Ill. 116; 22 N. E. Rep. 513. In Beckwith v. New York, &c., R. Co., 7 N. Y. Supl. 719; 54 Hun, 446, there was a confusion of lights and sounds, and the case, like the foregoing cases, was submitted to the jury. But see, also, Chase v. Maine Cent. R. Co., 78 Me. 346, which requires one to stop his horse if the view is obstructed and bells are attached to his team. Merkle v. N. Y., &c., R. Co., 49 N. J. Law, 473; 9 Atl. Rep. 680. To the same effect, where the noise was caused by the rattling of bottles in the wagon. Seefeld v. Chicago, &c., Ry. Co., 70 Wis. 216; 35 N. W.

so as to interfere with travel on the highway, it has been held that a person who attempts to cross by passing between the cars, or climbing over the coupling pins, or over flat cars, is guilty of contributory negligence depriving him of any remedy for injuries suffered by the starting of the trains without notice, or by jumping to the ground.[79] And if a horse known to be easily frightened by cars is allowed to stand or pass in close proximity to a train which has halted at a crossing, the owner cannot recover damages for a runaway.[80] But where persons become impatient of waiting and make endeavors to get by in ways not obviously dangerous, the questions of negligence and of contributory negligence are usually left to the jury.[81]

§ 197. Plaintiff deaf or intoxicated.— Deafness, so far from excusing one for a failure to use his eyesight, rather imposes upon him the duty of increased vigilance in the employment of that faculty,[82] and when contributory negligence is charged,

Rep. 278; Brady v. Toledo, &c., R. Co., 81 Mich. 616; 45 N. W. Rep. 1110; Davis v. N. Y., &c., R. Co., 47 N. Y. 400; Leonard v. N. Y., &c., R. Co., 10 J. & S. 225; Mahlen v. Lake Shore, &c., R. Co., 49 Mich. 585.

[79] Spencer v. Baltimore, &c., R. Co., 4 Mackey (D. C.) 138; 54 Am. Rep. 269. Passing between cars. Hudson v. Wabash W. Ry. Co., 101 Mo. 13; 14 S. W. Rep. 15. Climbing over coupling. Howard v. Kansas City, &c., R. Co., 41 Kan. 403; 21 Pac. Rep. 267. Plaintiff climbed over a coal car at the suggestion of a train hand and broke a leg in leaping to the ground. *Contra*, Philadelphia, &c., R. Co. v. Layer, 112 Penn. St. 414, where a child of six tried to pass between two cars of a train which blocked the street. See, also, Wilkins v. St. Louis, &c., Ry. Co., 101 Mo. 93; 13 S. W. Rep. 893.

[80] Hargis v. St. Louis, &c., Ry. Co., 75 Tex. 19; 12 S. W. Rep. 953; Union Pac. Ry. Co. v. Hutchinson, 39 Kan. 485, 488; 18 Pac. Rep. 705, 706; 19 Pac. Rep. 312.

[81] Young v. Detroit, &c., Ry, Co., 56 Mich. 430; Geveke v. Grand Rapids, &c., R. Co., 57 Mich. 589; Vicksburg, &c., R. Co. v. Alexander, 62 Miss. 496; Kellny v. Missouri Pac. Ry. Co. (Mo.), 13 S. W. Rep. 806; Adams v. Iron Cliffs Co., 78 Mich. 271; 44 N. W. Rep. 270; Smith v. Savannah, &c., Ry. Co., 84 Ga. 698; 11 S. E. Rep. 455; Bare v. Pennsylvania R. Co. (Penn.), 19 Atl. Rep. 935.

[82] Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570; Morris, &c., R. Co. v. Haslan, 38 N. J. Law, 147; Central, &c., R. Co. v. Fellar, 84 Penn. St. 226; International, &c., Ry. Co. v. Garcia, 75 Tex. 583; 13 S. W. Rep. 225; Mobile, &c., R. Co. v. Stroud, 64 Miss. 784; State v. Baltimore, &c., R. Co., 69 Md. 494. For a deaf person about to cross a track, not to make the utmost use of his powers of vision, is sheer recklessness. Zimmerman v. Hannibal, &c., R. Co., 71 Mo.

it is, as a rule, not sufficient for the plaintiff to urge his deafness by way of excuse. It may be of the very essence of the plaintiff's default that, being deaf, he put himself in a position where his deafness would especially expose him to injury. The rule is *caveat surdus*. Neither will intoxication excuse one crossing a railroad track from the exercise of such care as is due from a sober man.[83] But intoxication can hardly be said, as matter of law, to be contributory negligence. It tends to show contributory negligence, and is matter to go to the jury.[84] "Slight intoxication," however, when on the track of a railway, is said, in Illinois, not to be contributory negligence;[85] while, under the Georgia Code, intoxication is an absolute defense to actions of this character.[86] In every jurisdiction, presumably, falling asleep, or being helplessly drunk, upon a rail-

476; Purl v. St. Louis, &c., R. Co., 72 Mo. 168; Illinois, &c., R. Co. v. Buckner, 28 Ill. 299; Chicago, &c., R. Co. v. Triplett, 38 Ill. 482; New Jersey Trans. Co. v. West, 32 N. J. Law, 91; Laicher v. New Orleans, &c., R. Co., 28 La. Ann. 320; Cogswell v. Oregon, &c., R. Co., 6 Or. 417; Terre Haute, &c., R. Co. v. Graham, 46 Ind. 239; 95 Ind. 286; 48 Am. Rep. 719; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 279; Hayes v. Michigan, &c., R. Co., 111 U. S. 228.

[83] Kean v. Baltimore, &c., R. Co., 61 Md. 154; Lane v. Missouri Pacific Ry. Co., 132 Mo. 4; 33 S. W. Rep. 645, 1128; Toledo, &c., R. Co. v. Riley, 47 Ill. 514; Chicago, &c., R. Co. v. Bell, 70 Ill. 102; Yarnall v. St. Louis, &c., R. Co., 75 Mo. 575; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Norfolk & W. R. Co. v. Harman, 83 Va. 553; 8 S. E. Rep. 251. Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632, where it was left to the jury to say whether the injured party was intoxicated or was suffering from a "providential dispensation" — a fit. If he was drunk, recovery would be barred. But if he labored under the providential dispensation, and the proximate cause of the injury could be traced to the engineer, his right to recover damages would be clear. Herring v. Wilmington, &c., R. Co., 10 Ired. (Law) 402; 51 Am. Dec. 395; Jones v. North Carolina R. Co., 67 N. C. 125; Little Rock, &c., R. Co. v. Pankhurst, 36 Ark. 371.

[84] Seymer v. Lake, 66 Wis. 651; Ford v. Umatilla County, 15 Or. 313; 16 Pac. Rep. 33; Aurora v. Hillman, 90 Ill. 61; Baltimore, &c., R. Co. v. Boteler, 38 Md. 568; Ditchett v. Spuyten Duyvil, &c., R. Co., 5 Hun, 165; 67 N. Y. 425; Illinois, &c., R. Co. v. Cragin, 71 Ill. 177; Barker v. Savage, 45 N. Y. 191; Abbott's Trial Evidence, 779; Field on Damages, 188; Shearman & Redfield on Negligence (5th ed.), § 93.

[85] Indianapolis, &c., R. Co. v. Galbraith, 63 Ill. 436.

[86] Southwestern, &c., R. Co. v. Hankerson, 61 Ga. 114.

way track, would be held such contributory negligence as to bar an action for damages.[87]

§ 198. Trespassers on a railway track — the Pennsylvania rule.— There are two views taken by the courts in this country as to the degree of care to be exacted from railway corporations with reference to trespassers upon its tracks. One class of cases hold that the agents of a railroad company are under no obligation to take precautions for the safety of trespassers. "Except at crossings," says the Pennsylvania court, "where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril."[88] "The law insists upon a clear track."[89] The Pennsylvania courts insist to the utmost upon this rule. In Phila., &c., R. Co. v. Hummell,[90] Strong, J., said: — "It is time it should be understood in this State that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must so be held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong, of an aggravated nature; for it endangers not only the trespasser, but all who are passing or transporting along the line."

§ 199. Judge Gibson's statement of the rule.— "As long ago as 1852," continued the same judge, "it was said by Judge Gibson, with the concurrence of all the court, that 'a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground

87 Yarnall v. St. Louis, &c., R. Co., 75 Mo. 575; Denman v. St. Paul, &c., R. Co., 26 Minn. 357; Felder v. Louisville, &c., R. Co., 2 McMull. (Law) 403. In such a case, the courts call the proximate cause of the catastrophe the injured person's own voluntary act. Richardson v. Wilmington, &c., R. Co., 8 Rich. (Law) 120; Herring v. Wilmington, &c., R. Co., 10 Ired. (Law) 402; 51 Am. Dec. 395; Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Illinois, &c., R. Co. v. Hutchison, 47 Ill. 408; Weymire v. Wolfe, 52 Iowa, 533.

88 Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366. See *infra*, § 211.

89 Railroad Co. v. Norton, 24 Penn. St. 465; 64 Am. Dec. 672. *Cf.* Galena, &c., R. Co. v. Jacobs, 20 Ill. 478; Lake Shore, &c., R. Co. v. Hart, 87 Ill. 529.

90 44 Penn. St. 375.

paid for to the proprietor of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere. The company, on the one hand, and the people of the vicinage, on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of the train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested.'[91] So, in Railroad Co. v. Norton,[92] it was said, that 'until the legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not, indeed, a public offense punishable by indictment.' But if the use of a railroad is exclusively for its owners, or those acting under them, if others have no right to be upon it, if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligation to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume, and act on the presumption, that those in the vicinity will not violate the laws, will not trespass upon the right of a clear track; that even children of a tender age will not be there, for, though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians."

§ 200. The Pennsylvania rule further stated.—"Precaution," continues the opinion of Judge Strong, to which reference is made in the two last preceding sections, "is a duty only so far as there is reason for apprehension. No one can complain of want of care in another, where care is only rendered necessary by his own wrongful act. It is true, that what amounts to ordinary care, under the circumstances of the case, is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a

[91] Railroad Co. v. Skinner, 19 Penn. St. 298.

[92] 24 Penn. St. 465.

failure in duty and negligence. Such is this case. The defendants had no reason to suppose that either man, woman, or child, might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood, and, consequently, the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require anyone to presume that another may be negligent, much less to presume that another may be an active wrong-doer. The principle was asserted in Brown v. Lynn,[93] and in Reeves v. Delaware R. Co.[94] It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action. There is as perfect a duty to guard against accidental injury to a night intruder into one's bed chamber, as there is to look out for trespassers upon a railroad, where the public has no right to be. And the rule must be the same, whether the railroad is in the vicinage of many or few inhabitants. In the one case, as in the other, going upon it is unlawful, and, therefore, need not be expected. In this case it appears that there are fifteen houses between the railroad and public highway, all but two of them built since the railroad was constructed. The danger of trespassing may have been increased by the increase of the population, but the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusions upon his rights. Of course, we are not speaking of the duties of railroad companies to the public at lawful crossings of their railways. We refer only to their obligations at points where their right is exclusive."[95] This is a luminous and explicit statement of the rule as held not only in Pennsylvania but in other States of the Union. Where this rule prevails, only such aggravated negligence as amounts to intentional mischief on the part of the railway, will render it liable in the event of an injury to a trespasser.[96]

[93] 31 Penn. St. 510.

[94] 30 Penn. St. 454.

[95] Phila., &c., R. Co. v. Hummell, 44 Penn. St. 375.

[96] Louisville, &c., R. Co. v. Howard, 82 Ky. 212; Western, &c., R. Co. v. Bloomingdale, 74 Ga. 604; Terre Haute, &c., R. Co. v. Gra-

§ 201. The modified rule as to trespassers.—But the courts of some of the American States incline to relax the severity of the rule as to the public, and hold that a railway company is bound to run its trains with a view to the probability, or, at most, the possibility, of constant trespass upon its tracks. This is, however, neither correct in principle nor conformed to the analogy in other branches of the law of trespass. This doctrine is thus laid down by the Missouri court, viz.: — "If, after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care

ham, 95 Ind. 286; 48 Am. Rep. 719. Even if a child is in danger, the company is only liable for gross negligence. Sabine, &c., Ry. Co. v. Hanks, 75 Tex. 323; 11 S. W. Rep. 377; Roden v. Chicago, &c., R. Co., 133 Ill. 72; 24 N. E. Rep. 425; Little Rock, &c., Ry. Co. v. Haynes, 47 Ark. 497; 1 S. W. Rep. 774. Mere constructive negligence in violating a city ordinance is not wilful or intentional within the rule. Blanchard v. Lake Shore, &c., Ry. Co., 126 Ill. 416; 18 N. E. Rep. 799; Bertelson v. Chicago, &c., Ry. Co., 5 Dak. 313; 40 N. W. Rep. 531; Baltimore, &c., R. Co. v. State, 62 Md. 479; Galveston, &c., Ry. Co. v. Ryon, 70 Tex. 56; 7 S. W. Rep. 687; Gregory v. Cleveland, &c., R. Co., 112 Ind. 385; 14 N. E. Rep. 228; Jeffersonville, &c., R. Co. v. Goldsmith, 47 Ind. 43; LaFayette, &c., R. Co. v. Huffman, 28 Ind. 287; Cincinnati, &c., R. Co. v. Eaton, 53 Ind. 310; Evansville, &c., R. Co. v. Wolf, 59 Ind. 89; Carroll v. Minn., &c., R. Co., 13 Minn. 30. Nor does the mere acquiescence of a railroad company in the use of its track or right of way by persons passing along it, as a footway, give such persons a right of way, or make the company's liability greater than to any other trespassers. Illinois, &c., R. Co. v. Godfrey, 71 Ill. 500; 22 Am. Rep. 112; Donaldson v. Milwaukee, &c., R. Co., 21 Minn. 293; Herring v. Wilmington, &c., R. Co., 10 Ired. 402; 51 Am. Dec. 395; Kenyon v. N. Y., &c., R. Co., 5 Hun, 479; Green v. Erie Ry. Co., 11 Hun, 333; Baltimore, &c., R. Co. v. Schwindling, 101 Penn. St. 258; 47 Am. Rep. 706; Railroad Co. v. Houston, 95 U. S. 697; Ream v. Pittsburgh, &c., R. Co., 49 Ind. 93; Gaynor v. Old Colony R. Co., 100 Mass. 208; Indiana, &c., R. Co. v. Hudelson, 13 Ind. 325; Morrissey v. Eastern R. Co., 126 Mass. 377; 30 Am. Rep. 686; Terre Haute, &c., R. Co. v. Graham, 95 Ind. 286; 48 Am. Rep. 719; Pittsburgh, &c., R. Co. v. Collins, 87 Penn. St. 405; 30 Am. Rep. 371; Mason v. Missouri, &c., R. Co., 27 Kan. 84; 41 Am. Rep. 405, where one was run over by a hand-car while crossing a piece of trestle-work. The court ruled out the evidence concerning the custom of foot-passengers crossing such trestle-work, and held the plaintiff to be a trespasser, and hence without remedy, unless the defendant's conduct was wilful and reckless. Nicholson v. Erie Ry. Co., 41 N. Y. 525. *Cf.* McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 555, and

becomes a duty, for the neglect of which the company is liable. When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable if, by the exercise of ordinary care, it could have prevented the accident, it is to be understood that it will be so liable if, by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity."[97]

the note. The English statute upon this subject (3 & 4 Vict., chap. 97, § 16) makes it a penal offense wilfully to trespass upon the line of a railway, and this is generally the rule of law on the continent of Europe. Hounsell v. Smyth, 7 C. B. (N. S.) 731; 6 Jur. (N. S.) 897; 29 L. J. (C. P.) 203; 8 Week. Rep. 227; 97 Eng. Com. Law, 731. It is the duty of a passenger who is wrongfully ejected from a train and placed upon the track, to leave the track at the earliest practicable opportunity that a reasonably prudent man would discover and seize upon, and the burden of proof that he did so is upon him. Ham v. Delaware & Hudson Canal Co., 155 Penn. St. 548; 26 Atl. Rep. 757.

[97] Welsh v. Jackson Co., &c., R. Co., 81 Mo. 466; Keim v. Union Ry. & Transit. Co., 90 Mo. 314; 2 S. W. Rep. 427; Dunkman v. Wabash, &c., Ry. Co., 95 Mo. 232; 4 S. W. Rep. 670; Dahlstrom v. St. Louis, &c., Ry. Co., 96 Mo. 99; 8 S. W. Rep. 777; Harlan v. St. Louis, &c., R. Co., 64 Mo. 480; 65 Mo. 22; Burnett v. Burlington, &c., R. Co., 16 Neb. 332. In Barker v. Hannibal, &c., R. Co., 98 Mo. 50; 11 S. W. Rep. 254. the majority of the court thought the circumstances called for a mitigation of the rule, and held the company not liable. The facts were that the deceased walked upon a railroad track where he had no right, and knowing that a train was due from behind him, but did not look in that direction, and was struck and killed. The track was properly fenced. The train gave no signal, though the engineer could have seen him at nearly two hundred yards distance. Missouri Pac. Ry. Co. v. Weisen, 65 Tex. 443. The negligence to make the defendant liable must have occurred after its servants either knew, or might, by the exercise of ordinary care, have known of the danger to the plaintiff. Scoville v. Hannibal, &c., R. Co., 81 Mo. 434; Brown v. Hannibal, &c., R. Co., 50 Mo. 461; 11 Am. Rep. 420; Isabel v. Hannibal, &c., R. Co., 60 Mo. 475; Finlayson v. Chicago, &c., R. Co., 1 Dill. 579; Baltimore, &c., R. Co. v. State, 33 Md. 542; State v. Baltimore, &c., R. Co., 36 Md. 366; Baltimore, &c., R. Co. v. State, 54 Md. 648; Penn., &c., Co. v. State, 61 Md. 108. In Baltimore, &c., R. Co. v. State, 62 Md. 479, it was held not to be negligence *per se*

§ 202. Duty of trespasser.— As a general rule, a trespasser on the track is held to be there at his peril.[1] He must keep himself informed of the approach of trains from any direction, and, in case of injury, will be held guilty of such contributory negligence, that he cannot recover from the railway company, notwithstanding concurrent negligence on their part.[98]

if a railroad company failed to comply with a city ordinance requiring a man to ride on the front of the locomotive within city limits, the result of which failure being the killing of a trespasser. Hassenger v. Mich., &c., R. Co., 48 Mich. 205; 42 Am. Rep. 470; Johnson v. Chicago, &c., R. Co., 56 Wis. 274; Austin v. Chicago, &c., R. Co., 91 Ill. 35; Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 30 Am. Rep. 632; Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; Gothard v. Alabama, &c., R. Co., 67 Ala. 114. *Cf.* Carter v. Louisville, &c., R. Co., 98 Ind. 552; 49 Am. Rep. 780, where it is held that when certain servants of the company have implied authority to remove trespassers from the engine, and, in consequence of their reckless manner, they injure a trespasser, the latter has an action against the company. It is not contributory negligence for one walking on the track, in a snow storm, when the snow is blinding, to presume that the railway employees will be careful in running their train. Solen v. Virginia, &c., R. Co., 13 Nev. 106. See § 50, *supra*. "As we hold that the duty on the part of the engineer of watchfulness to protect life is an ever present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of the duty performed are co-extensive with the duty prescribed and may arise wherever it exists. We are of opinion that, when by the exercise of ordinary care an engineer can see that a human body is lying apparently helpless from any cause on the track in front of his engine in time to stop the train by using the appliances at his command, without peril to the safety of the persons on the train, the company is liable for any injury resulting from his failure to perform his duty." Pickett v. Wilmington & Weldon R. Co., 117 N. C. 616, 637; 23 S. E. Rep. 264.

[98] Central R. & B. Co. v. Smith, 78 Ga. 694; 3 S. E. Rep. 397; Heffinger v. Minneapolis, &c., Ry. Co. 43 Minn. 503; 45 N. W. Rep. 1131; East Tennessee, &c., R. Co. v. King, 81 Ala. 177; Savannah, &c., Ry. Co. v. Stewart, 71 Ga. 427; Omaha Street Ry. Co. v. Martin, 48 Neb. 65; 64 N. W. Rep. 1007; Union Pacific Ry. Co. v. Meyers, 35 Neb. 204; 52 N. W. Rep. 1099; Gonzales v. N. Y.. &c., R. Co., 50 How. Pr. 126; Elwood v. N. Y., &c., R. Co., 4 Hun, 808; Green v. Erie Ry. Co., 11 Hun, 333; Illinois, &c., R. Co. v. Hall, 72 Ill. 222; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Lake Shore, &c., R. Co. v. Hart, 87 Ill. 529; Austin v. Chicago, &c., R. Co., 91 Ill. 35; Norwood v. Raleigh & Alston R. Co., 111 N. C. 236; 16 S. E. Rep. 4; Little v. Carolina

§ **203. The rule summarized.**—The doctrine upon this point, declared by the Supreme Court of Missouri, is evidently an at-

Central R. Co., 118 N. C. 1072; 24 S. E. Rep. 514; Poole v. North Carolina R. Co., 8 Jones (Law) 340; Evans v. P., C., C. & St. L. Ry. Co., 142 Ind. 264; 41 N. E. Rep. 537. The *onus* will be on the trespasser to show that the company was guilty of wanton conduct, if he would recover. Carlin v. Chicago, &c., R. Co., 37 Iowa, 316; Murphy v. Chicago, &c., R. Co., 45 Iowa, 661; 38 Iowa, 539; Laicher v. N. O., &c., R. Co., 28 La. Ann. 320; Carroll v. Minn., &c., R. Co., 13 Minn. 30; Donaldson v. Milwaukee, &c., R. Co., 21 Minn. 293; Smith v. Minnesota, &c., R. Co., 26 Minn. 419; Rothe v. Milwaukee, &c., R. Co., 21 Wis. 256; Moore v. Penn. R. Co., 99 Penn. St. 301; Mason v. Mo. Pac. R. Co., 27 Kan. 83. And this will be the case, even though the engine were running backward with tender in front, without ringing the bell or sounding the whistle, and at a rate forbidden by the ordinances of the city. Hoover v. Texas, &c., R. Co., 61 Tex. 503; Lenix v. Mo. Pac. R. Co., 76 Mo. 86; Meek v. Penn., &c., R. Co., 38 Ohio St. 632; State v. Baltimore, &c., R. Co., 58 Md. 482; Feunenbrack v. South Pac. R. Co., 59 Cal. 269; Farve v. Louisville, &c., R. Co., 42 Fed. Rep. 441; John's Admr. v. Louisville, &c., R. Co. (Ky.), 10 S. W. Rep. 417; Bentley v. Georgia Pac. Ry. Co., 86 Ala. 484; 6 So. Rep. 37; Donnelly v. Boston, &c., R. Co., 151 Mass. 210; 24 N. E. Rep. 38; May v. Central R. & B. Co., 80 Ga. 363; 4 S. E. Rep. 330; Bell v. Hannibal & St. J. R. Co., 86 Mo. 599; Grethen v. Chicago, &c., Ry. Co., 22 Fed. Rep. 609; Virginia Midland R. Co. v. Barksdale's Admr., 82 Va. 330. As no one has a right to be negligently or wrongfully on a railroad track, the company owes no duty to a person so situated to anticipate that he will be in such a position; but if its servants see him in a place of peril, though he be wrongfully or negligently there, then the duty arises to avoid injuring him if possible. The duty which the company owes to such a person originates only when the perilous position is seen or known by the company's servants. When, therefore, a plaintiff is wrongfully or negligently on the tracks of a railroad in a position of peril, as the prayer we are considering assumes was the fact in the case at bar, the duty of the company to use due care to avoid injuring him arises at the moment the servants of the company see and become aware of his peril; and hence, to sustain this branch of the prayer, it was essential for him to show, first, that the company's servants had knowledge of his peril; secondly, that they had knowledge in time to arrest an injury; and, thirdly, that they failed to exert proper care to avoid the injury after acquiring knowledge of the peril. Until the employees are made aware of the peril arising from an act of negligence on the part of the plaintiff, they are under no obligation to assume that he will be negligent or will be in a dangerous place which he has no right to occupy; and consequently they owe him no duty to anticipate that he will be where he

tempt to apply the rule that Judge Thompson has formulated,[99] for the purpose of neutralizing the heresy in Davies v. Mann,[1] but as has been already suggested,[2] it is, in the author's judgment, better to abandon the theory of that case than to explain it away. The liability of a railroad company to a trespasser on its track must be measured by the conduct of its employees after they become aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the trespasser will defeat a recovery.[3] Nor is the company liable for a failure on the part of

ought not to be, or to guard in advance against the possible or even probable results of his unknown wrongful occupancy of the tracks. And as they owe him no such duty, their failure to prevent it is not an act of negligence on the part of the company. Western Md. R. Co. v. Kehoe, 83 Md. 434, 452; 35 Atl. Rep. 90. They owe no special duty to mere trespassers, but they cannot with impunity inflict upon them reckless or wanton injury; and when it is said that they owe to trespassers only the duty of ordinary care, it is intended merely to say that trespassers are not entitled to that provident circumspection which, as far as possible, foresees and forestalls danger. That high degree of duty is owed to passengers only, but where the danger of the trespasser is discovered, it then becomes the duty of the railroad company to avoid the infliction of injury, without regard to the fact that the trespasser was himself guilty of contributory negligence. It is then incumbent upon the company to do all that can be done, consistently with its higher duty to others, to save the trespasser from the consequences of his own improper act. Seaboard & Roanoke R. Co. v. Joyner, 92 Va. 354, 363; 23 S. E. Rep. 773. "Though plaintiff be chargeable with negligence contributing to the injury, yet, if the defendant know of the danger to the plaintiff arising from his negligence, and can by ordinary care avoid the injury, but does not, he is liable for his negligence, notwithstanding the plaintiff's negligence." Carrico v. Railway Co., 39 W. Va. 87. All trespassers into dangerous situations are guilty of negligence, yet if, by ordinary care on the part of those knowing the danger, it can be averted, it is their duty to exercise such care in tender consideration of human life. Davidson v. Pittsburgh, C., C. & St. L. Ry. Co., 41 W. Va. 407, 418; 23 S. E. Rep. 593.

[99] § 54, *supra.*

[1] Thompson on Negligence, 1115, § 7.

[2] § 27, *supra.*

[3] St. Louis, &c., Ry. Co. v. Monday, 49 Ark. 257; 4 S. W. Rep. 782; St. Louis, &c., Ry. Co. v. Ross, 61 Ark. 617; 33 S. W. Rep. 1054; Bouwmeester v. Grand Rapids, &c., R. Co., 67 Mich. 87; 34 N. W. Rep. 414; Bentley v. Georgia Pac. Ry. Co., 86 Ala. 484; 6 So. Rep. 37; Carrington v. Louisville, &c., R. Co., 88 Ala. 472; 6 So. Rep. 910; Farve v. Louisville, &c., R. Co., 42 Fed. Rep. 441; Frazer v. S. & N. Ala. R. Co., 81 Ala. 185; 1 So. Rep. 85.

its employees to stop the train, on seeing a person walking on the track, even though there was time enough to do so, provided the proper signals of warning were given. The company may presume that the trespasser is in full possession of his senses, and that he will appreciate his danger, and act with discretion.[4]

[4] Nichols' Admr. v. Louisville, &c., R. Co. (Ky.), 6 S. W. Rep. 339; International, &c., Ry. Co. v. Garcia, 75 Tex. 583; 13 S. W. Rep. 223; Artusy v. Missouri Pac. Ry. Co., 73 Tex. 191; 11 S. W. Rep. 177; Maloy v. Wabash, &c., Ry. Co., 84 Mo. 270: Kennedy v. Denver, S. P. & P. R. Co., 10 Colo. 493; 16 Pac. Rep. 210, deaf persons; Daily v. Richmond, &c., R. Co., 106 N. C. 301; 11 S. E. Rep. 320, an idiot; Bouwmeester v. Grand Rapids, &c., R. Co., 67 Mich. 87; 34 N. W. Rep. 414, a man subject to spells of absent-mindedness; Williams v. Southern Pac. R. Co., 72 Cal. 120; 13 Pac. Rep. 219; Virginia M. Ry. Co. v. Boswell's Admr., 82 Va. 932; 7 S. E. Rep. 383; Houston v. Vicksburg, &c., R. Co., 39 La. Ann. 796; 2 So. Rep. 562; Hughes v. Galveston, &c., Ry. Co., 67 Tex. 595; 4 S. W. Rep. 219. Where there is no evidence that the engineer saw plaintiff in time to avoid the injury, an instruction that if the engineer made no effort to stop the engine, and gave no warning, the defendant was liable, is error. Gulf, &c., Ry. Co. v. York, 74 Tex. 364; 12 S. W. Rep. 68; Rine v. Chicago, &c., R. Co., 88 Mo. 392; Illinois, &c., R. Co. v. Modglin, 85 Ill. 481; Herring v. Wilmington, &c., R. Co., 10 Ired. L. 402; 51 Am. Dec. 395; Poole v. North Car. R. Co., 8 Jones (Law) 340; Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Holmes v. Central, &c., R. Co., 37 Ga. 593; Maher v. Atlantic, &c., R. Co., 64 Mo. 267; Frech v. Phila., &c., R. Co., 39 Md. 574; Willets v. Buffalo, &c., R. Co., 14 Barb. 585; Kenyon v. N. Y., &c., R. Co., 5 Hun, 479; Harty v. Central, &c., R. Co., 42 N. Y. 468; Little Rock, &c., R. Co. v. Pankhurst, 36 Ark. 371; Laverenz v. Chicago, &c., R. Co., 56 Iowa, 689; Cogswell v. Oregon, &c., R. Co., 9 Or. 417; Terre Haute, &c., R. Co. v. Graham, 46 Ind. 239; 95 Ind. 286; 48 Am. Rep. 719; Indianapolis, &c., R. Co. v. McClaren, 62 Ind. 566, where the court said:—"It was the duty of the deceased to have stepped off the track of the railroad; he could see his danger; he had the ability to do so at will, while it was not in the power of the train to do so. The presumption was that he would leave the track at the last moment, at least before being struck, and it may be regarded as established law, that those in charge of the train had a right to act upon that presumption till it might be too late to avoid contact." Lake Shore, &c., R. Co. v. Miller, 25 Mich. 279; Weymire v. Wolfe, 52 Iowa, 533; Moore v. Phila., &c., R. Co., 108 Penn. St. 349; 32 Alb. Law Jour. 98. Where an engineer sees on the track, in front of the engine which he is moving, a person walking or standing whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured the law imputes it to his

But an engineer, who sees a helpless person, incapable of moving, on the track, is guilty of negligence if he fails to make all prudent efforts to avoid the collision, and this without reference to the cause of the person's disability.[5]

own negligence and holds the railroad company blameless. High v. Carolina Central R. Co., 112 N. C. 385; 17 S. E. Rep. 79.

[5] Omaha, &c., Ry. Co. v. Cook, 42 Neb. 906, citing and approving the text. If the engineer can see that a man is drunk, or knows that he is deaf, and runs him down the company is liable. St. Louis, &c., Ry. Co. v. Wilkerson, 46 Ark. 513; International, &c., Ry. Co. v. Smith, 62 Tex. 252; Spooner v. Delaware L. & R. Co., 115 N. Y. 22; 21 N. E. Rep. 696; Payne v. Humeston, &c., R. Co., 70 Iowa, 584; 31 N. W. Rep. 886. As where "the party injured is prevented by a providential dispensation from the use of his faculties at the time of the injury." Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632; Telfer v. Northern, &c., R. Co., 30 N. J. Law, 188; East Tennessee, &c., R. Co. v. St. John, 5 Sneed, 524; Meeks v. Southern, &c., R. Co., 56 Cal. 513; 38 Am. Rep. 67; Schierhold v. North Beach, &c., R. Co., 40 Cal. 447; Isabel v. Hannibal, &c., R. Co., 60 Mo. 475. If a person is drunk and lying upon a railroad track, such negligence is not deemed the proximate cause of an injury sustained from a moving train, if the engineer, by the exercise of ordinary care, could have seen him in time to have prevented the injury by the proper use of the appliances at his command. Lloyd v. Albermarle & Raleigh R. Co., 118 N. C. 1011; 24 S. E. Rep. 805. "Notwithstanding the drunkenness of one who goes to sleep on the track, the engineer must keep the same lookout for his safety as for that of a cow or hog." Baker v. Wilmington & Weldon R. Co., 118 N. C. 1015; 24 S. E. Rep. 415. "It is an elementary principle that intoxication will never excuse one for a failure to exercise the measure of ordinary care and prudence which is due from a sober man under the same circumstances; a person cannot thus voluntarily incapacitate himself from the ability to exercise ordinary care and then set up such incapacity as an excuse for his negligence; therefore, where the breach of duty on the part of the defendant consisted simply in a failure to discover an intoxicated person lying on its track in time to avert injury, the negligence of such person continues as in the case of a sober man, up to the moment of the collision, is concurrent with, if not indeed subsequent to, that of the defendant, and thus, being a proximate cause of the accident, constitutes contributory negligence which bars a recovery. It would be otherwise if the engineer, knowing or having reason to believe that such person was lying helpless on the track, failed to use all means in his power to avoid the injury." Smith v. Norfolk & Southern R. Co., 114 N. C. 728; 19 S. E. Rep. 863. *Cf.* Fox v. Oakland Con. St. Ry. Co., 118 Cal. 55, 63; 50 Pac. Rep. 561; Atwood v. Bangor, &c., Ry. Co., 91 Me. 390; 40 Atl. Rep. 67.

§ 204. Children as trespassers on railroad property.—The severity of the rule, as to trespassers upon railroad property, is essentially relaxed in the case of trespassers of tender years, who, in general, have not the faculties requisite for the perception of danger, or, having such faculties, are not capable of exercising them with the discretion of adults.[6] When the tres-

[6] Roth v. Union Depot Co., 13 Wash. 525; Gunu v. Ohio River R. Co., 42 W. Va. 676; Davidson v. C. C. & S. L. Ry. Co. 41 W. Va. 407, 419; San Antonio Street Ry. Co. v. Mechler, 87 Tex. 628; Lindsay v. Canadian Pac. R. Co., 68 Vt. 556; 35 Atl. Rep. 513; Evansich v. Gulf, &c., R. Co. 57 Tex. 126; 44 Am. Rep. 586; *sub nom.*, Gulf, &c., R. Co. v. Evansich, 61 Tex. 3, 24; Rockford, &c., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 308; Nagel v. Mo. Pac. R. Co., 75 Mo. 653; 42 Am. Rep. 418; Kansas, &c., R. Co. v. Fitzsimmons, 22 Kan. 636; 31 Am. Rep. 203; Isabel v. Hannibal, &c., R. Co., 60 Mo. 475. A railroad company's neglect to fence is for the jury to consider as bearing on its liability for injury done to a child going upon the track in consequence. Keyser v. Chicago, &c., Ry. Co., 56 Mich. 559; 56 Am. Rep. 405. Where a child, walking on the railroad track on her way from school, stepped aside for a passing train which had become separated from some cause, and returning to the track was run over by the detached part, it was held that the uncoupling of the train was not the proximate cause of the accident, and the company, no other negligence being shown, was not liable. Galveston, &c., Ry. Co. v. Chambers, 73 Tex. 296; 11 S. W. Rep. 279. Where a boy was killed while lying asleep on the track, having done the same thing before and been warned, and every effort was made to stop the train, an action against the company could not be maintained. Rudd v. Richmond, &c., R. Co., 80 Va. 546; Frick v. St. Louis, &c., R. Co., 75 Mo. 542, 595; Barley v. Chicago, &c., R. Co., 4 Biss. 430; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300; Kay v. Penn. R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; Penn. R. Co. v. Lewis, 79 Penn. St. 33; Penn. R. Co. v. Morgan, 82 Penn. St. 134; Byrne v. New York, &c., R. Co., 83 N. Y. 620; Meyer v. Midland, &c., R. Co., 2 Neb. 319; Johnson v. Chicago, &c., R. Co., 56 Wis. 274; Fitzpatrick v. Fitchburg R. Co., 128 Mass. 13; McMillan v. Burlington, &c., R. Co., 46 Iowa, 231, where it was held good law to instruct the jury that "the burden of proof is on the plaintiff to show both the negligence of the defendant and the care of the deceased, that is such care as a child of his age and discretion would naturally use. But she [the plaintiff] is not bound to do more than raise by her proof a reasonable presumption of negligence. If the facts make it probable that the defendant neglected his duty, it is for the jury to decide whether or not it did so." Plumley v. Birge, 124 Mass. 57; 26 Am. Rep. 645; Kerr v. Forgue, 54 Ill. 482; 5 Am. Rep. 146; Meibus v. Dodge, 38 Wis. 300; 20 Am. Rep. 6; Munn v. Reed, 4 Allen, 431; Dowd v. Chicopee, 116 Mass. 93, which was an action against a town to re-

passer is an infant, the railway company, on the one hand, is held bound to exercise a higher degree of care and caution than is required as to adults, and the infant, on the other hand, is not required to exercise a discretion and prudence beyond its years, but only that measure of sense and judgment which it may reasonably be expected to possess in view of its age.[7] When, however, children go so far, by way of a trespass, as to make a play-ground of the railroad track, or of other exposed railway premises or property, cases are not wanting to support the rule that such conduct is negligent *per se*, and that the company will not be liable for injury to children so conducting themselves, unless the acts of their employees evince a reckless and wanton disregard of human life which is equivalent to intentional mischief.[8]

cover for injuries sustained from a defect in a highway by a boy fifteen years old. Held, that he need not show that he exercised the same care as would be required of an adult. Keyser v. Chicago, &c., R. Co., 56 Mich. 559; 19 Am. Law Rev. 668.

[7] See generally the cases last cited. See § 21b.

[8] Morrissey v. Eastern R. Co., 126 Mass. 377; 30 Am. Rep. 686; Central Branch, &c., R. Co. v. Henigh, 23 Kan. 347; 33 Am. Rep. 167; Smith v. Atchison, &c., R. Co., 25 Kan. 738; *sub nom.*, Atchison, &c., R. Co. v. Smith, 28 Kan. 541; Cauley v. Pittsburgh, &c., R. Co., 95 Penn. St. 398; 40 Am. Rep. 664. In Moore v. Pennsylvania R. Co., 99 Penn. St. 301; 44 Am. Rep. 106, a boy ten years old, of rare, exceptional capacity, was sent by his parents upon an errand along a street in a populous suburb of a city on which a railroad track was constructed. He was run over and killed by a passenger train moving at a rapid rate of speed without whistle or other signal. It was found, however, that the boy, to amuse himself, was walking on the outer ends of the sleepers at the time the injury occurred. Held, that this was contributory negligence barring recovery. Baltimore, &c., R. Co. v. Schwindling, 101 Penn. St. 258; 47 Am. Rep. 706; Chicago, &c., R. Co. v. Smith, 46 Mich. 504; Malone v. Boston, &c., R. Co., 4 N. Y. Supl. 599; 51 Hun, 532. Where there was no evidence that defendants' servants saw or knew of the boy's danger, an instruction that, though there was contributory negligence, yet if his death could have been prevented by reasonable care on the part of defendant's employees after discovering his danger, defendant was liable, would be erroneous. Williams v. Kansas City, &c., R. Co., 96 Mo. 275; 9 S. W. Rep. 573; St. Louis, &c., R. Co. v. Bell, 81 Ill. 76; 25 Am. Rep. 269; *Ex parte* Stell, 4 Hughes, 157; Miles v. Atlantic, &c., R. Co., 4 Hughes, 172. A railway company which operated a coal mine near one of its stations in Colorado, was in the habit of depositing slack on an open lot between the mine and the station in such quantities that

§ 205. The General Rule.— In the application of the general principles of the law of negligence and trespass to cases involving the rights of infants, or persons of tender years, various questions of considerable difficulty have arisen. As a rule, a trespasser acts at his peril, and one owes no duty to such a person except that a wanton injury must not be inflicted upon him; but where one goes upon the premises or property of another, not as a mere trespasser, or by mere passive license, but by some sort of an invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases," said Chief Justice Bigelow, in Sweeney v. Old Colony and Newport R. Co.,[9] "is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon or pass over them, using due care, if he has held out any inducement, invitation or allurement, either express or implied, by which they have been led to enter thereon."[10]

§ 206. The rule illustrated.—There are cases that hold, as an application of this doctrine, that what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. Accordingly, when one exposes

the slack took fire and was in a permanent state of combustion. That fact had been well known for a long time to the employees and servants of the company, but no fence was erected about the open lot, and no efforts were made to warn people of the danger. A lad twelve years of age and his mother arrived by train at the station and descended there. Neither had any knowledge of the condition of the slack which on its surface, presented no sign of danger. Something having alarmed the boy, he ran toward the slack, fell on it, and was badly burned. Suit was brought to recover damages from the railway company, for the injuries thus inflicted upon him. Held, that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence; and that the case was within the rule that the court may withdraw the case from the jury altogether and direct a verdict, when the evidence is undisputed, or is of such a conclusive character that the court would be compelled to set aside a verdict returned in opposition to it. Union Pacific Ry. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. Rep. 619.

[9] 10 Allen, 368.

[10] *Cf.* Indermaur v. Dames, L. R. 1 C. P. 274; 12 Jur. (N. S.) 432; 35 L. J. (C. P.) 184; 14 Week. Rep. 586; 14 L. T. (N. S.) 484; affirmed, 36 L. J. (C. P.) 181; L. R. 2 C. P. 311; 15 Week. Rep. 434; 16 L. T. (N. S.) 293, and see § 67, *supra*.

upon his premises, in a place to which children may, or are likely to resort or be attracted, a dangerous tool, or machine, or other contrivance, which is calculated to inflict an injury upon any one who meddles with it, or even touches it heedlessly, without any precaution upon the part of the person so exposing it against mischief, it is held that such a person is not only guilty of negligence, but of negligence of a very reprehensible character.[11]

§ 207. **The turn-table cases.**— Stout v. Sioux City & Pacific R. Co.[12] is the first of a series of adjudications, which are known as the "turn-table cases," in which this rule is applied in actions brought by, or in behalf of, infants, who have been injured while playing on, or about turn-tables, left by railway companies unlocked or unguarded — and in such exposed positions as to tempt children to play with them. In this case, the plaintiff, a boy six years of age, who was playing upon such an exposed and unguarded turn-table in company with several other boys, was seriously hurt, and Judge Dillon, in delivering the charge, insisted that the circumstance that the plaintiff was in some sense a trespasser, did not, under these circumstances, exempt the defendant from the duty of care. The boy being the plaintiff, and not his parents, and it being conceded that there was no negligence on the part of the parents, and that as the plaintiff was but six years of age, none could be

[11] Lynch v. Nurdin, 1 Q. B. 29; Clark v. Chambers, L. R. 3 Q. B. Div. 327; Hughes v. Macfie and Abbott v. Macfie, 2 Hurl. & Colt. 744; 10 Jur. (N. S.) 682; 33 L. J. (Exch.) 177; 12 Week. Rep. 315. But for a contrary rule, see Mangan v. Atterton 4 Hurl. & Colt. 388, in which it was held that defendant had a clear right to place the machine in the market. He was not to blame, for instance, if he had painted it with some poisonous paint, and a child had sucked it. Why, then, make him negligent if other people improperly meddled with it? Whirley v. Whitman, 1 Head (Tenn.) 610; Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; Wood v. School District, 44 Iowa, 27; Hydraulic Works Co. v. Orr, 83 Penn. St. 332; Lane v. Atlantic Works, 107 Mass. 104; Mullaney v. Spence, 15 Abb. Pr. (N. S.) 319; Townsend v. Wathen, 9 East, 277, a case in which it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong scented meat, by which the dogs were allured to come upon his land and into his traps — and that, too, although the traps were not set to catch the dogs.

[12] 2 Dill. 294.

predicated of him, the simple question was as to the liability of the company by reason of their leaving the turn-table unlocked and unguarded in a place where boys were likely to come. It was held that the plaintiff might recover, and, upon appeal, the judgment of the court below was affirmed.[13]

§ 208. **The Minnesota case.**— The next case in which this question came before a court of last resort was one[14] in which, upon an essentially similar state of facts, the same result was reached. The court said: — "We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turn-table that any land-owner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury upon all the circumstances of the case."[15] In the same opinion it is declared that: — "To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and when put in motion by them was dangerous to young children, by whom it could be easily put in motion, and many of them were in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser capable of using care, consists in this — that the plaintiff was induced to come

[13] Affirmed, *sub nom.*, Railroad Co. v. Stout, 17 Wall. 657.

[14] Keffe v. Milwaukee, &c., R. Co., 21 Minn. 207; 18 Am. Rep. 393.

[15] Keffe v. Milwaukee, &c., R. Co., 21 Minn. 207; 18 Am. Rep. 393, following Railroad Co. v. Stout, 17 Wall. 657, and Stout v. Sioux City, &c., R. Co., 2 Dill. 294.

upon the defendant's turn-table by the defendant's own conduct, and that as to him, the turn-table was a hidden danger — a trap.[16]

§ 209. **Other cases which follow this rule.**— The same rule is laid down in several later cases,[17] and has been followed in Georgia, Kansas, California, Missouri, Texas, and several other States.

[16] Keffe v. Milwaukee, &c., R. Co., 21 Minn. 207; 18 Am. Rep. 395.

[17] Gulf, &c., Ry. Co. v. Styron, 66 Tex. 421; Bridger v. Asheville, &c., R. Co., 27 S. C. 456; 3 S. E. Rep. 860; Ferguson v. Railroad Co., 75 Ga. 637; Ferguson v. Columbus, &c., Ry. Co., 77 Ga. 102; Barrett v. Southern Pacific R. Co., 91 Cal. 296; 27 Pac. Rep. 666. Although the child had sufficient intelligence to know that it was wrong to trespass upon the turn-table, yet, if he had no knowledge that playing upon the table was dangerous, it cannot be said that he was guilty of contributory negligence. Union Pac. Ry. Co. v. Dunden, 37 Kan. 1; 14 Pac. Rep. 501. Evidence of accidents which happened to others at the same place is rightly excluded. Early v. Lake Shore, &c., Ry. Co., 66 Mich. 349; 33 N. W. Rep. 813. That plaintiff himself was unable to revolve the table, and was injured by its being turned by older children, who may have been responsible for their negligent acts, does not relieve defendant from liability for its negligence in leaving its turn-table exposed and unfastened. Gulf, &c., Ry. Co. v. McWhirter, 77 Tex. 356; 14 S. W. Rep. 26; Ferguson v. Columbus, &c., Ry. Co., 75 Ga. 637; O'Malley v. St. Paul, &c., Ry. Co., 43 Minn. 289; 45 N. W. Rep. 440; Ilwaco Ry. Co. v. Hedrick, 1 Wash. St. 446; 25 Pac. Rep. 335. A boy ten and one-half years old, and of average intelligence, who had often been near a railway turn-table, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play on it, and told not to do so, and knew that the railway company prohibited children from playing on the table, engaged with other boys in swinging on it, and was injured. Held, contributory negligence. Twist v. Winona, &c., R. Co., 39 Minn. 164; 39 N. W. Rep. 402; Kansas, &c., R. Co. v. Fitzsimmons, 22 Kan. 686; 31 Am. Rep. 203; 18 Kan. 34; Kansas, &c., R. Co. v. Allen, 22 Kan. 285; Koons v. St. Louis, &c., R. Co., 65 Mo. 592. The court in Evansich v. Gulf, &c., R. Co., 57 Tex. 126; 44 Am. Rep. 586, characterizes turn-tables as dangerous machines to children, who are attracted to them for amusement, it making no difference whether they be situated on the premises of the company or not. Nagel v. Missouri, &c., R. Co., 75 Mo. 653; 42 Am. Rep. 418. *Cf.* Baltimore, &c., R. Co. v. Schwindling, 101 Penn. St. 258; 47 Am. Rep. 706; Cauley v. Pittsburgh, &c., R. Co., 95 Penn. St. 398; 40 Am. Rep. 664; Central Branch, &c., R. Co. v. Henigh, 23 Kan. 347; 33 Am. Rep.

§ 210. The contrary rule.— But the doctrine of the United States Supreme Court in Railroad Co. v. Stout[19] has not met with universal approval. In McAlpin v. Powell[20] the New York Court of Appeals intimated that it could not be supported; and in the recent case of Walsh v. Fitchburg Railroad Co.[21] that court unanimously disapproved of the doctrine.[22] It has

167. But in regard to swing bridges, in Gavin v. Chicago, 97 Ill. 66; 37 Am. Rep. 99, it is held that municipal authorities are not bound to so construct these as to make them safe for children to play upon, and hence need not place guards or mechanical contrivances to keep children off the same. Meeks v. Southern Pacific R. Co., 56 Cal. 513; 38 Am. Rep. 67; Keyser v. Chicago, &c., R. Co., 56 Mich. 559; 19 Am. Law Rev. 668.

19 17 Wall. 657.

20 70 N. Y. 126.

21 145 N. Y. 301; 39 N. E. Rep. 1068.

22 The opinion in this case was written by Judge Peckham, now of the United States Supreme Court. In the course of the discussion, he said:—"The table might have been kept so fastened or locked when not in use that people could not turn it without unfastening or unlocking it, and the defendant might even have built a wall around it so high and guarded it so closely as to prevent any access to it by children at any time. But was defendant bound to do so? Did it owe any such duty to the public or to this plaintiff? The turn-table was on its own land; it was used by the defendant for the sole purpose of properly conducting its own business; it was a fit and proper machine for that purpose; it was not of the nature of a trap for the unwary; it was not built in any improper or negligent way with reference to the transaction of the business of the defendant. What further duty did it owe to those who had no business upon its land, who came there unasked and whose presence was simply tolerated? Upon the question of alluring plaintiff, we do not think it can be correctly said defendant either enticed or allured him to come upon its land. * * * We have not had occasion to decide the question up to this time, but now that it is presented, we not only reiterate the doubt which we expressed in the McAlpin case, but we think that the question of the defendant's negligence was erroneously submitted to the jury in the Stout case, and that we ought not to follow it as a precedent. We think it is not a question of fact to be submitted to the jury for its determination whether the defendant has or has not been guilty of negligence under such circumstances as appear in this case. Upon such facts we hold the defendant has violated no duty it owed the plaintiff. * * * There is a great difference in the facts between the case of Lynch v. Nurdin and the present case. Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from children passing along the street, might be held a proper question

also been repudiated in Massachusetts,[23] New Hampshire,[24] and New Jersey.[25]

for the jury to say whether it was or was not negligence, while in the case of a defendant engaged upon his own land in simply doing that which it is necessary to do in order that he may carry on his business properly and who fails to exercise the highest vigilance in order to protect from possible harm children who may stray upon his land for no other purpose than recreation, we think there is an absence of any fact upon which a jury ought to be permitted to find negligence. The defendant in the one case was not upon his own land nor was he engaged in the proper transaction of his business thereon, but, on the contrary, he was in a public street and improperly left his horse and cart therein unattended and where others, and among them children, had the same right to be that he had. In the case of this defendant, on the other hand, the turn-table was on its own land, it was a proper and appropriate machine for the carrying on of its business, it was properly made and it was properly used by the defendant."

[23] Daniels v. Railroad Co., 154 Mass. 349; 28 N. E. Rep. 283. In this case the boy was attracted to the premises of the railroad company by an unlocked and unguarded turn-table near a highway, and also near the accustomed resorts of children, and was injured while playing with it. The court held that upon such facts no invitation from the company was to be inferred, but that the boy was a mere trespasser to whom the company owed no duty which was violated.

[24] Frost v. Eastern, &c., R. Co., 64 N. H. 220; 9 Atl. Rep. 790.

[25] D., L. & W. R. Co. v. Reich (1898), 40 Atl. Rep. 682; Turess v. New York, Susquehanna & Western R. Co. (1898), 40 Atl. Rep. 614. In this case it is said by Magie, C. J.:—"It is nowhere pretended that the rule applies in the case of adults, who, under similar circumstances, would undoubtedly be trespassers, to whom the railroad company would owe no duty, or at most would be admitted by license or permission, and to them the railroad company would owe no duty but to abstain from wilful injuries, and from maintaining hidden and concealed dangers. But the expressed notion is that under such circumstances young children are not trespassers, because allured and tempted to come upon the land of another, and not being of sufficient age to appreciate the dangers consequent on yielding to such temptation. It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turn-tables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a wind-mill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work;

§ 210a. Same subject — Cars left across street. — If a train of cars has been left across a public street for a time greater than that allowed by law, a child who attempts to pass the obstruction thus created by climbing on the cars is not neces-

he who maintains a pond in which boys may swim in summer or on which they may skate in winter,— would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating, are attractions almost irresistible to children, and any land-owner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the doctrine of the turn-table cases, if correct, would charge the land-owner or occupier with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it. The only ground upon which this doctrine can be supported, if at all, is that he who maintains on his land a thing having the attractiveness mentioned, is assumed thereby to invite upon his lands children of tender age to whom this attractiveness has proved a temptation too strong to resist, and to know what the conduct of children thus invited would probably be. The duty must arise, in my judgment, from this implied invitation. I use the word 'invitation' as aptly expressing a well-known relation between an owner or occupier of land and one who comes thereon under certain circumstances. The nature and extent of the liability of the inviter are well settled. (Phillips v. Library Co., 55 N. J. Law, 307; 27 Atl. Rep. 478.) Mr. Justice Depue, in the case last cited, draws attention to a criticism of the master of the rolls in Heaven v. Pender (11 Q. B. Div. 508), on the accuracy of the word 'invitation,' as commonly used in this connection. But the statement which the learned master of the rolls suggested as more accurately expressing the relation between the parties in such cases seems to be unnecessarily and erroneously broad. Invitation is a term whose legal import is known, and there is no reason for not using it to express the relation now under consideration. Invitation which creates such a relation may be express, as when the owner or occupier of land by words invites another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition, originally given in Sweeny v. Railroad Co. (10 Allen, 368), was approved and adopted by our Court of Errors. Phillips v. Library Co. (*ubi supra*). It will

sarily a trespasser, and whether he was a trespasser or not will be left to the jury to determine from all the circumstances.[26]

§ 211. Walking along a railway track.— As a general rule, the courts declare that walking upon the track of a railway is not negligence *per se*, but, in the event of an injury, the question of negligence as to that act is one proper to go to

be observed that in the case of an implied invitation the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified, by the acts or conduct of the owner or occupier, in believing that such use was intended; and entry and use by such invitation is thus distinguished from entry and use by mere permission. Applying these views to the turn-table cases, it is obvious that the relation between a railroad company and a child who enters its lands to play with a turn-table is not one created by implied invitation. A turn-table, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults, but only to such prudence and care as their years indicate them to possess; for it is not (yet) a question of the child's negligence, but a question of the duty of the railroad company toward the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turn-table was designed for the use he makes of it; which is, of course, absurd. In my judgment, it follows that the liability of a railroad company to a child injured by playing on its turn-table cannot arise out of a duty imposed on the company by reason of a supposed implied invitation. If a child is not to be deemed invited to enter a railroad company's land to play upon a turn-table, it also follows that a child in doing so is either a trespasser, or is there by mere permission. In neither case is any duty cast upon the land-owner, except to abstain from wilful injury, and from maintaining hidden or concealed danger."

[26] L. E. & W. R. Co. v. Mackey, 53 Ohio St. 370; 41 N. E. Rep. 980; 53 Am. St. Rep. 641. "Whether or not the presence of a train upon a crossing should be treated as notice to a child of nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the child, and that, as we have already found, is a question of fact for the jury. Besides this, it might be argued that the train would naturally furnish temptations to such a child when desiring to pass, to take great risk in doing so, and that train-men, as

the jury.[27] So, also, even when one is upon the track, on horseback, between the crossings, such conduct is held not to constitute negligence as matter of law. Upon this point the Court of Appeals of Maryland said: — "He may have been attempting to cross it under circumstances which would relieve him of all imputation of negligence."[28] The courts of Pennsylvania, however, go to the opposite extreme.[29] What would be negligence sufficient to bar a right of action in a trespasser upon the company's track, will also be sufficient in the case of one of the company's servants walking or riding upon the track of the company in whose employ he is, if such action be not in the line of his duty, or essential to the discharge of his duty.[30]

reasonable men, ought to anticipate that children would exercise only the discretion usual among children, and, if circumstances indicated their presence at the crossing, to take reasonable precautions for their safety." Per Spear, J.

[27] Especially in a town or city, where passing and repassing are frequent. Ala., &c., R. Co. v. Chapman, 80 Ala. 615; 2 So. Rep. 738; Vicksburg, &c., R. Co. v. McGown, 62 Miss. 682; 52 Am. Rep. 205; Carter v. Columbia, &c., R. Co., 19 S. C. 20; 45 Am. Rep. 754. While such person negligently exposes himself to peril, yet, if he uses all proper care in endeavoring to escape the danger when it becomes apparent, and the defendant fails to use all possible means to avoid the accident, the original negligence is no defense, and the defendant is liable. Gothard v. Alabama, &c., R. Co., 67 Ala. 114. But see § 198, *supra;* Townley v. Chicago, &c., R. Co., 53 Wis. 626; Fitzpatrick v. Fitchburg R. Co., 128 Mass. 13; Hassenger v. Michigan, &c., R. Co., 48 Mich. 205; 42 Am. Rep. 470; Johnson v. Chicago, &c., R. Co., 56 Wis. 274. But in Pennsylvania, such an act is negligence, as matter of law. Moore v. Pennsylvania R. Co., 99 Penn. St. 301; 44 Am. Rep. 106; Cauley v. Pittsburgh, &c., R. Co., 95 Penn. St. 398; 40 Am. Rep. 664.

[28] Northern, &c., R. Co. v. State, 29 Md. 420. But see McDonald v. Chicago, &c., Ry. Co., 75 Wis. 121; 43 N. W. Rep. 744, where it was held that a sane man who drives a team upon a railroad track at a road crossing at night, and continues driving thereon for nearly two miles, where there is nothing to prevent his leaving the track except darkness, is guilty of gross negligence, and no recovery can be had for his death caused by a passing train, though the railroad company maintained the crossing in a negligent manner, and decedent was not negligent in entering on the track.

[29] § 198, *supra.*

[30] Burling v. Illinois, &c., R. Co., 85 Ill. 18; Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366. One who, though warned and knowing the danger, while on an errand which he has volunteered to do for the station agent, is struck by a train, supposed by him to be on another track, contributes to his own injury so as to bar recovery.

The omission to give the signals, required by statute, at the public crossings, is not evidence of negligence toward a person injured upon the track beyond the crossing. This provision of law is made for the benefit only of persons traveling upon the highway and coming lawfully upon the track at a public crossing. The Supreme Judicial Court of Massachusetts had said, upon this point: — "The law requires no one to provide protection or safeguards for mere trespassers or wrong-doers, nor, indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk, and enjoy the license subject to its perils. Toward them there exists no unfulfilled obligation or duty on the part of the owner.[31] Compliance with a city ordinance requiring that "when a loco-

Barstow v. Old Colony R. Co., 143 Mass. 535; Maher v. Atlantic, &c., R. Co., 64 Mo. 267; Clark v. Boston, &c., R. Co., 128 Mass. 1; Holland v. Chicago, &c., R. Co., 5 McCrary, 549; Miller v. Union Pac. Ry. Co., 2 McCrary, 87; Sweeney v. Boston, &c., R. Co., 128 Mass. 5.

[31] Gaynor v. Old Colony, &c., R. Co., 100 Mass. 208; O'Donnell v. Providence, &c., R. Co., 6 R. I. 211; Holmes v. Central R. Co., 37 Ga. 593; Railroad Co. v. Houston, 95 U. S. 697; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 300; Elwood v. N. Y., &c., R. Co., 4 Hun, 808. It makes no difference how neglectful it may be of a railroad company in some cases to violate the statutory requirements to give signals at certain points,— toward trespassers such conduct will not be called negligence. Harty v. Central R. Co., 42 N. Y. 468. But in Central R. Co. v. Raiford, 82 Ga. 400; 9 S. E. Rep. 169, the omission was held evidence of negligence both as to those crossing and those walking along the track, and in Vicksburg, &c., R. Co. v. McGown, 62 Miss. 682; 52 Am. Rep. 205, a trespasser in the exercise of due care, recovered for an injury occasioned by the negligence of the company in running at an unlawful rate of speed. Mason v. Mo. Pac. R. Co., 27 Kan. 83; 41 Am. Rep. 405; Pittsburgh, &c., R. Co. v. Collins, 87 Penn. St. 405; 30 Am. Rep. 371; Morrissey v. Eastern, &c., R. Co., 126 Mass. 377; 30 Am. Rep. 686; Meeks v. Southern Pac. R. Co., 56 Cal. 513; 38 Am. Rep. 67; Terre Haute, &c., R. Co. v. Graham, 95 Ind. 286; 48 Am. Rep. 719; Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632; Shackelford's Admr. v. Louisville, &c., R. Co., 84 Ky. 43. There is no duty to provide a flagman at a street crossing in favor of a man walking on the track. Chicago, &c., Ry. Co. v. Eininger, 114 Ill. 79. In Kelley v. Mich. Cent. R. Co., 65 Mich. 186; 31 N. W. Rep. 904, plaintiff, while walking upon the defendant's tracks, and crossing the highway, was struck by a stake attached to an engine used in "staking cars." It was held that the plaintiff was not lawfully upon the public highway, and that defendant owed no greater or different duty to him than if he were on the track off the highway.

motive engine is used within the limits of the city, a man shall ride on the front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road," is not due to persons walking on the private way of the railroad company, at an uninhabited point and not at a street crossing, although in a path used by the public with the silent acquiescence of the company.[32]

§ 212. Where the track is a quasi public way.— Where the track of a railway company is used by pedestrians for purposes of travel, by permission of the company, such pedestrian thereby becomes a licensee. He is no longer a mere trespasser upon the track at his peril; and this consideration enhances the duty of the employees of the company to exercise caution and increased prudence in operating the road at this point.[33] But that there has grown up a habit on the part of individuals, or of the public generally, to travel over the track on foot, and that no measures have been taken to prevent it, does not change the relative rights and obligations of the public and the company. It is not the

[32] Baltimore, &c., R. Co. v. State, 62 Md. 479; 50 Am. Rep. 233; Rafferty v. Missouri Pac. Ry. Co., 91 Mo. 33.

[33] Illinois, &c., R. Co. v. Hammer, 72 Ill. 347; Kay v. Penn. R. Co., 65 Penn. St. 269; Penn. R. Co. v. Lewis, 79 Penn. St. 33; Davis v. Chicago, &c., R. Co., 58 Wis. 646; 46 Am. Rep. 667; Barry v. New York, &c., R. Co., 92 N. Y. 289; 44 Am. Rep. 377; Solen v. Virginia, &c., R. Co., 13 Nev. 106, where the plaintiff walked along the track of a company laid on a street provided with no sidewalks or passage-way. Held, that the plaintiff had a right to expect that the usual statutory signals would be given. Fitzpatrick v. Fitchburg R. Co., 128 Mass. 13; Daley v. Norwich, &c., R. Co., 26 Conn. 591; Kansas, &c., R. Co. v. Pointer, 9 Kan. 620; 14 Kan. 38; Brown v. Hannibal, &c., R. Co., 50 Mo. 461; Harty v. Central R. Co., 42 N. Y. 468; Murphy v. Chicago, &c., R. Co., 38 Iowa, 539; 45 Iowa, 661. But see Sutton v. New York Central, &c., R. Co., 66 N. Y. 243, holding that, although a railroad company has given an *implied* license to people to cross its tracks at a certain point, yet it owes no duty to active vigilance to those crossing to guard them from accident. It would be liable, however, for an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license. Nicholson v. Erie Ry. Co., 41 N. Y. 425; Donaldson v. Milwaukee, &c., R. Co., 21 Minn. 293; Graves v. Thomas, 95 Ind. 361; 48 Am. Rep. 727; Campbell v. Boyd, 88 N. C. 129; 43 Am. Rep. 740; Bennett v. Louisville, &c., R. Co., 102 U. S. 577.

less a trespass in that it is repeated, or that there are many trespassers.[34] A contrary doctrine is declared in several recent cases to the effect that when the railroad permits people to pass over their grounds, they thereby tacitly license the public to come upon them, and that they do not become trespassers if they do so in a proper manner.[35] This is, however, contrary to the general course of authority in this country.[36]

[34] Phila., &c., R. Co. v. Hummel, 44 Penn. St. 375; Gaynor v. Old Colony, &c., R. Co., 100 Mass. 208; Bancroft v. Boston, &c., R. Co., 97 Mass. 276; Finlayson v. Chicago, &c., R. Co., 1 Dill. 579; Indiana, &c., R. Co. v. Hudelson, 13 Ind. 325; Jeffersonville, &c., R. Co. v. Goldsmith, 47 Ind. 43; Galena, &c., R. Co. v. Jacobs, 20 Ill. 478. Implied assent of a railroad company to the use of its tracks as a foot-way cannot be deduced from previous non-interference. No right of way can be acquired simply because the company does not see fit to keep people off its premises. Illinois, &c., R. Co. v. Godfrey, 71 Ill. 500; 22 Am. Rep. 212; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Aurora, &c., R. Co. v. Grimes, 13 Ill. 585; Parker v. Portland Publishing Co., 69 Me. 173; 31 Am. Rep. 262; Sullivan v. Waters, 14 Ir. C. L. 466; Holmes v. N. E. Ry. Co., L. R. 4 Exch. 257.

[35] Illinois, &c., R. Co. v. Hammer, 72 Ill. 347; Taylor v. Delaware, &c., Canal Co., 113 Penn. St. 162; 8 Atl. Rep. 43; Harriman v. Pittsburgh, &c., R. Co., 45 Ohio St. 11; 12 N. E. Rep. 451; Nichols' Admr. v. Washington, &c., R. Co., 83 Va. 99; 5 S. E. Rep. 171; St. Louis, &c., R. Co. v. Crosnoe, 72 Tex. 79; 10 S. W. Rep. 342; Troy v. Cape Fear, &c., R. Co., 99 N. C. 298; 6 S. E. Rep. 77; Nuzum v. Pittsburgh, &c., R. Co., 30 W. Va. 228; 4 S. E. Rep. 242; Byrne v. New York, &c., R. Co., 104 N. Y. 362; 58 Am. Rep. 512. *Cf.* Graves v. Thomas, 95 Ind. 361; 48 Am. Rep. 727.

[36] Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; Blanchard v. Lake Shore, &c., Ry. Co., 126 Ill. 416; 18 N. E. Rep. 799; Wright v. Boston, &c., R. Co., 142 Mass. 296; Memphis, &c., R. Co. v. Womack, 84 Ala. 149; 4 So. Rep. 618; Kay v. Penn. R. Co., 65 Penn. St. 269; Railroad Co. v. Norton, 24 Penn. St. 465; Penn. R. Co. v. Lewis, 79 Penn. St. 33; Gillespie v. McGowen, 100 Penn. St. 144; 45 Am. Rep. 365; Blockman v. Toronto Street Ry. Co., 38 Up. Can. Q. B. 173; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Pierce v. Whitcomb, 48 Vt. 127; 21 Am. Rep. 120; Seymour v. Maddox, 16 Q. B. 326; 20 L. J. (Q. B.) 327. See, however, the following cases, in which it is declared as law that if the managers of a train have reasonable grounds to expect that persons will be upon the track at a particular place, they must exercise more care than ordinarily, whether such persons are on the track rightfully or wrongfully. Cassida v. Oregon Ry. & Nav. Co., 14 Or. 551; 13 Pac. Rep. 438; South & North Ala. R. Co. v. Donovan (Ala.), 4 So. Rep. 142; Peyton v. Texas, &c., Ry. Co., 41 La. Ann. 861; 6 So. Rep. 690; Western, &c., R. Co. v. Meigs, 74 Ga. 857.

§ 213. The English rule.— In England it has been decided, in a comparatively recent and very carefully considered case, that where notices have been put up by the railway company, forbidding persons to cross the track at a certain point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in case of an injury to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages.[37] This is the rule of Illinois, &c., R. Co. v. Hammer,[38] but it is not the received rule in this country, as we have seen. Our courts, very generally and consistently, adhere to the stricter rule which is well expounded by the Massachusetts Supreme Judicial Court:— "The law requires no one to provide protection, or safe-guards for mere trespassers or wrong-doers, nor, indeed, for those who enter by mere permission, without inducement held out by the owner. Such go at their own risk, and enjoy the license subject to its perils. Toward them there exists no unfulfilled obligation, or duty, on the part of the owner."[39] The English case of Dublin, &c., Ry. Co. v. Slattery, cited above as stating the present English rule in point, is fully set forth, and the opinions of the judges reproduced at length by Judge Thompson."[40] This exact and learned writer concludes:— "The current of authority of this country is, undoubtedly, with the dissenting opinions in this case,[41] as to the duty incumbent upon one stepping upon a road track, to have all his faculties alive to the sense of danger, the neglect of which precaution amounts to negligence *per se*."[42]

§ 214. Further statement of the rule in the United States.— The courts of Pennsylvania have taken high ground upon this

[37] Dublin, &c., Ry. Co. v. Slattery, 3 App. Cas. 1115.

[38] 72 Ill. 347.

[39] Gaynor v. Old Colony, &c., R. Co., 100 Mass. 208.

[40] Thompson on Negligence, 455.

[41] Dublin, &c., Ry. Co. v. Slattery.

[42] Citing Railroad Co. v. Houston, 95 U. S. 697; Bancroft v. Boston, &c., R. Co., 97 Mass. 275; Wilcox v. Rome, &c., R. Co., 39 N. Y. 358. But where a railroad company has taken certain precautions in guarding the track, the removal of such precautions without notice may be negligence on its part. Ernst v. Hudson River R. Co., 39 N. Y. 61; Sutton v. N. Y., &c., R. Co., 66 N. Y. 243; Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366; Illinois, &c., R. Co. v. Hetherington, 83 Ill. 510; North Penn. R. Co. v. Heileman, 49 Penn. St. 60.

question, insisting upon the absolute right of the railway company to a clear track. This position, as I understand it, is not extreme, and if the public could understand that venturing upon a railway track, in this way, is negligence *semper ubique*, and that he who so acts, acts at his peril, and in case of injury has no remedy, it can well be believed that fewer accidents of such a character would happen. In Tennessee the matter of injuries to persons upon the track is regulated by statute.[43] "Every railroad company," this statute provides, "shall keep the engineer, firemen, or some other person upon the locomotive, always upon the lookout ahead, and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." The burden of proof is upon the company; it must show that all the statutory requirements have been complied with.[44] It is not sufficient merely to show that the accident was inevitable, and would certainly not have been prevented by a strict compliance on the part of the railroad with all the requirements of the statute.[45] This is a somewhat more onerous obligation than the law usually imposes upon railway corporations in this particular.

§ 215. The duty of the railway to the trespasser after the injury.— Under certain circumstances, the railroad may owe a

[43] Thompson & Steiger, § 1166 (5).

[44] Thompson & Steiger, § 1168. East Tenn., &c., R. Co. v. Pratt, 85 Tenn. 9; 31 S. W. Rep. 618, holds the statute to be merely declaratory of the common law, and that an allegation charging the defendant with wrongfully and negligently running its train over the plaintiff, is sufficient notice to compel the company to prove its compliance with the statute. East Tennessee, &c., R. Co. v. Winters, 85 Tenn. 240; 1 S. W. Rep. 790.

[45] East Tenn., &c., R. Co. v. St. John, 5 Sneed, 524; Louisville, &c., R. Co. v. Burke, 6 Coldw. 45; Smith v. Nashville, &c., R. Co., 6 Coldw. 589; 6 Heisk. 174; Nashville, &c., R. Co. v. Prince, 2 Heisk. 580; Railroad Co. v. Walker, 11 Heisk. 383. See, also, Hill v. Louisville, &c., R. Co., 9 Heisk. 823, holding that it is the positive and imperative duty of the engineer to sound the alarm whistle the *instant* he sees a person upon the track. We know not what might be the effect of the alarm whistle, even upon the maudlin brain of a drunken man; nor is the court allowed to conjecture as to whether its startle may have saved his life. Louisville, &c., R. Co. v. Conner, 9 Heisk. 19.

duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person. This is not more a rule of law than a dictate of humanity. Where it appeared that a person, run over and thought to be dead, was placed upon some rubbish in a railway warehouse by the station master, and there left over night, during which time he had revived and dragged himself some distance along the floor, where he was found dead the next morning with his body yet warm, in a stooping posture, pressing his hand upon his leg to stop the flow of blood from a severed artery, it was held that, even though the accident was caused by the negligence of the deceased, still it might go to the jury whether his death did not result from the subsequent negligence of the railway employees.[46]

§ 216. Various other acts of trespass upon railway property.— It is negligence *per se* to attempt to crawl under cars which have been stopped temporarily upon the tracks,[47] or to stand between two tracks while a train passes.[48] And the act of climbing over stationary cars without looking to see whether or not they are attached to a locomotive is held gross negligence.[49]

[46] Northern, &c., R. Co. v. State, 29 Md. 420, 442; 1 Redfield on Railways, 510. *Cf.* Phila., &c., R. Co. v. Derby, 14 How. Pr. 468; Whatman v. Pearson, L. R. 3 C. P. 422.

[47] Chicago, &c., R. Co. v. Dewey, 26 Ill. 255; Chicago, &c., R. Co. v. Cross, 73 Ill. 394; Chicago, &c., R. Co. v. Sykes, 96 Ill. 162; Smith v. Chicago, &c., R. Co., 55 Iowa, 33; Central R. Co. v. Dixon, 42 Ga. 327; Ostertag v. Pacific, &c., R. Co., 64 Mo. 421; Stillson v. Hannibal, &c., R. Co., 67 Mo. 671. So to pass between cars while slowly moving. Gahagan v. Boston, &c., R. Co., 1 Allen, 187; Lewis v. Baltimore, &c., R. Co., 38 Md. 588; McMahon v. Northern, &c., R. Co., 39 Md. 438. *Cf.* Central Branch, &c., R. Co. v. Henigh, 23 Kan. 347; 33 Am. Rep. 167.

[48] Moore v. Philadelphia, &c., R. Co., 108 Penn. St. 349. See, also, Chicago, &c., R. Co. v. Flint, 22 Ill. App. 502. And one who crosses at an opening in a train does so at his peril. Dahlstrom v. St. Louis, &c., Ry. Co., 96 Mo. 99; 8 S. W. Rep. 777.

[49] Lewis v. Baltimore, &c., R. Co., 38 Md. 588; Gahagan v. Boston, &c., R. Co., 1 Allen, 187.

When the plaintiff was a child, and the position of the cars in the street was illegal, the plaintiff's conduct in thus attempting to cross the street was not contributory negligence.[50] It is negligence for one in charge of stock to ride on top of cars in which the cattle are transported;[51] and, wherever it appears that a plaintiff voluntarily placed himself in a dangerous position, where a collision could not have been avoided by the trainmen, such conduct is held negligence as matter of law.[52]

§ 217. **Flying switches.**— The method of switching, known as making a "running" or "flying" switch, is constantly a fruitful source of accident to persons walking, or being upon the tracks. It consists in detaching the portion of the train to be switched off while the cars are in motion, the fore part of the train advancing with increased speed, while the rear portion, proceeding more slowly, is, at the proper time, switched off upon the desired track; or, the engine may push forward a car or part of a train with considerable speed, and then giving it a strong propulsion sent it off alone on the desired switch. This practice, in many courts, is condemned as negligent, even to-

50 Rauch v. Lloyd, 31 Penn. St. 358.

51 Little Rock, &c., R. Co. v. Miles, 40 Ark. 298; McCorkle v. Chicago, &c., R. Co., 61 Iowa, 555.

52 Memphis, &c., R. Co. v. Womack, 84 Ala. 149; 4 So. Rep. 618; Columbus, &c., R. Co. v. Wood, 86 Ala. 164; 5 So. Rep. 463; Williams v. Southern Pac. R. Co. (Cal.), 11 Pac. Rep. 849; Houston, &c., Ry. Co. v. Smith, 77 Tex. 179; 13 S. W. Rep. 972; Hughes v. Galveston, &c., R. Co., 67 Tex. 595; Texas, &c., Ry. Co. v. Barfield (Tex.), 3 S. W. Rep. 665; Mobile & O. R. Co. v. Stroud, 64 Miss. 784; 2 So. Rep. 171; Pzolla v. Mich. Cent. R. Co., 54 Mich. 273; Shackelford's Admr. v. Louisville, &c., R. Co., 84 Ky. 43; Frazer v. S. & N. Ala. R. Co., 81 Ala. 185; 1 So. Rep. 85. A person cannot recover for injuries received by being struck by an engine while walking on the ends of the ties on a railroad track on a stormy night, with his hat pulled over his eyes, and "looking straight down." Gulf, &c., Ry. Co. v. York, 74 Tex. 364; 12 S. W. Rep. 68; Wilds v. Hudson River R. Co., 29 N. Y. 315; Brooks v. Buffalo, &c., R. Co., 25 Barb. 600; 1 Abb. App. Dec. 211; Central R. Co. v. Moore, 24 N. J. Law, 824. As where one, seeing a train approach, runs across the track instead of waiting for it to pass. Grows v. Maine Central R. Co., 67 Me. 100; Lewis v. Balto., &c., R. Co., 38 Md. 588; McMahon v. Northern, &c., R. Co., 39 Md. 438. See, also, Pittsburgh, &c., R. Co. v. Kunston, 69 Ill. 103.

ward trespassers.[53] And, when the cars are suffered to run over a crossing, after being detached from the train, in making a flying switch, whereby travelers are injured, it is held negligence of an aggravated nature, and the practice is not unfrequently sharply denounced by the judges.[54]

[53] Louisville, &c., R. Co. v. Coleman's Admr., 86 Ky. 556; 6 S. W. Rep. 438; 8 S. W. Rep. 875. Backing trains with no lookout or other warning. Bergman v. St. Louis, &c., R. Co., 88 Mo. 678; 1 S. W. Rep. 384; Whalen v. Chicago, &c., Ry. Co., 75 Wis. 654; 44 N. W. Rep. 849; Illinois, &c., R. Co. v. Baches, 55 Ill. 379; Chicago, &c., R. Co. v. Dignan, 56 Ill. 486; Illinois, &c., R. Co. v. Hammer, 72 Ill. 347; 85 Ill. 526; Haley v. N. Y., &c., R. Co., 7 Hun, 84; Sutton v. N. Y., &c., R. Co., 66 N. Y. 243; Kay v. Penn. R. Co., 65 Penn. St. 269; 3 Am. Rep. 628; Murphy v. Chicago, &c., R. Co., 38 Iowa, 539; 45 Iowa, 661.

[54] French v. Taunton, &c., R. Co., 116 Mass. 537; Hinckley v. Cape Cod, &c., R. Co., 120 Mass. 257; Butler v. Milwaukee, &c., R. Co., 28 Wis. 487; Brown v. New York, &c., R. Co., 32 N. Y. 597; Chicago, &c., R. Co. v. Garvey, 58 Ill. 83. It was not negligence for a traveler on a highway to drive across a railroad track immediately after the passage of a train for which he has waited without looking in the direction from which it came, and from which a single car was following at a distance of one hundred and fifty or two hundred feet, moving by its own momentum, having been detached from the train for the purpose of making a flying switch. Ward v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 85 Wis. 601; 55 N. W. Rep. 771. Section 3548, Code 1892, prohibiting running, flying, walking, or kicking switches within the limits of a municipality, and making a railroad company liable for damages sustained thereby "without regard to the mere contributory negligence of the party injured," imposes no liability where the injury results from the voluntary, deliberate, wilful, and reckless exposure of the person injured, but does impose liability where the negligence consists in want of ordinary care in the situation that has arisen, and if not as usually and ordinarily contributes proximately to the injury, and without which it could not have occurred. Alabama & Vicksburg Ry. Co. v. Jones, 73 Miss. 110; 19 So. Rep. 105.

CHAPTER IX.

FENCES AND FIRES.

(A.) Fences.

§ 218. Injuries to domestic animals trespassing on railway tracks.
219. How far the English rule prevails in the United States.
220. A modification of the English rule.
221. The American rule.
222. The American the reverse of the English rule.
223. The effect of a statute.
224. A summary statement of the prevailing doctrine.
225. Duty of a railway company to maintain fences.
226. Statutes requiring the maintenance of a fence.
227. These statutes considered.
228. Contributing to a breach in a fence, or failure to repair.
229. Where the land-owner contracts to fence for the railway.
230. Where the stock escape and are injured.
§ 231. The New York decisions.
232. The same subject continued.
233. Summary statement of the rule.
234. The rule in New England and in Wisconsin.

(B.) Fires.

235. Negligent communication of fire.
236. The effect of a statute.
237. A further statement of the rule in the United States.
238. Vaughan v. Taff Vale Ry. Co.— the doctrine of this case criticised.
239. The rule as to combustibles, shavings, dried grass, &c.
240. The obligation of the plaintiff herein.
241. The analogy of the "Squib case."
242. The rule in Pennsylvania.

§ **218. Injuries to domestic animals trespassing on railway tracks.**— By the common law of England, the owner of cattle is required to confine them to his own premises. Fences, in her majesty's kingdom, are to keep one's cattle in, not to keep other people's cattle out. The owner may drive his cattle from place to place, upon the highway, and he may lawfully herd them upon a common, but, if he permits them to run at large, without a keeper, he is guilty of negligence. If they trespass upon the premises of another, he is a wrong-doer, and liable in damages for any injury consequent upon their trespass.[1]

[1] Lade v. Shepherd, 2 Strange, 104; Stevens v. Whistler, 11 East, 51; Star v. Rookesby, 1 Salk. 335; Ricketts v. East and West India

§ 219. How far the English rule prevails in the United States.— This rule, that the owner of domestic animals must keep them at home, and that there is no obligation to fence against them, in the absence of statutes requiring owners of land to fence, or permitting stock to run at large, prevails in several of the older States of the Union. It is the law in Maine,[2] New Hampshire,[3] Vermont,[4] Massachusetts,[5] Connecticut,[6] Rhode Island,[7] New

Docks, &c., Ry. Co., 12 C. B. 160; 16 Jur. 1072; 21 L. J. (C. P.) 201; 12 Eng. Law & Eq. 520; 7 Eng. Ry. Cases, 295; Dickinson v. London, &c., Ry. Co., 1 Harr. & R. 399; Ellis v. London, &c., Ry. Co., 2 Hurl. & N. 424; 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008. But if there is an obligation on the part of the railway company to keep a fence in repair, neglect to do this and consequently injury to cattle getting on the tracks because of defective openings, will subject the company to an action. Sharrod v. London, &c., Ry. Co., 4 Exch. 580; 14 Jur. 23; 20 L. J. (Exch.) 185; 7 Dow. & L. 213; 6 Eng. Ry. Cases, 239; Tillett v. Ward, L. R. 10 Q. B. D. 17; 22 Am. Law Reg. (N. S.) 245; 3 Kent's Commentaries, 536; 3 Blackstone's Commentaries, 211; Cooley on Torts, 337; 2 Waterman on Trespass, § 858 *et seq.*

[2] Little v. Lathrope, 5 Greenleaf, 35; Lord v. Wormwood, 29 Me. 282; 50 Am. Dec. 586; Perkins v. Eastern, &c., R. Co., 29 Me. 307; 50 Am. Dec. 589; Norris v. Androscoggin, &c., R. Co., 39 Me. 273; 63 Am. Dec. 621; Wyman v. Penobscot, &c., R. Co., 46 Me. 162; Wilder v. Maine, &c., R. Co., 65 Me. 332; 20 Am. Rep. 698; Webber v. Closson, 35 Me. 26 [but modified by statute in 1834; Sturtevant v. Merrill, 33 Me. 62; Knox v. Tucker, 48 Me. 375].

[3] Makepeace v. Worden, 1 N. H. 16. The law in New Hampshire has, however, been changed by statute. Gen. Stats., chap. 148, § 1. So that in a later case it was held that the neglect of a railroad company to fence their road does not excuse them from liability for injury to animals upon the track, although the owner of such animals was aware of that neglect when he turned them out to graze on his own adjoining land. Cressy v. Northern, &c., R. Co., 59 N. H. 564; 47 Am. Rep. 227; Avery v. Maxwell, 4 N. H. 36; Wheeler v. Rowell, 7 N. H. 515; Mayberry v. Concord, &c., R. Co., 47 N. H. 391; Giles v. Boston, &c., R. Co., 55 N. H. 552.

[4] Trow v. Vermont, &c., R. Co., 24 Vt. 488; 58 Am. Dec. 191; Jackson v. Rutland, &c., R. Co., 25 Vt. 150; 60 Am. Dec. 246; Hurd v. Rutland, &c., R. Co., 25 Vt. 116; Holden v. Shattuck, 34 Vt. 336; Keenan v. Cavanaugh, 44 Vt. 262; Congdon v. Central, &c., R. Co., 56 Vt. 390; 48 Am. Rep. 793; Morse v. Rutland, &c., R. Co., 27 Vt. 49.

[5] Rust v. Low, 6 Mass. 90; Thayer v. Arnold, 4 Metc. 589; Stearns v. Old Colony, &c., R. Co., 1 Allen, 493; Eames v. Salem, &c., R. Co., 98 Mass. 560; Lyons v. Merrick, 105 Mass. 71; Maynard v. Boston, &c., R. Co., 115 Mass. 458; 15 Am. Rep. 119; McDonnell v. Pittsfield, &c., R. Co., 115 Mass. 564; Towne v. Nashua, &c., R. Co., 124 Mass. 101; Darling v.

York,[8] New Jersey,[9] Pennsylvania,[10] Delaware,[11] Maryland,[12] Kentucky,[13] Michigan,[14] Wisconsin,[15] Minnesota,[16] Indiana,[17]

Boston, &c., R. Co., 121 Mass. 118; Rogers v. Newburyport, &c., R. Co., 1 Allen, 16.

[6] Isbell v. New York, &c., R. Co., 27 Conn. 393; Bulkley v. N. Y., &c., R. Co., 27 Conn. 479; Housatonic, &c., R. Co. v. Knowles, 30 Conn. 313.

[7] Tower v. Providence, &c., R. Co., 2 R. I. 404.

[8] Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239, and the note, pp. 248-273, in which the whole law in point is set out; 4 N. Y. 349; 53 Am. Dec. 384; Clarke v. Syracuse, &c., R. Co., 11 Barb. 112; Marsh v. New York, &c., R. Co., 14 Barb. 364; Terry v. New York, &c., R. Co., 22 Barb. 575; Bowman v. Troy, &c., R. Co., 37 Barb. 516; Cowles v. Balzer, 47 Barb. 562; Bowyer v. Burlew, 3 N. Y. Super. Ct. 362; Halloran v. New York, &c., R. Co., 2 E. D. Smith, 257. In New York the common law rule is to some extent changed by statute. Spinner v. New York, &c., R. Co., 67 N. Y. 153.

[9] Coxe v. Robbins, 9 N. J. Law, 384; Chambers v. Matthews, 18 N. J. Law, 368; Vandegrift v. Rediker, 22 N. J. Law, 185; 51 Am. Dec. 262; Price v. Central, &c., R. Co., 31 Am. Dec. 229; 32 Am. Dec. 19.

[10] Knight v. Albert, 6 Penn. St. 472; 47 Am. Dec. 478; Railroad Co. v. Skinner, 19 Penn. St. 298; 57 Am. Dec. 654. When, however, a person lawfully crosses a track at grade with a drove of cattle, he is not bound to give a signal to an approaching train. If necessary, it is the duty of the company to employ a person to give signals. Reeves v. Delaware, &c., R. Co., 30 Penn. St. 454; Powell v. Penn. R. Co., 32 Penn. St. 416; Phila., &c., R. Co v. Hummel, 44 Penn. St. 378; Phila., &c., R. Co. v. Spearen, 47 Penn. St. 403; North Penn. R. Co. v. Rehman, 49 Penn. St. 106; Drake v. Phila., &c., R. Co., 51 Penn. St. 240; Gregg v. Gregg, 55 Penn. St. 227; Gillis v. Penn. R. Co., 59 Penn. St. 142; Penn. R. Co. v. Riblet, 66 Penn. St. 166. See, also, Sullivan v. Penn. R. Co., 30 Penn. St. 240.

[11] Vandergrift v. Delaware, &c., R. Co., 2 Houst. 297.

[12] Richardson v. Milburn, 11 Md. 340; Baltimore, &c., R. Co. v. Lamborn, 12 Md. 257. By the several acts of assembly regulating the liability of railroad companies in Maryland for stock injured, a very high degree of care is imposed on the companies. Keech v. Baltimore, &c., R. Co., 17 Md. 33; Baltimore, &c., R. Co. v. Mulligan, 45 Md. 487; Annapolis, &c., R. Co. v. Baldwin, 60 Md. 88; 45 Am. Rep. 711.

[13] Louisville, &c., R. Co. v. Ballard, 2 Metc. 177; Louisville, &c., R. Co. v. Milton, 14 B. Mon. 75; 58 Am. Dec. 674; but modified by statute, see Kentucky Central R. Co. v. Lebus, 14 Bush, 518; Louisville, &c., R. Co. v. Wainscot, 3 Bush, 149; O'Bannon v. Louisville, &c., R. Co., 8 Bush, 350.

[14] Robinson v. Flint, &c., R. Co., 79 Mich. 323; 44 N. W. Rep. 779; Williams v. Michigan, &c., R. Co., 2 Mich. 260; 55 Am. Dec. 59; Johnson v. Wing, 3 Mich. 163.

[15] Harrison v. Brown, 5 Wis. 27; Stucke v. Milwaukee, &c., R. Co., 9 Wis. 203; Chicago, &c., R.

and Kansas.[18] In these States it has generally been held that permitting stock to run at large is such negligence, on the part of the owner, as to bar his right of recovery for injuries to them, unless such injury was wanton or wilful.[19] The general principles of the law of contributory negligence, of course, apply to

Co. v. Goss, 17 Wis. 428, where the act of allowing brute animals to stray upon the tracks of a railroad is characterized as "gross negligence." Bennett v. Chicago, &c., R. Co., 19 Wis. 145; Galpin v. Chicago, &c., R. Co., 19 Wis. 604; McCall v. Chamberlain, 13 Wis. 640.

[16] In Minnesota, by Gen. Stats., chap 10, § 15, subd. 6, cattle are prohibited from going at large between October 15th and April 1st. In the absence of any action by the various towns, however, this restriction is also held applicable during the other months. Locke v. St. Paul, &c., R. Co., 15 Minn. 350; Fitzgerald v. St. Paul, &c., R. Co., 29 Minn. 336; 43 Am. Rep. 212; Witherell v. St. Paul, &c., R. Co., 24 Minn. 410.

[17] Page v. Hollingsworth, 7 Ind. 317; Williams v. New Albany, &c., R. Co., 5 Ind. 111; La Fayette, &c., R. Co. v. Shriner, 6 Ind. 141; Brady v. Ball, 14 Ind. 317; Indianapolis, &c., R. Co. v. McClure, 26 Ind. 370; Lyons v. Terre Haute, &c., R. Co., 101 Ind. 419; Wabash, &c., Ry. Co. v. Nice, 99 Ind. 152; Cincinnati, &c., Ry. Co. v. Hiltzhauer, 99 Ind. 486. In Indiana the boards of county commissioners are authorized to determine what animals may run at large (1 G. & H. 65). Indianapolis, &c., R. Co. v. Hartu, 38 Ind. 557; Jeffersonville, &c., R. Co. v. Adams, 43 Ind. 403; Jeffersonville, &c., R. Co. v. Underhill, 48 Ind. 389; Cincinnati, &c., R. Co. v. Street, 50 Ind. 225; Pittsburgh, &c., R. Co. v. Stuart, 71 Ind. 505; New Albany, &c., R. Co. v. Tilton, 12 Ind. 3; Michigan, &c., R. Co. v. Fisher, 27 Ind. 96.

[18] Wells v. Beal, 9 Kan. 597; Baker v. Robbins, 9 Kan. 303; Sherman v. Anderson, 27 Kan. 333; 41 Am. Rep. 414; Union Pac. R. Co. v. Rollins, 5 Kan. 168; Kansas, &c., R. Co. v. Mower, 16 Kan. 573; Larkin v. Taylor, 5 Kan. 433; Central Branch, &c., R. Co. v. Lea, 20 Kan. 353; Atchison, &c., R. Co. v. Hegwir, 21 Kan. 622; Compiled Laws 1879, 784, § 30. *Cf.* Pacific R. Co. v. Brown, 14 Kan. 469, where a horse, without its owner's knowledge, got out of the barn, where it had been locked in, strayed to the track of a railroad and was injured. The owner was allowed to recover. Kansas, &c., R. Co. v. Landis, 20 Kan. 406; Kansas, &c., R. Co. v. McHenry, 24 Kan. 501; Mo. Pac. R. Co. v. Wilson, 28 Kan. 637; Central, &c., R. Co. v. Philippi, 20 Kan. 9.

[19] See generally the cases cited *supra*, and especially Railroad Co. v. Skinner, 19 Penn. St. 298; 57 Am. Dec. 654, in which the court not only affirms this rule, but also declares that in such cases the owner is very apt to become liable to the railroad company or the passengers for damage done by his cattle. See, also, Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239, note.

cases of injury to stock. If the injury is the result of mutual carelessness, as in any other case, neither has a remedy against the other; but, if it be not in any degree ascribable to the negligence of one party, due regard being had to the circumstances of his position, he may recover from the other;[20] but, where each is in fault, neither can recover.[21] The plaintiff's negligence, in order to a recovery, must, as in any other case, be the proximate or immediate cause of the injury,[22] and it must appear that permitting the stock to run at large contributed proximately to the injury in order to bar a recovery.[23] It is sometimes held that

[20] Reeves v. Delaware, &c., R. Co., 30 Penn. St. 455; Waldron v. Portland, &c., R. Co, 35 Me. 422; Balcom v. Dubuque, &c., R. Co., 21 Iowa, 102; Whitbeck v. Dubuque, &c., R. Co., 21 Iowa, 103; Illinois, &c., R. Co. v. Goodwin, 30 Ill. 117; Fisher v. Farmers', &c., Co., 21 Wis. 74. If the owner of a blind horse turns him out upon the common, he is guilty of gross negligence, amounting to willingness to have any injury occur to the animal, and under no circumstances can he recover. Knight v. Toledo, &c., R. Co., 24 Ind. 402; Indianapolis, &c., R. Co. v. Wright, 22 Ind. 377; Mentges v. New York, &c., R. Co., 1 Hilt. 425; Annapolis, &c., R. Co. v. Baldwin, 60 Md. 88; 45 Am. Rep. 711; Eames v. Salem, &c., R. Co., 98 Mass. 560; Tower v. Providence, &c., R. Co., 2 R. I. 404.

[21] Haigh v. London, &c., Ry. Co., 1 Fost. & Fin. 646; Williams v. Michigan, &c., R. Co., 2 Mich. 265; 55 Am. Dec. 59; Illinois, &c., R. Co. v. Middlesworth, 43 Ill. 65. As where a person in charge of stock rushed them over the track of a railroad, though his son told him that he thought he heard a train. Several of the animals were killed by a train; but no recovery was allowed, in spite of the fact that the engineer had neglected to give the statutory signals. Ohio, &c., R. Co. v. Eaves, 42 Ill. 288; Pittsburgh, &c., R. Co. v. Stuart, 71 Ind. 504; Railroad Co. v. Skinner, 19 Penn. St. 298; 57 Am. Dec. 654; Perkins v. Eastern, &c., R. Co., 29 Me. 307; 50 Am. Dec. 589.

[22] Rockford, &c., R. Co. v. Irish, 72 Ill. 405; St. Louis, &c., R. Co. v. Todd, 36 Ill. 409; South, &c., R. Co. v. Williams, 65 Ala. 74; Toledo, &c., R. Co. v. McGinnis, 71 Ill. 347; Ewing v. Chicago, &c., R. Co., 72 Ill. 25; Peoria, &c., R. Co. v. Champ, 75 Ill. 578. In Georgia, under the doctrine of comparative negligence, the owner of stock can recover for injuries done to them, even though he be in some degree negligent himself. Central, &c., R. Co. v. Davis, 19 Ga. 437; Pac., &c., R. Co. v. Houts, 12 Kan. 328; Searles v. Milwaukee, &c., R. Co., 35 Iowa, 490; Gates v. Burlington, &c., R. Co., 39 Iowa, 45; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Smith v. Chicago, &c., R. Co., 34 Iowa, 506; Kuhn v. Chicago, &c., R. Co., 42 Iowa, 420; Schwarz v. Hannibal, &c., R. Co., 58 Mo. 207.

[23] The fact that the plaintiff kept his hogs in an insecure inclosure, and thereby permitted them to escape and go upon de-

turning stock out to graze, even though it is negligence, must be regarded a remote, and cannot be the proximate cause of the injury.[24]

§ 220. A modification of the English rule.— In some States the English rule is held in a more or less modified form. Thus, it is held in several jurisdictions, that it is proper to make a distinction between carelessly or rashly permitting stock to roam upon the track of a railway, to the peril of the lives and limbs of passengers and employees and the property of the company, and using due care to restrain cattle which, in spite of such precautions, break out and are injured. In the one case there is gross negligence, barring any recovery, and in the other there is no negligence at all. This is a rational and just distinction. It is declared in many cases.[25]

fendant's railroad was not such negligence contributing directly to the injury as to prevent his recovery. Leavenworth, &c., Ry. Co. v. Forbes, 37 Kan. 445; 15 Pac. Rep. 595. In California it is not negligence to allow stock to run at large. The court, in Richmond v. Sacramento R. Co., 18 Cal. 351, said:—"It is not easy for us to see that the mere fact that a party suffers his cows to go at large near the line of a railroad, is guilty of such negligence as to excuse the corporation from reasonable diligence and care to avoid injury to them when they happen to be upon the track. The suffering of them to go at large is certainly not the usual or natural cause of such an injury; such a result would not probably happen once in a thousand, or perhaps ten thousand times. Corwin v. New York, &c., R. Co., 13 N. Y. 42; Cairo, &c., R. Co. v. Murray, 82 Ill. 76; Illinois, &c., R. Co. v. Baker, 47 Ill. 295; Kuhn v. Chicago, &c., R. Co., 42 Iowa, 420; Fritz v. Milwaukee, &c., R. Co., 34 Iowa, 377; Ewing v. Chicago, &c., R. Co., 72 Ill. 25; Cairo, &c., R. Co. v. Woolsey, 85 Ill. 370; Flint, &c., R. Co. v. Lull, 28 Mich. 510; Bellefontaine, &c., R. Co. v. Reed, 33 Ind. 476; Isbell v. New York, &c., Ry. Co., 27 Conn. 393.

[24] Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Central, &c., R. Co. v. Lawrence, 13 Ohio St. 67; Cleveland, &c., R. Co. v. Elliott, 4 Ohio St. 474; Vicksburg, &c., R. Co. v. Patton, 31 Miss. 157; Central, &c., R. Co. v. Phillippi, 20 Kan. 9. See, also, Washington v. Baltimore, &c., R. Co., 17 W. Va. 190; Bemis v. Connecticut, &c., R. Co., 42 Vt. 375; 1 Am. Rep. 339; Kentucky, &c., R. Co. v. Lebus, 14 Bush, 518; Lawson v. Chicago, &c., R. Co., 57 Iowa, 672.

[25] McCandless v. Chicago, &c., R. Co., 45 Wis. 365; Curry v. Chicago, &c., R. Co., 43 Wis. 665; Lande v. Chicago, &c., R. Co., 33 Wis. 640; Fisher v. Farmers', &c., Co., 21 Wis. 74; Towne v. Nashua, &c., R. Co., 124 Mass. 101; Estes v. Atlantic, &c., R. Co., 63 Me.

§ 221. **The American rule.**— In a number of the States the English rule on this point is distinctly repudiated, and one more suited to the wants of a new and comparatively thinly settled country has grown up instead. In these States a fence is regarded as something to keep animals out, rather than to keep them in, and it is held not a trespass for cattle to wander upon unenclosed lands. Statutes define what is a "lawful fence," and declare that no one whose close is not surrounded by such a fence shall recover damages from his neighbor, whose cattle break in and do him an injury. It is, therefore, not contributory negligence in these jurisdictions to allow cattle to run at large. This may be known as the American rule, in contradistinction to the rule we have hitherto been considering. It was set forth with much force and cogency of reasoning in the great case of Kerwhacker v. Cleveland, &c., R. Co.[26] by the Supreme Court of Ohio, in 1854, in which it is declared to be the common law of Ohio that the owner of domestic animals is guilty neither of an unlawful act nor of an omission of ordinary care in keeping or caring for them, by allowing such stock to run at large on the

308; Pacific, &c., R. Co. v. Brown, 14 Kan. 469; Cairo, &c., R. Co. v. Woolsey, 85 Ill. 370; Ohio, &c., R. Co. v. Fowler, 85 Ill. 21; Toledo, &c., R. Co. v. Johnston, 74 Ill. 83; Bulkley v. New York, &c., R. Co., 27 Conn. 479; Isbell v. New York, &c., R. Co., 27 Conn. 393; White v. Concord, &c., R. Co., 30 N. H. 188; Trout v. Virginia, &c., R. Co., 23 Gratt. 619; Pearson v. Milwaukee, &c., R. Co., 45 Iowa, 497; South, &c., Ala. R. Co. v. Williams, 65 Ala. 74; Balcom v. Dubuque, &c., R. Co., 21 Iowa, 102; Macon, &c., R. Co. v. Davis, 13 Ga. 68; Knight v. Toledo, &c., R. Co., 24 Ind. 402; St. Louis, &c., R. Co. v. Todd, 36 Ill. 409. But, for a contrary rule, to the effect that even where animals escape from a well-fenced enclosure, without their owner's fault, and stray upon a railway track and are there injured, they are trespassers, and for a negligent injury to them the owner cannot recover, see Pittsburgh, &c., R. Co. v. Stuart, 71 Ind. 504. Spinner v. New York, &c., R. Co., 67 N. Y. 153; North Penn. R. Co. v. Rehman, 49 Penn. St. 104. And see, also, Darling v. Boston, &c., R. Co., 121 Mass. 118, holding that if a horse is put in a proper pasture by its owner, and escapes thence into a highway, and goes upon the track of a railroad at a point at which, although the company is bound to maintain cattle-guards, there are no such guards, and is there killed by a train of cars, it is a trespasser, and the company is not liable to the owner of the horse, unless there was wanton misconduct on the part of those who managed the train. And *cf.* Atchison, &c., R. Co. v. Hegwir, 21 Kan. 622.

[26] 3 Ohio St. 172; 62 Am. Dec. 246.

range of unenclosed lands; that there is no law which requires land-owners to fence their land, and that this equally applies to railway corporations; that the owner who leaves his lands unenclosed takes the risk of intrusions upon them from the animals of other persons running at large, and that the owner of the animals, on his part, takes the risk, in allowing them to be at large, of their loss or of injury to them by unavoidable accidents arising from any danger into which they may wander.

§ 222. The American the reverse of the English rule.—This is a complete abrogation of the English rule. The later cases in Ohio follow it,[27] and a similar doctrine is maintained by the courts of Illinois,[28] Iowa,[29] Missouri,[30] California,[31] Dakota,[32]

[27] Cincinnati, &c., R. Co. v. Waterson, 4 Ohio St. 431; Cleveland, &c., R. Co. v. Elliott, 4 Ohio St. 474; Central, &c., R. Co. v. Lawrence, 13 Ohio St. 67; Marietta, &c., R. Co. v. Stevenson, 24 Ohio St. 48; Cincinnati, &c., R. Co. v. Smith, 22 Ohio St. 227; 10 Am. Rep. 729. But the right to allow domestic animals to run at large has been abridged by statute. Sloan v. Hubbard, 34 Ohio St. 585.

[28] Seeley v. Peters, 10 Ill, 130; Bass v. Chicago, &c., R. Co., 28 Ill. 9; Chicago, &c., R. Co. v. Cauffman, 38 Ill. 424. Where two persons own land adjoining each other and join fences, each building the fence on his own land, and have no partition fence between them, and cattle break through the defective fence of one and enter the premises of the other, the latter would have no right to take them up, or recover for injuries against the owner of the stock. Stoner v. Shugart, 45 Ill. 76; Illinois, &c., R. Co. v. Baker, 47 Ill. 295; Headen v. Rust, 39 Ill. 186; Toledo, &c., R. Co. v. Bray, 57 Ill. 514; Rockford, &c., R. Co. v. Lewis, 58 Ill. 49; Toledo, &c., R. Co. v. Ingraham, 58 Ill. 20; Toledo, &c., R. Co. v. Barlow, 71 Ill. 640; Rockford, &c., R. Co. v. Rafferty, 73 Ill. 58; Chicago, &c., R. Co. v. Kellam, 92 Ill. 245; 34 Am. Rep. 128.

[29] Where stock are allowed to run at large, the owner must be held to take the risk only of such injuries as do not result from the defendant's negligence. Van Horn v. Burlington, &c., R. Co., 59 Iowa, 33; Wagner v. Bissell, 3 Iowa, 396; Alger v. Mississippi, &c., R. Co., 10 Iowa, 268; Herold v. Meyer, 20 Iowa, 378; Smith v. Chicago, &c., R. Co., 34 Iowa, 506; Whitbeck v. Dubuque, &c., R. Co., 21 Iowa, 103; Inman v. Chicago, &c., R. Co., 60 Iowa, 459; Miller v. Chicago, &c., R. Co., 59 Iowa, 707; Frazier v. Nortinus, 38 Iowa, 82; Searles v. Milwaukee, &c., R. Co., 35 Iowa, 490, modified by statute in 1870. See Hallock v. Hughes, 42 Iowa, 516; Little v. McGuire, 38 Iowa, 560; 43 Iowa, 447.

[30] Nolan v. Chicago, &c., R. Co., 23 Mo. App. 353; Gorman v. Pacific, &c., R. Co., 26 Mo. 442; Hannibal, &c., R. Co. v. Kenney, 41 Mo. 271; Tarwater v. Hannibal, &c., R. Co., 42 Mo. 193; McPhee-

Florida,[33] West Virginia,[34] Oregon,[35] Colorado,[36] Nevada,[37] Alabama,[38] Georgia,[39] Mississippi,[40] Arkansas,[41] South Carolina,[42] North Carolina,[43] Texas,[44] Virginia,[45] and Nebraska.[46]

ters v. Hannibal, &c., R. Co., 45 Mo. 23; Crafton v. Hannibal, &c., R. Co., 55 Mo. 580; Silver v. Kansas City, &c., R. Co., 78 Mo. 528; 47 Am. Rep. 118; Clardy v. St. Louis, &c., R. Co., 73 Mo. 576; Comings v. Hannibal, &c., R. Co., 48 Mo. 512.

[31] Waters v. Moss, 12 Cal. 535; Comerford v. Dupuy, 17 Cal. 308; Logan v. Gedney, 38 Cal. 579.

[32] Williams v. Northern Pac. R. Co., 3 Dak. 168.

[33] Savannah, &c., Ry. Co. v. Geiger, 21 Fla. 669; 58 Am. Rep. 697.

[34] Blaine v. Chesapeake, &c., R. Co., 9 W. Va. 252; Baylor v. Balto., &c., R. Co., 9 W. Va. 270.

[35] Campbell v. Bridwell, 5 Or. 311. But see French v. Cresswell, 13 Or. 418; Moses v. Southern Pac. R. Co., 18 Or. 385; 23 Pac. Rep. 498.

[36] Neither common nor statute law in Colorado requires a railroad to fence its track to prevent cattle from straying on it. Hence, the company is not liable for the death of one of its engineers caused by a collision with cattle on the track. Cowan v. Union Pac. Ry. Co., 35 Fed. Rep. 43. "The general law of this State permits the owners of cattle to allow them to range at will, and, in the absence of local acts, the owner of crops can only recover damages done thereon by the trespasses of cattle when the same are, at the time of the trespass, enclosed by good and sufficient fences." McGan v. O'Neil, 5 Colo. 425; Denver, &c., Ry. Co. v. Henderson, 10 Colo. 11; 13 Pac. Rep. 910.

[37] Chase v. Chase, 15 Nev. 259.

[38] Mobile, &c., R. Co. v. Williams, 53 Ala. 595; South Ala., &c., R. Co. v. Williams, 65 Ala. 74; Alabama, &c., R. Co. v. McAlpine, 71 Ala. 545.

[39] Macon, &c., R. Co. v. Lester, 30 Ga. 914; Georgia, &c., R. Co. v. Anderson, 33 Ga. 110. In Macon, &c., R. Co. v. Baker, 42 Ga. 301, the jury was charged, "that if it were shown that plaintiff's cow was injured by defendant's servants, this presumes negligence on their part, and they must explain it, * * * that it was not true that if said cow, turned out by the plaintiff, got upon the track it made plaintiff a trespasser; unless the track was enclosed by a lawful fence." Georgia, &c., R. Co. v. Neely, 56 Ga. 540; Macon, &c., R. Co. v. Vaughn, 48 Ga. 464.

[40] Vicksburg, &c., R. Co. v. Patton, 31 Miss. 157; Memphis, &c., R. Co. v. Blakeney, 43 Miss. 218; Railford v. Mississippi, &c., R. Co., 43 Miss. 233; New Orleans, &c., R. Co. v. Field, 46 Miss. 573; Mobile, &c., R. Co. v. Hudson, 50 Miss. 572; Dickson v. Parker, 3 How. 219; 34 Am. Dec. 78; Mississippi, &c., R. Co. v. Miller, 40 Miss. 45; Fairchild v. New Orleans, &c., R. Co., 62 Miss. 177.

[41] Little Rock, &c., R. Co. v. Finley, 37 Ark. 562, holding that the common law doctrine of enclosing domestic animals has never been recognized in the State. "Such a rule," says the court, "is inapplicable to the condition and circumstances of our people. It would be most oppressive and unwise; from the first settlement to the present, all

§ 223. The effect of a statute.— It is held not contributory negligence, as matter of law, to permit cattle to go at large, even though it is in violation of a statute.[47] There is a contrary rule in Kansas,[48] while in Illinois, whether or not such a practice is contributory negligence, is usually held a proper question for the jury.[49] In Iowa, where stock is "lawfully" running at large, it is said not to be contributory negligence in an action against a railway company for negligently running cattle down.[50] There

kinds of stock have been allowed to go at large on unenclosed lands."

[42] An instruction that much less care is required of railroad companies in providing against stock on its track since the passage of the stock law requiring stock to be enclosed, is correct. Joyner v. South Carolina R. Co., 26 S. C. 49; 1 S. E. Rep. 52; Danner v. South Carolina, &c., R. Co., 4 Rich. (Law) 329; 55 Am. Dec. 678; Wilson v. Wilmington, &c., R. Co., 10 Rich. (Law) 52; Murray v. South Carolina, &c., R. Co., 10 Rich. 227; Rowe v. Railroad Co., 7 S. C. 167; Simkins v. Columbia, &c., R. Co., 20 S. C. 258; Jones v. Columbia, &c., R. Co., 20 S. C. 249. But, in Wilson v. Wilmington, &c., R. Co., *supra*, the rule is held of no application to the case of a dog killed on a railway track. "It would indeed be a startling doctrine," the court says, "to hold that a train of cars, whether freighted with produce or with passengers, should be arrested in its progress, and compelled, at the hazard of responsibility, to come to a dead halt whenever a domestic fowl, or perchance a yelping cur, should happen to take its stand on the track."

[43] In North Carolina, a railroad company need not fence its tracks. And if, in constructing its road, a pasture fence is removed and animals fall into an unfenced cut, the company is not liable. Jones v. Western N. C. R. Co., 95 N. C. 328; Laws v. North Carolina, &c., R. Co., 73 Jones (Law) 468.

[44] Walker v. Herron, 22 Tex. 55; Texas, &c., R. Co. v. Young, 60 Tex. 201.

[45] Trout v. Virginia, &c., R. Co., 23 Gratt. 619.

[46] Delaney v. Errickson, 11 Neb. 533; Burlington, &c., R. Co. v. Franzer, 15 Neb. 365.

[47] Owens v. Hannibal, &c., R. Co., 58 Mo. 387; Schwarz v. Hannibal, &c., R. Co., 58 Mo. 207; Mumpower v. Hannibal, &c., R. Co., 59 Mo. 245.

[48] Central, &c., R. Co. v. Lea, 20 Kan. 353; Leavenworth, &c., Ry. Co. v. Forbes, 37 Kan. 445; 15 Pac. Rep. 595. See, also, Vanhorn v. Burlington, &c., Ry. Co., 63 Iowa, 67.

[49] Rockford, &c., R. Co. v. Irish, 72 Ill. 405; Cairo, &c., R. Co. v. Woolsey, 85 Ill. 370. *Cf.* Galena, &c., R. Co. v. Crawford, 25 Ill. 529; Toledo, &c., R. Co. v. Fergusson, 42 Ill. 449; Toledo, &c., R. Co. v. McGinnis, 71 Ill. 346; Rockford, &c., R. Co. v. Rafferty, 73 Ill. 58; Cairo, &c., R. Co. v. Murray, 82 Ill. 77; Chicago, &c., R. Co. v. Engle, 84 Ill. 397.

[50] McCool v. Galena, &c., R. Co., 17 Iowa, 461.

is, however, at present a statute in that State which requires a railroad company to fence its track against animals running at large.[51] When contributory negligence is the issue in actions against railway companies for injuries to cattle run down upon the track, it is very generally held a proper question to go to the jury.[52] Where a local municipal ordinance permits cattle to run at large, it is, nevertheless, negligence on the part of the owner of stock to suffer it to do so upon the highway in the vicinity of a railroad track.[53] The prevailing rule is, that it is not negligence to turn animals loose upon one's own land, where there is an unfenced or defectively fenced railway track adjoining or running through it, which the railway is required by law

[51] Spence v. Chicago, &c., R. Co., 25 Iowa, 139; Stewart v. Chicago, &c., R. Co., 27 Iowa, 282. Horses attached to a sleigh, and wandering on the prairie at night, driven by a man in a drunken stupor, are not "live-stock running at large" within Code Iowa, § 1289, providing that if it fail to fence, the railroad shall be liable for damages to such stock. Grove v. Burlington, &c., Ry. Co., 75 Iowa, 163; 39 N. W. Rep. 248; Krebs v. Minneapolis, &c., Ry. Co., 64 Iowa, 670; Fritz v. Milwaukee, &c., R. Co., 34 Iowa, 338; Pearson v. Milwaukee, &c., R. Co., 45 Iowa, 497. But see Vanhorn v. Burlington, &c., Ry. Co., 63 Iowa, 67.

[52] Timins v. Chicago, &c., Ry. Co., 72 Iowa, 94; 33 N. W. Rep. 379; Lay v. Richmond, &c., R. Co., 106 N. C. 404; 11 S. E. Rep. 412; Southworth v. Old Colony, &c., R. Co., 105 Mass. 342; Housatonic, &c., R. Co. v. Waterbury, 23 Conn. 101; Indianapolis, &c., R. Co. v. Wright, 13 Ind. 213; Ellis v. London, &c., Ry. Co., 2 Hurl. & N. 424; 26 L. J. (Exch.) 349; Fawcett v. York, &c., Ry. Co., 16 Q. B. 610; 15 Jur. 173; 20 L. J. (Q. B.) 222; Midland, &c., R. Co. v. Daykin, 17 C. B. 126; 25 L. J. (C. P.) 73.

[53] Williams v. Michigan, &c., R. Co., 2 Mich. 259; 55 Am. Dec. 59; Fritz v. First Div., &c., R. Co., 22 Minn. 404; Chicago, &c., R. Co. v. Engle, 84 Ill. 397; Marsh v. New York, &c., R. Co., 14 Barb. 364; Clark v. Syracuse, &c., R. Co., 11 Barb. 112; Bowman v. Troy, &c., R. Co., 37 Barb. 516; Halloran v. New York, &c., R. Co., 2 E. D. Smith, 257; Tonawanda R. Co. v. Munger, 5 Denio, 255, holding that the term "to run at large" does not apply to railroads, which, "although designed to subserve the public interest and convenience, are still not highways, but in strictness mere private property, and no town has any right to authorize cattle to enter on them." 49 Am. Dec. 239, and note; *sub nom.*, Munger v. Tonawanda R. Co., 4 N. Y. 349; 53 Am. Dec. 384; Louisville, &c., R. Co. v. Ballard, 2 Metc. 177; Michigan, &c., R. Co. v. Fisher, 27 Ind. 97; Van Horn v. Burlington, &c., R. Co., 59 Iowa, 33; Miller v. Chicago, &c., R. Co., 59 Iowa, 707; Inman v. Chicago, &c., R. Co., 60 Iowa, 459.

to fence.[54] But, although a railroad company is in default for not maintaining a fence between its right of way and the pasture land of an adjoining owner, yet, where such owner habitually turns his cattle loose upon such track, through a gate maintained for his accommodation, and thus willingly abandons them to destruction, he cannot recover therefor.[55] And one who turned a colt into a pasture, knowing that a fence next the railroad was down, using no precaution to prevent the colt from going on the track, and being authorized by statute to rebuild the fence at the expense of the company after notice and default, was held by the Supreme Court of Wisconsin to be guilty of contributory negligence, though he had no other pasture, and requested the company to repair the fence.[56]

§ 224. A summary statement of the prevailing doctrine.— In States where the modified or American rule prevails, as distinguished from the stricter English rule, railway companies are liable only for the ordinary negligence of their servants toward animals straying on their tracks,[57] and the owners of animals

[54] Wilder v. Maine, &c., R. Co., 65 Me. 332; 20 Am. Rep. 698; McCoy v. California, &c., R. Co., 40 Cal. 532; 6 Am. Rep. 623; Rogers v. Newburyport, &c., R. Co., 1 Allen, 16; Shepard v. Buffalo, &c., R. Co., 36 N. Y. 641; Mead v. Burlington, &c., R. Co., 52 Vt. 278. "It would be a novel doctrine to hold that a railway company, by violating the law, could restrict one's rightful use of his own land." Mr. Freeman's note to Munger v. Tonawanda R. Co., 49 Am. Dec. 239, 271. See, also, Horner v. Williams, 100 N. C. 230; 5 S. E. Rep. 734; Burlington, &c., R. Co. v. Webb, 18 Neb. 215; 53 Am. Rep. 809; Harmon v. Columbia, &c., R. Co. (S. C.), 10 S. E. Rep. 877.

[55] Fort Wayne, &c., R. Co. v. Woodward, 112 Ind. 118; 13 N. E. Rep. 260.

[56] Martin v. Stewart, 73 Wis. 553; 41 N. W. Rep. 538.

[57] Durham v. Wilmington, &c., R. Co., 82 N. C. 352; Vicksburg, &c., R. Co. v. Patton, 31 Miss. 157; Mississippi, &c., R. Co. v. Miller, 40 Miss. 45; New Orleans, &c., R. Co. v. Field, 46 Miss. 574; Gorman v. Pacific, &c., R. Co., 26 Mo. 442; Alger v. Mississippi, &c., R. Co., 10 Iowa, 268; Macon, &c., R. Co. v. Baber, 42 Ga. 300. Even in Maryland, where the common law rule prevails, it is held that the negligence of the owner of cattle in letting them trespass on the road of a railway company will not bar recovery for injuries if the company did not exercise all reasonable care. Baltimore, &c., R. Co. v. Mulligan, 45 Md. 487; St. Louis, &c., R. Co. v. Vincent, 36 Ark. 451; Louisville, &c., R. Co. v. Milton, 14 B. Mon. 61; 58 Am. Dec. 647; Bellefontaine, &c., R. Co. v. Bailey, 11 Ohio St. 333; Hawker v. Baltimore, &c., R. Co., 15 W. Va. 628.

turned out upon the range assume some of the risks incident to their possibly wandering upon the track, which is the same as to say that the owners assume the risk of all unavoidable accidents; the railway company on their part assuming to operate the road, wherever the track is unfenced, with due care to avoid any injury to cattle that may stray upon their premises.[58] "Persons living contiguous to railroads," said the Supreme Court of Mississippi, "have the same right as others in more remote localities to turn their cattle upon the ranges, but they assume the risk of their greater exposure to danger. The cattle are liable to go upon the road; the company cannot detain them damage feasant any more than any other land-owner, nor can they treat them as unlawfully there, and, therefore, relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is, that in the prosecution of their lawful and ordinary business, the act could not have been avoided by the use of such care, prudence and skill as a discreet man would put forth to prevent or avoid it."[59] In Alabama,[60]

[58] Timm v. Northern Pac. R. Co., 3 Wash. Ter. 299; 13 Pac. Rep. 415; Bethea v. Raleigh, &c., R. Co., 106 N. C. 279; 10 S. E. Rep. 1045; Taylor on Corporations, § 369; Macon, &c., R. Co. v. Davis, 18 Ga. 680; Central, &c., R. Co. v. Davis, 19 Ga. 437; Memphis, &c., R. Co. v. Blakeney, 43 Miss. 218; Raiford v. Mississippi, &c., R. Co., 43 Miss. 233; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Kentucky, &c., R. Co. v. Lebus, 14 Bush, 518; Little Rock, &c., R. Co. v. Finley, 37 Ark. 572.

[59] New Orleans, &c., R. Co. v. Field, 46 Miss. 573. See, also, Richmond v. Sacramento, &c., R. Co., 18 Cal. 351; Macon v. California, &c., R. Co., 40 Cal. 532; Blaine v. Chesapeake, &c., R. Co., 9 W. Va. 252; Balor v. Baltimore, &c., R. Co., 9 W. Va. 270; Washington v. Baltimore, &c., R. Co., 17 W. Va. 190; Central, &c., R. Co. v. Lawrence, 13 Ohio St. 66; Rockford, &c., R. Co. v. Irish, 72 Ill. 404; Macon, &c., R. Co. v. Lester, 30 Ga. 911; Macon, &c., R. Co. v. Baber, 42 Ga. 300; Georgia, &c., R. Co. v. Neely, 56 Ga. 540; Locke v. First Div., &c., R. Co., 15 Minn. 350; South, &c., R. Co. v. Williams, 65 Ala. 74; Pearson v. Milwaukee, &c., R. Co., 45 Iowa, 497; Trout v. Virginia, &c., R. Co., 23 Gratt. 619, where, under the circumstances of the case, the company was held guilty of gross negligence, although the engineer had continuously sounded the whistle on discovering the plaintiff's horses on the track. Baltimore, &c., R. Co. v. Mulligan, 45 Md. 486; Gorman v. Pacific, &c., R. Co., 26 Mo. 441.

[60] East Tenn., &c., R. Co. v. Watson (Ala.), 7 So. Rep. 813; Nashville, &c., R. Co. v. Hembree, 85 Ala. 481; Ala., &c., R. Co. v. McAlpine, 75 Ala. 113. *Cf.* East Tenn., &c., R. Co. v. Bayliss, 75

Arkansas,[61] Dakota,[62] Georgia,[63] Kentucky,[64] North Carolina,[65] South Carolina,[66] Mississippi,[67] Colorado,[68] Iowa,[69] New York,[70] Missouri,[71] Kansas,[72] West Virginia,[73] Indiana,[74] Illinois,[75] and Florida,[76] there are statutes making the killing of animals by a

Ala. 466; East Tenn., &c., R. Co. v. Bayliss, 77 Ala. 429; 54 Am. Rep. 69; Western Ry. Co. v. Lazarus, 88 Ala. 453; Mobile, &c., R. Co. v. Caldwell, 83 Ala. 196; 3 So. Rep. 445.

[61] Little Rock, &c., Ry. Co. v. Turner, 41 Ark. 161; Kansas City, &c., Ry. Co. v. Kirksey, 48 Ark. 366; 3 S. W. Rep. 190; Memphis, &c., Ry. Co. v. Shoecraft (Ark.), 13 S. W. Rep. 422; St. Louis, &c., Ry. Co. v. Basham, 47 Ark. 321.

[62] Volkman v. Chicago, &c., R. Co., 5 Dak. 69; 37 N. W. Rep. 731.

[63] Georgia R. & B. Co. v. Wall, 80 Ga. 202; 7 S. E. Rep. 639; Georgia, &c., R. Co. v. Harris, 83 Ga. 393; 9 S. E. Rep. 786; Northeastern R. Co. v. Martin, 78 Ga. 603; 3 S. E. Rep. 701; Moye v. Wrightsville, &c., R. Co., 83 Ga. 669; Western, &c., R. Co. v. Trimmier, 84 Ga. 112; Georgia, &c., R. Co. v. Harris, 83 Ga. 393; 9 S. E. Rep. 786.

[64] Grundy v. Louisville, &c., R. Co. (Ky.), 2 S. W. Rep. 899.

[65] Carlton v. Wilmington, &c., R. Co., 104 N. C. 365; Randall v. Richmond, &c., R. Co., 104 N. C. 410; Seawell v. Raleigh, &c., R. Co., 106 N. C. 272; Snowden v. Norfolk, &c., R. Co., 95 N. C. 93.

[66] Walker v. Columbia, &c., R. Co., 25 S. C. 141.

[67] Louisville, &c., Ry. Co. v. Smith, 67 Miss. 15; Yazoo, &c., R. Co. v. Brumfield, 64 Miss. 637; 4 So. Rep. 341; Ill. Cent. R. Co. v. Person, 65 Miss. 319; 3 So. Rep. 375; New Orleans, &c., R. Co. v. Bourgeois, 66 Miss. 3; 5 So. Rep. 529; Kent v. New Orleans, &c., Ry. Co., 67 Miss. 608; 7 So. Rep. 391; Howard v. Louisville, &c., Ry. Co., 67 Miss. 247; 7 So. Rep. 216; Kansas City, &c., R. Co. v. Myers (Miss.), 7 So. Rep. 321.

[68] Colorado, &c., R. Co. v. Caldwell, 11 Colo. 545; 19 Pac. Rep. 542; Denver, &c., Ry. Co. v. Henderson, 10 Colo. 1; 13 Pac. Rep. 910.

[69] Baker v. Chicago, &c., R. Co., 73 Iowa, 389; 35 N. W. Rep. 460; Grimmell v. Chicago, &c., Ry. Co., 73 Iowa, 93; 34 N. W. Rep. 758; Connyers v. Sioux City, &c., R. Co., 78 Iowa, 410; 43 N. W. Rep. 267.

[70] Boyle v. N. Y., &c., R. Co., 39 Hun, 171.

[71] Jewett v. Kansas City, &c., Ry. Co., 38 Mo. App. 48; Brooks v. Hannibal, &c., R. Co., 35 Mo. App. 571; Buster v. Hannibal, &c., R. Co., 18 Mo. App. 578; Sloop v. St. Louis, &c., R. Co., 22 Mo. App. 593; Grant v. Hannibal, &c., Ry. Co., 25 Mo. App. 227.

[72] Kansas City, &c., R. Co. v. Cravens, 43 Kan. 650; Missouri Pac. Ry. Co. v. Gedney (Kan.), 24 Pac. Rep. 464; Kansas City, &c., R. Co. v. Lane, 33 Kan. 702; Kansas City, &c., R. Co. v. Bolson, 36 Kan. 534; 14 Pac. Rep. 5.

[73] Heard v. Chesapeake, &c., Ry. Co., 26 W. Va. 455; Johnson v. Baltimore, &c., R. Co., 25 W. Va. 570.

[74] Chicago, &c., R. Co. v. Nash (Ind.), 24 Rep. 884.

[75] Ohio, &c., Ry. Co. v. O'Donnell, 26 Ill. App. 348.

[76] Savannah, &c., Ry. Co. v. Rice, 23 Fla. 575; 3 So. Rep. 170.

train upon a railroad *prima facie* evidence of negligence on the part of the company. In the notes are cited many cases wherein it is decided what does and what does not constitute ordinary care to relieve the defendant from liability.

§ 225. Duty of a railway company to maintain fences.— At common law a railway company is not bound to maintain fences sufficient to keep cattle off its tracks. It stands in this regard upon precisely the same footing as any other owner of land.[77] But an obligation on the part of a railway to make and maintain a fence may arise out of contract.[78] And such a contract will be implied, if in granting the right of way the award of damages was made on the understanding that a fence would be erected and maintained by the company.[79] In Kentucky, *per contra*, it is held that neither the grantor of right of

[77] Day v. New Orleans, &c., Ry. Co., 36 La. Ann. 291; Rex v. Pease, 4 Barn. & Adol. 30; Star v. Rookesby, 1 Salk. 335; Adams v. McKinney, Add. 258; Rust v. Low, 6 Mass. 94; Stackpole v. Healey, 16 Mass. 33; 8 Am. Dec. 121; Lyman v. Gipson, 18 Pick. 422; Pool v. Alger, 11 Gray, 489; Hartford v. Brady, 114 Mass. 468; McDonald v. Pittsfield, &c., R. Co., 115 Mass. 564; Mills v. Stark, 4 N. H. 512; 17 Am. Dec. 444; Halladay v. Marsh, 3 Wend. 142; 20 Am. Dec. 678; Brooks v. New York, &c., R. Co., 13 Barb. 597; Terry v. New York, &c., R. Co., 22 Barb. 579; Railroad Co. v. Skinner, 19 Penn. St. 298; 57 Am. Dec. 654; Knight v. New Orleans, &c., R. Co., 15 La. Ann. 105; Moore v. Levert, 24 Ala. 310; Hurd v. Rutland, &c., R. Co., 25 Vt. 116; Perkins v. Eastern, &c., R. Co., 29 Me. 307; 50 Am. Dec. 589; Northeastern, &c., R. Co. v. Sineath, 8 Rich. (Law) 185; Munger v. Tonawanda R. Co., 4 N. Y. 349; 53 Am. Dec. 384.

[78] Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239, and the note; Fernow v. Dubuque, &c., R. Co., 22 Iowa, 528; Joliet, &c., R. Co. v. Jones, 20 Ill. 221. In Drake v. Philadelphia, &c., R. Co., 51 Penn. St. 240, it was held that, although a railroad company bound itself by contract to fence the plaintiff's land, no action could be maintained by the latter for injury to his cattle in spite of the fact that the company had not carried out its contract. McDowell v. New York, &c., R. Co., 37 Barb. 195; Quimby v. Vermont, &c., R. Co., 23 Vt. 393; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Norris v. Androscoggin, &c., R. Co., 39 Me. 273; 63 Am. Dec. 621; Jackson v. Rutland, &c., R. Co., 25 Vt. 150; 60 Am. Dec. 246. *Cf.* Star v. Rookesby, 1 Salk. 335; Binney v. Proprietors, 5 Pick. 505; Adams v. Van Alstyne, 25 N. Y. 232; Knox v. Tucker, 48 Me. 373; Lawrence v. Coombs, 37 N. H. 335.

[79] Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Lawton v. Fitchburg R. Co., 8 Cush. 230; 54 Am. Dec. 753; *In re* Rensselaer, &c., R. Co., 4 Paige, 553.

way to a railway company through his property, nor the company itself, is under any legal obligation to maintain fences.[80] When the track is not fenced by the railroad company, it will be held to assume the risk of damage to its own property, as the result of all intrusions from animals, just as other proprietors are held to do who leave their lands unenclosed.[81] In Vicksburg, &c., R. Co. v. Patton,[82] the court said:—"As a proprietor, the company is under no greater obligation to fence its road than any other owner of land; but in the event of an injury, the fact that the road was not fenced must and should exercise an influence in weighing the degree of care to be employed by the company. When an injury is done, the omission to fence will be weighed along with the other circumstances in determining the measure of diligence to be used by the company or its agents. The want of the fence will increase the care required in order to prevent wrong.[83]

[80] Louisville, &c., R. Co. v. Milton, 14 B. Mon. 75; 58 Am. Dec. 647. See Louisville, &c., R. Co. v. Ballard, 2 Metc. 177; Louisville, &c., R. Co. v. Wainscott, 3 Bush, 149; O'Bannon v. Louisville, &c., R. Co., 8 Bush, 350, and *cf.* to the same point, Indianapolis, &c., R. Co. v. Brownenburg, 32 Ind. 199. In this case a railroad company agreed, in part consideration for a right of way, to reimburse the owner of the land for whatever damage might be done by the running of the cars. Held, that the company was not bound by this contract to answer in damages for the consequences of the land-owner's negligence. The owner of domestic animals is not required to fence against a railroad. That duty devolves upon the company, if it would use its privileges and franchises with due regard to the rights and interests of others. Birmingham Mineral R. Co. v. Harris, 98 Ala. 326, 334; 13 So. Rep. 377.

[81] Roll. Abr. Trespass, 565, pl. 3; 2 Waterman on Trespass, 299; Kerwhacker v. Cleveland, &c., R. Co., 3 Ohio St. 172, 185; 62 Am. Dec. 246; Atlantic, &c., R. Co. v. Burt, 49 Ga. 606; Macon, &c., R. Co. v. Vaughn, 48 Ga. 464; Vicksburg, &c., R. Co. v. Patton, 31 Miss. 157; Memphis, &c., R. Co. v. Orr, 43 Miss. 279; New Orleans, &c., R. Co. v. Field, 46 Miss. 573; Gorman v. Pacific, &c., R. Co., 26 Mo. 442; Sherman v. Anderson, 27 Kan. 333; 41 Am. Rep. 414; Annapolis, &c., R. Co. v. Baldwin, 60 Md. 88; 45 Am. Rep. 711.

[82] 31 Miss. 157.

[83] Chase v. Chase, 15 Nev. 259; Wills v. Walters, 5 Bush, 351; Studwell v. Ritch, 14 Conn. 292; Hine v. Munson, 32 Conn. 329; Mann v. Williamson, 70 Mo. 661; Jones v. Witherspoon, 7 Jones (Law) 555; Deyo v. Stewart, 4 Denio, 101; Mooney v. Maynard, 1 Vt. 470; 18 Am. Dec. 699; Hinshaw v. Gilpin, 64 Ind. 116; Duffees v. Judd, 48 Iowa, 256; York

§ 226. Statutes requiring the maintenance of a fence.— In England, and in most, if not all of the States of the Union, the duty of maintaining a sufficient fence upon each side of their tracks is imposed upon railway companies by statute, the object being to prevent collisions with cattle straying upon the road.[84] The English statute has served in some sort as a model, and there are, accordingly, enactments in material essentials similar to that of 8 & 9 Vict., chap. 20, in most of the New England and Western States. In the Western courts, notably in Missouri,[85] these

v. Davies, 11 N. H. 241; Campbell v. Bridwell, 7 Or. 311; Gregg v. Gregg, 56 Penn. St. 227, as to the rule that whenever an owner of land is bound to maintain a fence, and his neighbor's cattle, by reason of his failure so to do, enter upon his land and do damage, there being no negligence or fault on the part of the owner of the trespassing cattle, such owner of land so damaged cannot recover therefor, his own negligent wrongdoing having occasioned the mischief.

[84] Railway Clauses Consolidation Act, 8 & 9 Vict., chap. 20, § 68; Fawcett v. York, &c., Ry. Co., 20 L. J. (Q. B.) 222.

[85] *Construction of the statute.*— Smith v. St. Louis, &c., Ry. Co., 91 Mo. 58; 3 S. W. Rep. 836; McIntosh v. Hannibal, &c., R. Co., 26 Mo. App. 377; Smith v. St. Louis, &c., Ry. Co., 91 Mo. 58; Henderson v. Wabash, &c., Ry. Co., 81 Mo. 605; Parks v. Hannibal, &c., R. Co., 20 Mo. App. 440; Davis v. Hannibal, &c., Ry. Co., 19 Mo. App. 425; Vaughn v. Missouri Pac. Ry. Co., 17 Mo. App. 4; Holland v. West End, &c., Ry. Co., 16 Mo. App. 172; Townsley v. Missouri Pac. Ry. Co., 89 Mo. 31; 1 S. W. Rep. 15; Hendrix v. St. Joseph, &c., Ry. Co., 38 Mo. App. 520; Donovan v. Hannibal, &c., R. Co., 89 Mo. 147; 1 S. W. Rep. 232; Ferris v. St. Louis, &c., Ry. Co., 30 Mo. App. 122; Dooley v. Missouri Pac. Ry. Co., 36 Mo. App. 381; Cowgill v. Hannibal, &c., R. Co., 33 Mo. App. 677; Pearson v. Chicago, &c., Ry. Co., 33 Mo. App. 543; Miles v. Hannibal, &c., R. Co., 31 Mo. 407; Burton v. North Mo., &c., R. Co., 30 Mo. 372; Gorham v. Pacific, &c., R. Co., 26 Mo. 441; Cary v. St. Louis, &c., R. Co., 60 Mo. 213; Collins v. Atlantic, &c., R. Co., 65 Mo. 230; Silver v. Kansas City, &c., R. Co., 78 Mo. 528; 47 Am. Rep. 118; Morris v. St. Louis, &c., R. Co., 58 Mo. 78.

Pleading.— Ward v. St. Louis, &c., Ry. Co., 91 Mo. 168. A petition under Mo. Rev. Stat., § 800, need not negative the fact that the place where the animal went upon the track was within the limits of an incorporated town or city. Meyers v. Union Trust Co., 82 Mo. 237; Briggs v. Missouri Pac. Ry. Co., 82 Mo. 37; Nicholson v. Hannibal, &c., R. Co., 82 Mo. 73; Manz v. St. Louis, &c., Ry. Co., 87 Mo. 278. The complaint is defective if it fails to aver that the stock got on the track at a point where the company was required to fence. Wilson v. Wa-

statutes have been a most prolific source of litigation, and in that State the decisions relating to the construction of the statute and the proceedings under it are so numerous as almost to furnish sufficient material of themselves for a treatise on the subject. The Iowa reports also abound in cases under this head,[86] and in other States where the land is largely given up to grazing, it is believed that litigation in which railroad companies are subjected to suits for damages arising from neglect to comply with the fence law will not diminish in the near future. In

bash, &c., Ry. Co., 18 Mo. App. 258. The killing of a number of cattle at the same time constitutes but one cause of action, otherwise when they are killed at different times. Pucket v. St. Louis, &c., Ry. Co., 25 Mo. App. 650.

Presumptions.— If cattle were killed at a point where the track is not fenced, it may be presumed in the absence of evidence, that they entered at that point. Asher v. St. Louis, &c., Ry. Co., 89 Mo. 116; McGuire v. Missouri Pac. Ry. Co., 23 Mo. App. 325; Pearson v. Chicago, &c., Ry. Co., 33 Mo. App. 543.

Proof.— It need not be shown by direct evidence where the animal strayed upon the track. Lepp v. St. Louis, &c., Ry. Co., 87 Mo. 139; McBride v. Kansas City, &c., R. Co., 20 Mo. App. 216; Townsley v. Missouri Pac. Ry. Co., 89 Mo. 31; Radcliffe v. St. Louis, &c., Ry. Co., 90 Mo. 127; 2 S. W. Rep. 277.

[86] The Iowa act, making railroads liable in double damages for stock killed in cases of failure to erect proper fences, does not impose the duty to build fences so high that they will never be covered with snow, nor that of removing the snow and drifts from the fences. Patton v. Chicago, &c., Ry. Co., 75 Iowa, 459; 39 N. W. Rep. 708; Shellabarger v. Chicago, &c., Ry. Co., 66 Iowa, 18. If a railroad company would exonerate itself from liability for swine killed, it must build a fence sufficient to turn swine. Lee v. Minneapolis, &c., Ry. Co., 66 Iowa, 131; Glandon v. Chicago, &c., Ry. Co., 68 Iowa, 457. Under Code Iowa, § 1289, making a railroad company liable for the value of stock killed by reason of its failure to fence its road "unless the same was occasioned by the wilful act of the owner or his agent," the owner cannot recover for the killing of a cow when he was himself present, and saw the effort of the train-men to stop the train, and had the power and opportunity to drive the cow from the track, but wilfully refused to do so. Moody v. Minneapolis, &c., Ry. Co., 77 Iowa, 29; 41 N. W. Rep. 477; Payne v. Kansas City, &c., R. Co., 72 Iowa, 214; 33 N. W. Rep. 633; Aylesworth v. Chicago, &c., R. Co., 30 Iowa, 457; Stewart v. Burlington, &c., R. Co., 32 Iowa, 561; Hinman v. Chicago, &c., R. Co., 28 Iowa, 491; Hammond v. Chicago, &c., R. Co., 43 Iowa, 168; Pearson v. Milwaukee, &c., R. Co., 45 Iowa, 497; Davis v. Chicago, &c., R. Co., 40 Iowa, 292.

Maine,[87] New Hampshire,[88] Vermont,[89] Massachusetts,[90] and Connecticut,[91] these statutes have been long in force, and the authorities in those States being frequently consulted by the courts of last resort in the newer States, have tended much to the development of a reasonably harmonious body of law in this behalf. The Wisconsin statute expressly makes contributory negligence a bar to recovery. And where one who, knowing that a storm has prostrated fences, turns his cattle loose without inquiring whether the railroad fences have been blown down, he can maintain no action for the value of cattle which, straying upon the track where the fences have been blown down, are killed by a train.[92] Under the Nebraska statute contributory

[87] Norris v. Androscoggin, &c., R. Co., 39 Me. 273; 63 Am. Dec. 621; Perkins v. Eastern, &c., R. Co., 29 Me. 307; 50 Am. Dec. 589; Wyman v. Penobscot, &c., R. Co., 46 Me. 162; Wilder v. Maine, &c., R. Co., 65 Me. 333; 20 Am. Rep. 698. Where a colt is injured by becoming entangled in a barbed-wire fence which had become dilapidated by the company's negligence, and which was likely to cause injury to a colt, without misconduct on its part, the company is liable, though the fence was legally sufficient to prevent the escape of animals. Gould v. Bangor, &c., R. Co., 82 Me. 122; 19 Atl. Rep. 84.

[88] Smith v. Eastern, &c., R. Co., 35 N. H. 356; Horn v. Atlantic, &c., R. Co., 35 N. H. 169; Dean v. Sullivan, &c., R. Co., 22 N. H. 316; Cressey v. Northern, &c., R. Co., 56 N. H. 390; 47 Am. Rep. 227.

[89] Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Nelson v. Vermont, &c., R. Co., 26 Vt. 717; Holden v. Rutland, &c., R. Co., 30 Vt. 298; Congdon v. Central, &c., R. Co., 56 Vt. 390; 48 Am. Rep. 793; St. Johnsbury, &c., R. Co. v. Hunt, 59 Vt. 294.

[90] Rogers v. Newburyport, &c., R. Co., 1 Allen, 16; Eames v. Boston, &c., R. Co., 14 Allen, 151; Baxter v. Boston, &c., R. Co., 102 Mass. 383; Maynard v. Boston, &c., R. Co., 115 Mass. 458; 15 Am. Rep. 119.

[91] Bulkley v. New York, &c., R. Co., 27 Conn. 480.

[92] Carey v. Chicago, &c., Ry. Co., 61 Wis. 71. Contributory negligence bars recovery by express statute. Martin v. Stewart, 73 Wis. 553; 41 N. W. Rep. 538. A statute making a railroad company failing to fence liable to "persons" injured, may be availed of by an employee of the company, nor does an employee lose his right of recovery by remaining in the service of the company with knowledge that there is no fence. Quackenbush v. Wisconsin, &c., R. Co., 62 Wis. 411. Plaintiff must show that his cattle strayed on the track at a point where the company was found to fence. Bremmer v. Green Bay, &c., R. Co., 61 Wis. 114; Brown v. Milwaukee, &c., R. Co., 21 Wis. 39; McCall v. Chamberlain, 13 Wis. 637; Blair v. Milwaukee, &c., R. Co., 20 Wis. 254; Sika v. Chicago, &c., R. Co., 21 Wis. 370; Curry v. Chicago, &c., R. Co., 43 Wis. 665; Veerhusen v. Chicago, &c., R. Co., 53 Wis. 689.

negligence is no defense,[93] and in Michigan it has been held that where sheep got upon the track through an open gate, the owner could not recover without showing that the gate was left open through the negligence of an employee of the company.[94] In the notes are cited many cases in which these fence laws have been considered in the courts of Minnesota,[95] Ohio,[96] Indiana,[97]

[93] Burlington, &c., R. Co. v. Webb, 18 Neb. 215; 53 Am. Rep. 809.

[94] Lemon v. Chicago, &c., Ry. Co., 59 Mich. 618; Talbot v. Minneapolis, &c., Ry. Co. (Mich.), 45 N. W. Rep. 1113. The plaintiff sold the defendant railroad ties, which were to be delivered at the side of the track. While engaged in hauling them, the plaintiff used a gap in the fence along the track, through which he entered to deliver the ties. During the absence of the plaintiff's son, who was doing the hauling, the team got on the track and was killed. The company was held not negligent. Clark v. Chicago, &c., R. Co., 62 Mich. 358; 28 N. W. Rep. 914; Gardner v. Smith, 7 Mich. 410; Bay City, &c., R. Co. v. Austin, 21 Mich. 390; Robinson v. Grand Trunk R. Co., 32 Mich. 322; Toledo, &c., R. Co. v. Eder, 45 Mich. 329; Grand Rapids, &c., R. Co. v. Monroe, 47 Mich. 152. *Cf.* Williams v. Michigan Central R. Co., 2 Mich. 259; 55 Am. Rep. 59, holding that the defendant company, having purchased its road from the State, is bound neither by its charter nor the common law to fence its tracks for the protection of other persons' domestic animals, or for any other purpose.

[95] Whittier v. Chicago, &c., R. Co., 24 Minn. 394; Gillam v. Sioux City, &c., R. Co., 26 Minn. 268; Fitzgerald v. St. Paul, &c., R. Co., 29 Minn. 336; 43 Am. Rep. 212. Under ordinary circumstances a railroad company is not required to remove the natural accumulations of ice and snow from cattle-guards. Clais v. Minneapolis, &c., R. Co., 34 Minn. 57. The Minnesota statute makes a wire fence a lawful fence. It is, therefore, a sufficient fence for a railroad required to fence. Halverson v. Minneapolis, &c., Ry. Co., 32 Minn. 88.

[96] Cincinnati, &c., R. Co. v. Smith, 22 Ohio St. 227; 10 Am. Rep. 722; Sloan v. Hubbard, 34 Ohio St. 585.

[97] A railroad company's obligation to fence includes the duty of maintaining cattle-guards, when they are necessary to prevent access from intersecting highways. Wabash, &c., Ry. Co. v. Tretts, 96 Ind. 450; Cincinnati, &c., Ry. Co. v. Parker, 109 Ind. 235; 9 N. E. Rep. 787; Pennsylvania Co. v. Dunlap (Ind.), 13 N. E. Rep. 403; Pennsylvania Co. v. McCarty, 112 Ind. 322; 13 N. E. Rep. 409; Williams v. New Albany, &c., R. Co., 5 Ind. 111; Toledo, &c., R. Co. v. Cory, 39 Ind. 218; Indianapolis, &c., R. Co. v. Kinney, 8 Ind. 402. The statutes never require fencing where public rights would be interfered with. Cleveland, &c., R. Co. v. Crossley, 36 Ind. 370; Jeffersonville, &c., R. Co. v. Ross, 37 Ind. 545; Louisville, &c., R. Co. v. Cahill, 63 Ind. 34; Louisville, &c., R. Co. v. Whitsell, 68 Ind. 297; Cincinnati, &c., R. Co. v. Hildreth, 77 Ind. 504.

Oregon,[98] Illinois,[99] New York,[1] Kansas,[2] Utah,[3] Nevada,[4] and Texas.[5]

§ 227. **These statutes considered.**—These statutes have been held not to require railway companies to fence their tracks within the limits of incorporated cities and towns,[6] nor at high-

[98] Eaton v. Oregon Ry. & Nav. Co., 19 Or. 371, 391; 24 Pac. Rep. 413.

[99] Galena, &c., R. Co. v. Crawford, 25 Ill. 529; Terre Haute, &c., R. Co. v. Augustus, 21 Ill. 186; Toledo, &c., R. Co. v. Crane, 68 Ill. 355; Chicago, &c., R. Co. v. Umphenor, 69 Ill. 198; Peoria, &c., R. Co. v. Barton, 80 Ill. 72; Chicago, &c., R. Co. v. Saunders, 85 Ill. 288; Indianapolis, &c., R. Co. v. Hall, 88 Ill. 368.

[1] The obligation of a railroad company to fence its road is imperative, and, if by reason of its failure to do so, pasture land is rendered unfit for use as such, the owner may recover his loss from the company. Leggett v. Rome, &c., R. Co., 41 Hun, 80. But a company failing to fence is not liable for an injury to an animal caused by its straying upon the track, and becoming caught between the ties of the bridge. Knight v. New York, &c., Ry. Co., 99 N. Y. 25. [Reversing 30 Hun, 25.] Suydam v. Moore, 8 Barb. 358; Staats v. Hudson River R. Co., 4 Abb. App. Dec. 287; 3 Keyes, 196; 33 How. Pr. 139; Rhodes v. Utica, &c., R. Co., 5 Hun, 344; Brooks v. New York, &c., R. Co., 13 Barb. 594; McDowell v. New York, &c., R. Co., 37 Barb. 195; Spinner v. New York, &c., R. Co., 67 N. Y. 153; Tracy v. Troy, &c., R. Co., 38 N. Y. 433; Corwin v. New York, &c., R. Co., 13 N. Y. 42.

[2] Kansas, &c., R. Co. v. McHenry, 24 Kan. 501; St. Joseph, &c., R. Co. v. Glover, 11 Kan. 302; Kansas, &c., R. Co. v. Mower, 16 Kan. 573; Hopkins v. Kansas, &c., R. Co., 18 Kan. 462. But see Sherman v. Anderson, 27 Kan. 333; 41 Am. Rep. 414; Missouri, &c., R. Co. v. Leggett, 27 Kan. 323; Atchison, &c., R. Co. v. Cash, 27 Kan. 587.

[3] Act March 13, 1890 (Laws 1890, chap. 52, p. 78).

[4] Walsh v. Virginia, &c., R. Co., 8 Nev. 111.

[5] Under 2 Sayles' Civil Stat. Tex., art. 4245, providing that railway companies shall be liable for stock injured or killed on the track by their trains, without regard to negligence, except when the right of way is fenced, where horses attached to a wagon run away, and are injured at a place on the track which was not fenced, nor a public crossing, defendant is liable, without regard to negligence. Gulf, &c., Ry. Co. v. Keith, 74 Tex. 287; 11 S. W. Rep. 1117.

[6] Rippe v. Chicago, &c., Ry. Co., 42 Minn. 34; 43 N. W. Rep. 652; Fitzgerald v. Chicago, &c., Ry. Co., 18 Mo. App. 391; Missouri Pac. Ry. Co. v. Dunham (Tex.), 4 S. W. Rep. 472; Beckdolt v. Grand Rapids, &c., R. Co., 113 Ind. 343; 15 N. E. Rep. 686; Chicago, &c., R. Co. v. Hogan, 27 Neb. 801; 43 N. W. Rep. 1148. The burden of proof is upon the

way crossings,[7] nor around depot grounds.[8] In order to fix the liability of the company, it is generally held that the animal

defendant. Missouri Pac. Ry. Co. v. Dunham (Tex.), 4 S. W. Rep. 472; Meyer v. North Mo., &c., R. Co., 35 Mo. 352; Edwards v. Hannibal, &c., R. Co., 66 Mo. 571; Davis v. Burlington, &c., R. Co., 26 Iowa, 549; Rogers v. Chicago, &c., R. Co., 26 Iowa, 558; Illinois, &c., R. Co. v. Williams, 27 Ill. 49; Chicago, &c., R. Co. v. Rice, 71 Ill. 567.

[7] Soward v. Chicago, &c., R. Co., 30 Iowa, 551; Missouri, &c., R. Co. v. Leggett, 27 Kan. 323; Louisville, &c., R. Co. v. Francis, 58 Ind. 389; Eaton v. Oregon Ry. & Nav. Co., 19 Or. 371, 391; Parker v. Rensselaer, &c., R. Co., 16 Barb. 315; Halloran v. New York, &c., R. Co., 2 E. D. Smith, 257; Marfell v. South Wales, &c., Ry. Co., 8 C. B. (N. S.) 525; 7 Ins. (N. S.) 240; 29 L. J. (C. P.) 315; 8 Week. Rep. 765; 2 L. T. (N. S.) 629. Accordingly, where a railroad track was laid through one of the streets of a village, and at the end of the street it entered upon a bridge extending across a stream, it was held that the company was not bound to erect a cattle-guard at the entrance upon the bridge, and that they were not liable for the value of an animal destroyed by the locomotive in passing over the bridge, no negligence being charged. Vanderkar v. Rensselaer, &c., R. Co., 13 Barb. 390. But see Brace v. New York, &c., R. Co., 27 N. Y. 269, where the statute is subjected to a very strict construction. Toledo, &c., R. Co. v. Howell, 38 Ind. 447; Toledo, &c., R. Co. v. Owen, 43 Ind. 405; Walton v. St. Louis, &c., R. Co., 67 Mo. 56; Davis v. Burlington, &c., R. Co., 26 Iowa, 549. Under the Kansas railroad stock law the fact that the stock was killed at a highway crossing will not defeat recovery, where it appears that the stock escaped from the pasture through the failure of the company to properly fence its road. Kansas City, &c., R. Co. v. Burge, 40 Kan. 736; 21 Pac. Rep. 589. See, also, Cincinnati, &c., R. Co. v. Jones, 111 Ind. 259; 12 N. E. Rep. 113; Coleman v. Flint, &c., R. Co., 64 Mich. 160; 31 N. W. Rep. 47; Fort Wayne, &c., R. Co. v. Herbold, 99 Ind. 91. Plaintiff's testimony showed that he drove his cows across defendant's railroad track, and paid no further attention to them, though he knew that the track was not fenced; that at the time of the accident plaintiff was about seventy rods distant; and that the cow entered on defendant's grounds at a place where it was not required to maintain a fence. Held, that plaintiff was guilty of negligence, and could not recover. Niemann v. Michigan Cent. R. Co., 80 Mich. 197; 44 N. W. Rep. 1049.

[8] Indiana, &c., Ry. Co. v. Sawyer, 100 Ind. 342; Indiana, &c., Ry. Co. v. Quick, 109 Ind. 295; Moses v. Southern Pac. R. Co., 18 Or. 385; 23 Pac. Rep. 498; Johnson v. Chicago, &c., Ry. Co., 27 Mo. App. 379. It is the duty of a company to erect and maintain suitable fences and guards to prevent domestic animals from passing over or through the depot grounds, on the track, beyond the limits of such grounds. Kobe v. Northern Pac. R. Co., 36 Minn.

must have been injured by actual contact with the train.[9] The plaintiff's recovery for an animal killed depends on where it entered the track, without regard to the place where it was killed.[10] Such statutes, moreover, have in general been held to be remedial in their nature, and hence have been liberally construed.[11] And in actions against railway companies, for killing or injuring stock, in consequence of a failure to make or maintain proper fences, these enactments are usually held to apply only to the negligence or misconduct of the defendant. The common law rule, that a plaintiff to maintain an action for damages from negligence, must himself be free from contributory

518; 32 N. W. Rep. 783. As to what are the proper limits of depot grounds, see Moser v. St. Paul, &c., 42 Minn. 480; 44 N. W. Rep. 530; Jaeger v. Chicago, &c., Ry. Co., 75 Wis. 130; 43 N. W. Rep. 732; Dixon v. New York, &c., R. Co., 4 N. Y. Supl. 296; Rinear v. Grand Rapids, &c., R. Co., 70 Mich. 620; 38 N. W. Rep. 599; McGrath v. Detroit, &c., R. Co., 57 Mich. 555; Hooper v. Chicago, &c., Ry. Co. (Minn.), 33 N. W. Rep. 314. The burden of proving exemption from duty to fence is upon the defendant. Atchison, &c., R. Co. v. Shaft, 33 Kan. 521; Wilder v. Chicago, &c., Ry. Co., 70 Mich. 382; 38 N. W. Rep. 289. And the question is usually one of fact for the jury. Rhines v. Chicago, &c., Ry. Co., 75 Iowa, 597; 39 N. W. Rep. 912; Dinwoodie v. Chicago, &c., Ry. Co., 70 Wis. 160; 35 N. W. Rep. 296; Bean v. St. Louis, &c., Ry. Co., 20 Mo. App. 641.

[9] Burlington, &c., R. Co. v. Shoemaker, 18 Neb. 369; New Orleans, &c., R. Co. v. Thornton, 65 Miss. 256; 3 So. Rep. 654; Louisville, &c., Ry. Co. v. Thomas, 106 Ind. 10; Foster v. St. Louis, &c., R. Co., 90 Mo. 116; 2 S. W. Rep. 138; Penn. R. Co. v. Dunlap (Ind.), 13 N. E. Rep. 403; Penn. R. Co. v. McCarty, 112 Ind. 322; 13 N. E. Rep. 409; International, &c., R. Co. v. Hughes, 68 Tex. 290; 4 S. W. Rep. 492. But see Louisville, &c., R. Co. v. Upton, 18 Ill. App. 605; Boggs v. Missouri Pac. Ry. Co., 18 Mo. App. 274. In the latter case an action was held to be maintainable, though not under the statute.

[10] Indiana, &c., Ry. Co. v. Quick, 109 Ind. 295; Ehret v. Kansas City, &c., R. Co., 20 Mo. App. 251; Foster v. St. Louis, &c., R. Co., 90 Mo. 116; 2 S. W. Rep. 138. If stock get on the track at a point where the company should have a fence and are injured at a point where no fence is necessary, the company is liable. Alsop v. Ohio, &c., Ry. Co., 19 Ill. App. 292. It is for defendant to show that at the point where the animal got upon the track, there was no obligation to fence. Cincinnati, &c., Ry. Co. v. Parker, 109 Ind. 235; Banister v. Pennsylvania Co., 98 Ind. 220; Louisville, &c., Ry. Co. v. Hurst, 98 Ind. 330.

[11] Tracy v. Troy, &c., R. Co., 38 N. Y. 433; Ohio, &c., R. Co. v. Brubaker, 47 Ill. 462; Rockford, &c., R. Co. v. Heflin, 65 Ill. 367.

fault, remains unchanged, and this, although the defendant may have failed in a statutory duty.[12] But, in Indiana, it has been held that the liability of a railway company, not fencing its tracks as required by the statute, for injuries to cattle is so absolute that even the contributory negligence of the owner of the cattle is no defense.[13]

§ 228. Contributing to a breach in a fence, or failure to repair.— Contributing to a breach in the fence is such negligence on the

[12] In an action against a railroad company for killing plaintiff's cow, which was on defendant's track, with a block attached to her by a small rope, an instruction that if the injury was the consequence of the block and chain attached to the cow, and would not have occurred but for that encumbrance, then defendant should have a verdict, is not error of which plaintiff can complain. Guess v. South Carolina Ry. Co., 30 S. C. 163; 9 S. E. Rep. 18; Hanna v. Terre Haute, &c., R. Co., 119 Ind. 316; 21 N. E. Rep. 903; Kansas, &c., R. Co. v. McHenry, 24 Kan. 501; Marsh v. New York, &c., R. Co., 14 Barb. 364; Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239; Munger v. Tonawanda R. Co., 4 N. Y. 350; 53 Am. Dec. 384; Curry v. Chicago, &c., R. Co., 43 Wis. 665, holding that in an action against a railroad company for injury occasioned by failure either to *erect* or to *maintain* fences, contributory negligence is a defense. In such action, it is further held, it will make no difference if the animal injured passed to the defendant's road from land not belonging to the plaintiff. The latter will not be barred on that account. See *contra*, on this last point, Brooks v. New York, &c., R. Co., 13 Barb. 594, on the ground that the fences are only erected to protect cattle of the *adjoining owners*. Hance v. Cayuga, &c., R. Co., 26 N. Y. 428; Browne v. Providence, &c., R. Co., 12 Gray, 55; Eames v. Boston, &c., R. Co., 14 Allen, 151; Kansas City, &c., R. Co. v. Landis, 24 Kan. 406; Toledo, &c., R. Co. v. Thomas, 18 Ind. 215; Indianapolis, &c., R. Co. v. Shimer, 17 Ind. 295; Pittsburgh, &c., R. Co. v. Metheven, 21 Ohio St. 586; Rockford, &c., R. Co. v. Irish, 72 Ill. 405.

[13] Jeffersonville, &c., R. Co. v. Ross, 37 Ind. 545; Louisville, &c., R. Co. v. Cahill, 63 Ind. 34; Louisville, &c., R. Co. v. Whitesell, 68 Ind. 297. See Louisville, &c., R. Co. v. Goodbar, 102 Ind. 596. In Kentucky where railroads are liable for stock killed by negligence of passing trains, it is held that if stock were killed by such negligence, it is immaterial that the railroad track was enclosed by a lawful fence, which the stock broke through; the railroad is liable unless it show that the killing was the result of an accident which could not have been avoided by the exercise of ordinary care and diligence. Louisville, &c., R. Co. v. Simmons, 85 Ky. 151; 3 S. W. Rep. 10.

part of a plaintiff as will bar his recovery from the company.[14] Any failure on the part of the plaintiff to perform any duty devolving upon him, in reference to the fence, contributing to the injury will be a defense for the company,[15] even though the fence may have been damaged by the railroad itself.[16] Where, however, the owner of mules, for his own convenience, had made two gaps in a railroad fence, the company was held liable if the mules were killed by getting on the track through a third gap which it should have fenced.[17] If the railroad has built its

[14] Ellis v. London, &c., Ry. Co., 2 Hurl. & N. 424; 26 L. J. (Exch.) 349; 3 Jur. (N. S.) 1008; Haigh v. London, &c., Ry. Co., 1 Fost. & Fin. 646; 8 Week. Rep. 6; Sandusky, &c., R. Co. v. Sloan, 27 Ohio St. 342. This is particularly applicable to partition fences. By statute in Ohio the adjacent owners of such fences are required to keep them in repair in equal shares. So that, in Dayton R. Co. v. Miami Co. Infirmary, 32 Ohio St. 566, where both plaintiff and defendant knew of a defect in their partition fence, and the former allowed his horses to escape through the breach, it was held, in an action to recover for injuries suffered by them through collision with a train, that both parties were negligent, and no action could be maintained. Duffy v. New York, &c., R. Co., 2 Hilt. 496; Eames v. Boston, &c., R. Co., 14 Allen, 151; Illinois, &c., R. Co. v. McKee, 43 Ill. 120; Illinois, &c., R. Co. v. Arnold, 47 Ill. 173; Chicago, &c., R. Co. v. Seirer, 60 Ill. 295; Koutz v. Toledo, &c., R. Co., 54 Ind. 515; Indianapolis, &c., R. Co. v. Petty, 25 Ind. 414; Indianapolis, &c., R. Co. v. Adkins, 23 Ind. 340; Indianapolis, &c., R. Co. v. Shimer, 17 Ind. 295; Indianapolis, &c., R. Co. v. Wright, 13 Ind. 213; Jones v. Sheboygan, &c., R. Co., 42 Wis. 306.

[15] One who maintains for his own convenience a gate between his land and a railroad track has no right of action against the railroad company, if his cattle stray through the gate on to the track and are killed by a train. Louisville, &c., Ry. Co. v. Goodbar, 102 Ind. 596; Laney v. Kansas City &c., R. Co., 83 Mo. 466; Davidson v. Central Iowa Ry. Co., 75 Iowa, 22; 39 N. W. Rep. 163; Hungerford v. Syracuse, &c., R. Co., 46 Hun, 339. But the fact that the fence enclosing the land-owner's field was joined to the railroad company's fence with its consent, creates no obligation on the part of the land-owner to aid in keeping up the fence. Bushby v. St. Louis, &c., Ry. Co., 81 Mo. 43. Where an animal killed by a train gets from A.'s lot to B.'s and thence to the track, unless the fence between the lots was a lawful fence, the railroad company is not liable. Peddicord v. Missouri Pac. Ry. Co., 85 Mo. 160; Poler v. New York, &c., R. Co., 16 N. Y. 476; Chicago, &c., R. Co. v. Seirer, 60 Ill. 295.

[16] Terry v. New York, &c., R. Co., 22 Barb. 575.

[17] Accola v. Chicago, &c., R. Co., 70 Iowa, 185.

fence in a defective manner, it is presumed to have knowledge of the defects, and it is not in such a case incumbent upon a plaintiff to notify the company of it.[18] The doctrine that a reasonable time must elapse after a gate or a fence gets out of repair, in which a railroad company may discover its condition, does not apply where the gate never had such a fastening as the law required,[19] and the fact that the bars of a fence were half rotten may constitute evidence of negligence on the part of the company.[20] A failure to repair a division fence, when it is a plaintiff's duty to repair it, is negligence,[21] but in Texas it is not negligence to leave the repair of fences to the railroad com-

18 Hammond v. Chicago, &c., R. Co., 43 Iowa, 169. If the cattle entered on the track simply because the gate was left open by third persons the company would not be liable. Binicker v. Hannibal, &c., R. Co., 83 Mo. 660. A railroad company which, while assuming to maintain a fence, maintains it with such defects that it is not a protection against stock which, because of the defects, get on the track and are injured, is liable for the injury. Baltimore, &c., R. Co. v. Schultz, 43 Ohio St. 270. *Cf.* upon the question of a plaintiff's duty to notify the company of a defect in the fence, Chicago, &c., R. Co. v. Seirer, 60 Ill. 295, where plaintiff repaired a fence with defective materials, and failed to notify the company of this fact, and it was held, that he became liable for the natural consequences of his negligence.

19 Duncan v. St. Louis, &c., Ry. Co. 91 Mo. 68.

20 Hovorka v. Minneapolis, &c., Ry. Co., 34 Minn. 281. On the question of reasonable time in which to repair, see Wait v. Burlington, &c., Ry. Co., 74 Iowa, 207; 37 N. W. Rep. 159; King v. Chicago, &c., Ry. Co., 90 Mo. 520; Young v. Hannibal, &c., R. Co., 82 Mo. 427; Heaston v. Wabash, &c., Ry. Co., 18 Mo. App. 403; Morrison v. Kansas City, &c., R. Co., 27 Mo. App. 418; Crosby v. Detroit, &c., Ry. Co., 58 Mich. 458; Giger v. Chicago, &c., Ry. Co., 80 Iowa, 492; 45 N. W. Rep. 906; Chicago, &c., R. Co. v. Kennedy, 22 Ill. App. 308; Grahlman v. Chicago, &c., Ry. Co., 78 Iowa, 564; 43 N. W. Rep. 529, and Robinson v. Chicago, &c., Ry. Co., 79 Iowa, 495; 44 N. W. Rep. 718, were cases where cattle-guards became filled with snow and ice.

21 Sandusky, &c., R. Co. v. Sloan, 27 Ohio St. 341; Warren v. Keokuk, &c., R. Co., 41 Iowa, 484; St. Louis, &c., R. Co. v. Washburn, 97 Ill. 293; Rockford, &c., R. Co. v. Lynch, 67 Ill. 149; Toledo, &c., R. Co. v. Pease, 71 Ill. 174; Georgia, &c., R. Co. v. Anderson, 33 Ga. 110. But the duty of keeping railroad fences, gates, and bars in repair cannot be shifted from the company to the owner of stock injured, merely because, through the neglect of the company, such owner has found it necessary to make such temporary repairs thereon. Peoria, &c., Ry. Co. v. Babbs, 23 Ill. App. 454.

pany,[22] and in Vermont, where a plaintiff knew that a fence was defective, and that his horse was "breachy," the company was, nevertheless, held liable for killing the horse when it had passed the fence and gotten upon the track.[23]

§ 229. **Where the land-owner contracts to fence for the railway.**— When an adjacent owner has contracted, for a consideration, to erect and maintain a fence which the law requires the railway company to make, but has failed to perform his contract, he cannot recover from the company for injury to his stock, on the ground that there was no fence, or that the fence was defective and insufficient.[24] So, also, where the owner of the land agrees or assents to the failure of the railway company to erect fences or cattle-guards there can be no recovery.[25] But where a railroad company agreed with a land-owner to fence the

22 Texas, &c., R. Co. v. Young, 60 Tex. 201. If a railroad company neglects its statutory duty of erecting fences or maintaining proper cattle-guards, it cannot escape liability for damages resulting therefrom to a land-owner's crops, on the ground that he was guilty of contributory negligence in not himself erecting and maintaining them upon the company's omission. Houston, &c., Ry., Co. v. Adams, 63 Tex. 200.

23 Congdon v. Central, &c., R. Co., 56 Vt. 390; 48 Am. Rep. 793, holding that in the presence of statutory liability, the doctrine of contributory negligence could not apply. See, also, South, &c., R. Co. v. Williams, 65 Ala. 74; Cressy v. Northern, &c., R. Co., 59 N. H. 564; 47 Am. Rep. 227. It is no bar to plaintiff's right of recovery that he knew that the fence was defective and did not repair it. Wilson v. St. Louis, &c., Ry. Co., 87 Mo. 431. But where hogs passed upon the track through an insufficient fence, the company was not liable if a lawful fence would not have been sufficient to turn them. Leebrick v. Republican Val., &c., R. Co., 41 Kan. 756; 21 Pac. Rep. 796.

24 Ellis v. Pacific, &c., R. Co., 48 Mo. 231; Talmadge v. Rensselaer, &c., R. Co., 13 Barb. 493; Georgia, &c., R. Co. v. Anderson, 33 Ga. 110; Warren v. Keokuk, &c., R. Co., 41 Iowa, 484; Cincinnati, &c., R. Co. v. Waterson 4 Ohio St. 424. The tenant of the land-owner, thus bound by contract to maintain the fence, or a person whose animals trespass upon the land, is in no better position to maintain an action than the proprietor. Indianapolis, &c., R. Co. v. Petty, 25 Ind. 413; Pittsburgh, &c., R. Co. v. Smith, 26 Ind. 124; Terre Haute, &c., R. Co. v. Smith, 16 Ind. 102. But see, also, New Albany, &c., R. Co. v. Maiden, 12 Ind. 10, and Baltimore, &c., R. Co. v. Johnson, 59 Ind. 188.

25 Whittier v. Chicago, &c., R. Co., 24 Minn. 394; Hurd v. Rutland, &c., R. Co., 25 Vt. 116. *Contra*, Cincinnati, &c., R. Co. v. Hildreth, 77 Ind. 504.

right of way it was held that the company could not escape its liability for stock killed and for injuries to pasturage by trespassing animals, by contending that the land-owner might have fenced as the company did not.[26] When the plaintiff undertakes to repair a fence, it is a question for the jury whether his repairs were such as a prudent and cautious man would have made.[27] Where an owner of land uses a defective fence of an adjoining proprietor as a part enclosure but without consent or contract, he cannot recover for damages to his crops by cattle of his neighbor wandering through the insufficient fence.[28]

§ 230. Where the stock escape and are injured.— In many of the States where fence laws have been enacted, as well as where the common law rule obtains, it has been held that the owners of cattle, wrongfully in the highway, or in an adjoining close, cannot recover under the statute, for their injury or destruction by the railway;[29] even though animals were lawfully in the highway in charge of a suitable keeper, and breaking away, escape into a lot adjoining a railway track, insufficiently fenced, and thence get upon the track and suffer injury.[30] But there

26 Louisville, &c., R. Co. v. Sumner, 106 Ind. 55.

27 Poler v. New York, &c., R. Co., 16 N. Y. 476; Chicago, &c., R. Co. v. Seirer, 60 Ill. 295.

28 Markin v. Priddy, 39 Kan. 462; 18 Pac. Rep. 514.

29 It is *prima facie* contributory negligence for one to voluntarily allow a horse to run at large in the public streets, contrary to law, in the immediate vicinity of unfenced railroad tracks. Moser v. St. Paul, &c., R. Co., 42 Minn. 480; 44 N. W. Rep. 530; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Staats v. Hudson River R. Co., 4 Abb. App. Dec. 287; 3 Keyes, 196; Woolson v. Northern, &c., R. Co., 19 N. H. 267; Chapin v. Sullivan, &c., R. Co., 39 N. H. 564. To have the law otherwise, would be "to assume that the corporation is bound to fence, not only against the adjacent land-owner and for the protection of animals placed there by him, but also against all animals which are there under such circumstances that he would not be entitled to treat them as trespassers." Cushing, C. J., in Giles v. Boston, &c., R. Co., 55 N. H. 552; Van Horn v. Burlington, &c., R. Co., 59 Iowa, 33; Miller v. Chicago, &c., R. Co., 59 Iowa, 707; Inman v. Chicago, &c., R. Co., 60 Iowa, 459; Missouri, &c., R. Co. v. Leggett, 27 Kan. 323; Eames v. Salem, &c., R. Co., 98 Mass. 560. See, also, Stacey v. Winona, &c., R. Co., 42 Minn. 158; 43 N. W. Rep. 905; Palmer v. Northern Pac. R. Co., 37 Minn. 223; 33 N. W. Rep. 707.

30 Pittsburgh, &c., R. Co. v. Stuart, 71 Ind. 504; Spinner v. New York, &c., R. Co., 67 N. Y. 153; Giles v. Boston, &c., R. Co., 55 N. H. 552; Mayberry v. Con-

is a better rule in Alabama,[31] where it is held that contributory negligence cannot be imputed to an owner of stock that escapes from lawful custody, and gets upon the track and is injured.[32] Neither, in Iowa, does the lawful exposure of stock to danger, by the owner, constitute such wilful negligence on his part as to bar a recovery, as matter of law.[33] And in Minnesota it is the settled doctrine that while the statutory liability of railroad companies for domestic animals killed or injured by reason of their failure to fence their roads is subject to the general rule that a person cannot recover whose negligence has proximately contributed to the injury complained of, yet the mere fact of voluntarily permitting animals to unlawfully run at large does not, as between the owner and the railway company, amount, *per se*, to contributory negligence.[34] When a rail-

cord, &c., R. Co., 47 N. H. 391; North Penn. R. Co. v. Rehman, 49 Penn. St. 104; McDonnell v. Pittsfield, &c., R. Co., 115 Mass. 564; Eames v. Boston, &c., R. Co., 14 Allen, 151; Indianapolis, &c., R. Co. v. Shimer, 17 Ind. 295; Indianapolis, &c., R. Co. v. Adkins, 23 Ind. 340; Hance v. Cayuga, &c., R. Co., 26 N. Y. 428.

[31] South. & North., &c., R. Co. v. Williams, 65 Ala. 74.

[32] To the same effect, see Kansas, &c., R. Co. v. Wiggins, 24 Kan. 588; Trout v. Virginia, &c., R. Co., 23 Gratt. 619; Chicago, &c., R. Co. v. Kellam, 92 Ill. 245; 34 Am. Rep. 128; Clark v. Boston, &c., R. Co., 64 N. H. 323; 10 Atl. Rep. 676; Missouri Pac. Ry. Co. v. Johnson, 35 Kan. 58; Moriarty v. Central Iowa Ry. Co., 64 Iowa, 696; Cox v. Minneapolis, &c., Ry. Co., 41 Minn. 101; 42 N. W. Rep. 924; Bowman v. Chicago, &c., R. Co., 35 Mo. App. 621; Doran v. Chicago, &c., R. Co., 73 Iowa, 115; 34 N. W. Rep. 619. Although a horse is crazy, the company is liable, where it is killed on the track because the company failed to maintain a sufficient fence. Liston v. Central Iowa, Ry. Co., 70 Iowa, 414; Story v. Chicago, &c., Ry. Co., 79 Iowa, 402; 44 N. W. Rep. 690; Courson v. Chicago, &c., Ry. Co., 71 Iowa, 28; 32 N. W. Rep. 8. Plaintiff cannot recover for colts injured by defendant's train, while he was driving them along the right of way inside the fences to a crossing, intending there to turn them off, in the absence of negligence on defendant's part. Davidson v. Central Iowa Ry. Co., 75 Iowa, 22; 39 N. W. Rep. 163.

[33] Smith v. Kansas, &c., R. Co., 58 Iowa, 622. See, also, White v. Concord, &c., R. Co., 30 N. H. 188; Evansville, &c., R. Co. v. Barbee, 74 Ind. 169; Sawyer v. Vermont, &c., R. Co., 105 Mass. 196; Midland, &c., Ry. Co. v. Daykin, 17 C. B. 126; Valleau v. Chicago, &c., Ry. Co., 73 Iowa, 723; 36 N. W. Rep. 760, and the Iowa cases cited in the preceding note.

[34] Ericson v. Duluth & Iron Range R. Co., 57 Minn. 26, 27, 28; 58 N. W. Rep. 822. To charge the owner with contributory negligence, it must appear that he allowed his stock to run at large

road divides a farm into two parts, it is not negligence on the part of the owner to allow his stock to cross the track from one part of the farm to the other at any point, if there be no public way or other assigned place for crossing;[35] but it is negligence to suffer a blind horse to wander about in the neighborhood of an unfenced railway.[36]

§ 231. The New York decisions.—In New York there has been some inconsistency in the decisions upon this point. It appears, however, to be the law in that State that a railway company cannot avoid liability for injuries to stock, in consequence of their failure to comply with the provisions of the statute, merely because the owner of the stock has been guilty of negligence in permitting it to stray at large. And the reason upon which that court proceeds, is that the statute imposes a public duty superior to any merely individual interest.[37] There are some decisions in New York to the contrary. Munger v. Tonawanda R. Co.,[38] an early and leading case, in which the cause of action arose prior to the passage of the fence law,[39] decided that the common law rule with reference to the duty of restraining cattle is the law of New York, and that one whose cattle are injured in

under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the railroad track and be injured; that the risk of danger was such that a person in the exercise of ordinary prudence and reasonable care would not have allowed the animals to run at large. Ordinarily this would be a question of fact for the jury.

[35] But the owner has no right to allow his stock to loiter or stand on the track. He only has the right to allow them to cross, and even this license must be exercised reasonably. Housatonic R. Co. v. Waterbury, 23 Conn. 101. See, also, Jeffersonville, &c., R. Co. v. Ross, 37 Ind. 549; Indianapolis, &c., R. Co. v. Townsend, 10 Ind. 39; Bellefontaine, &c., R. Co. v. Reed, 33 Ind. 476; Matthews v. St. Paul, &c., R. Co., 18 Minn. 434.

[36] Knight v. Toledo, &c., R. Co., 24 Ind. 402. *Cf.* Macon, &c., R. Co. v. Davis, 13 Ga. 68; St. Louis, &c., R. Co. v. Todd, 36 Ill. 409.

[37] Corwin v. New York, &c., R. Co., 13 N. Y. 42; Duffy v. New York, &c., R. Co., 2 Hilt. 496; Munch v. New York, &c., R. Co., 29 Barb. 647; Morrison v. New York, &c., R. Co., 32 Barb. 568; McDowell v. New York, &c., R. Co., 37 Barb. 195; Hodge v. New York, &c., R. Co., 27 Hun, 394; Wheeler v. Erie Ry. Co., 2 Thomp. & C. 634.

[38] 4 N. Y. 349; 53 Am. Dec. 384; *sub nom.*, Tonawanda R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239.

[39] N. Y. Laws of 1848, page 221.

consequence of straying about and going upon a railroad track is a trespasser, and, therefore, cannot recover. This case has been followed, whenever the cause of action does not involve the act of 1848, as to fences.[40]

§ 232. The same subject continued.— It is impossible to reconcile all the decisions of the lower courts of New York, in the endeavors of the judges to apply the provisions of the fence law to the common law rule of Munger v. Tonawanda R. Co. A line of decisions hold that, under the statute as a police regulation, a plaintiff may recover for an injury to his cattle, consequent upon a defective fence, notwithstanding the circumstance that the cattle were allowed to roam at large in the vicinity of the track;[41] and another line, of equal value, lay down an exactly contrary rule.[42] The case of Hance v. Cayuga, &c., R. Co., [43] which decides that the owner of cattle which escape from his enclosure and go upon a railway track, and are injured, though guilty of no actual negligence, is, nevertheless, chargeable with contributory negligence and can maintain no

[40] Halloran v. New York, &c., R. Co., 2 E. D. Smith, 257; Fitch v. Buffalo, &c., R. Co., 13 Hun, 668; Clark v. Syracuse, &c., R. Co., 11 Barb. 112; Bowman v. Troy, &c., R. Co., 37 Barb. 516; Spinner v. New York, &c., R. Co., 67 N. Y. 156; Eaton v. Delaware, &c., R. Co., 57 N. Y. 396.

[41] Waldron v. Rensselaer, &c., R. Co., 8 Barb. 390; Labussiere v. New York, &c., R. Co., 10 Abb. Pr. 398 (n); Brady v. Rensselaer, &c., R. Co., 3 Thomp. & C. 537; 1 Hun, 378; Shepard v. Buffalo, &c., R. Co., 35 N. Y. 641. In this case the court is of the opinion that if the construction in the Tonawanda case were allowed to hold, the statute would virtually be nullified. It would mean that failure of the statutory duty on the part of the railroads would cast negligence on the land-owners. The provisions of the General Railroad Act (Chap. 140, Laws of 1850, as amended by § 8, chap. 282, Laws of 1854), requiring railroad corporations to construct and maintain fences on the sides of their roads, and making them, in case of failure to do so, liable for any damages to any cattle, horses, &c., thereon, does not require such a corporation to indemnify the owner of a team, who has voluntarily driven it on the lands of the corporation, and has negligently permitted it to escape onto the track, in front of a moving train. Dolan v. Newburgh, D. & C. R. Co., 120 N. Y. 571; 24 N. E. Rep. 824.

[42] Marsh v. New York, &c., R. Co., 14 Barb. 364; Mentges v. New York, &c., R. Co., 1 Hilt. 425; Shanahan v. New York, &c., R. Co., 10 Abb. Pr. 398.

[43] 26 N. Y. 428.

action against the railway company although it had been guilty of negligence in maintaining the fence and cattle-guards, stands alone in the New York reports. The rule in that State is plainly the reverse of this.[44] Corwin v. New York, &c., R. Co.,[45] is still cited as the leading case upon this point. In this case, decided in 1855, it is distinctly laid down that no failure on the part of an owner of stock, as to confining it, can operate to excuse a railway corporation for a failure to comply with the provisions of the statute as to fences and this is still the law in New York.

§ 233.—Summary statement of the rule.—Judge Cooley has said:— "Indeed, if contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large or even on his grounds in the vicinity of the road, so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."[46] This is a reasonable view, and one which has been adopted, even in cases where animals were at large in violation of law.[47]

§ 234. The rule in New England and in Wisconsin.—In several of the New England States, where it appears that an owner of stock has knowingly suffered his cattle to run at large in the highway in the neighborhood of a railroad, and that the railroad company has neglected to fence its tracks, the courts have held that, in respect of negligence, "honors are easy" between plaintiff and defendant, and hence that there can be no recov-

[44] See generally the New York cases cited in the preceding notes.

[45] 13 N. Y. 42.

[46] Flint, &c., R. Co. v. Lull, 28 Mich. 510.

[47] Cairo, &c., R. Co. v. Woolsey, 85 Ill. 370; Fritz v. Milwaukee, &c., R. Co., 34 Iowa, 337; Louisville, &c., R. Co. v. Cahill, 63 Ind. 34; Boyle v. Missouri Pac. Ry. Co., 21 Mo. App. 416; Apitz v. Missouri Pac. Ry. Co., 17 Mo. App. 419; Burlington, &c., R. Co. v. Webb, 18 Neb. 215; 53 Am. Rep. 809. See, also, Hamilton v. Missouri Pac. Ry. Co., 87 Mo. 85.

ery.[48] There is much the same rule in Wisconsin.[49] The Wisconsin court seem to have distinguished between actions brought against railway companies for injuries to cattle from failure on their part to construct the fence required by statute, and such as are brought for injuries from failure on the part of the railroad to maintain in good repair fences already made. In the latter case, it holds that the negligence of the plaintiff would be sufficient to defeat his action.[50] One cannot be deprived of the proper and ordinary use of his own property by the failure of a railway company to perform its statutory duty. Therefore, it is not negligence for an owner of stock to pasture it upon his own premises, although he knows that the fence between his land and the railroad, which it is the duty of the company to keep in order, is out of repair and defective.[51]

[48] Wilder v. Maine, &c., R. Co., 65 Me. 333; 20 Am. Rep. 698; Trow v. Vermont, &c., R. Co., 24 Vt. 488; 58 Am. Dec. 191; Eames v. Salem, &c., R. Co., 98 Mass. 560; McDonnell v. Pittsfield, &c., R. Co., 115 Mass. 564; Woolson v. Northern, &c., R. Co., 19 N. H. 267; Towns v. Cheshire, &c., R. Co., 21 N. H. 364; Chapin v. Sullivan, &c., R. Co., 39 N. H. 564; Mayberry v. Concord, &c., R. Co., 47 N. H. 391; Giles v. Boston, &c., R. Co., 55 N. H. 552; Tower v. Providence, &c., R. Co., 2 R. I. 404.

[49] Sika v. Chicago, &c., R. Co., 21 Wis. 370.

[50] Lawrence v. Milwaukee, &c., R. Co., 42 Wis. 322; Jones v. Sheboygan, &c., R. Co., 42 Wis. 306; Curry v. Chicago, &c., R. Co., 43 Wis. 665; Bennett v. Chicago, &c., R. Co., 19 Wis. 145. *Cf.* McCall v. Chamberlain, 13 Wis. 637, where the absolute liability of railroad companies for failure to fence is laid down. This case, however, is criticised in Pitzner v. Shinnick, 39 Wis. 129, the court seeming to think that if the plaintiff's act was the proximate cause of the injury, he cannot recover in spite of the statute. Joliet, &c., R. Co. v. Jones, 20 Ill. 221; Dunnigan v. Chicago, &c., R. Co., 18 Wis. 28; Louisville, &c., R. Co. v. Spain, 61 Ind. 460; Ricketts v. East & West India Docks, &c., R. Co., 21 L. J. (C. P.) 201; 16 Jur. 1072; 12 Eng. Law & Eq. 520; Manchester, &c., Ry. Co. v. Wallis, 14 C. B. 213; 23 L. J. (C. P.) 185.

[51] Congdon v. Central, &c., R. Co., 56 Vt. 390; 48 Am. Rep. 793; Rogers v. Newburyport, &c., R. Co., 1 Allen, 16; Shepard v. Buffalo, &c., R. Co., 35 N. Y. 644; McCoy v. California, &c., R. Co., 40 Cal. 532; 6 Am. Rep. 623; Cressey v. Northern, &c., R. Co., 59 N. H. 564; 47 Am. Rep. 227; Wilder v. Maine, &c., R. Co., 65 Me. 332; 20 Am. Rep. 698; Mead v. Burlington, &c., R. Co., 52 Vt. 278; Brady v. Rensselaer, &c., R. Co., 1 Hun, 378; 3 Thomp. & C. 537; Donovan v. Hannibal, &c., R. Co., 89 Mo. 147; Gooding v. Atchison, &c., R. Co., 32 Kan. 150.

(B.) FIRES.

§ **235. Negligent communication of fire.**— What constitutes contributory negligence on the part of an owner of property situated near a railroad track, which is damaged or destroyed by fire negligently permitted to escape from the company's locomotives, is a question that has very frequently presented itself. It is the settled rule of law in England that, while a railway company, authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine, still, in the event of its own negligence, it is no defense that the plaintiff who has used his land in a natural and proper way, for the purpose for which it is fit, has thereby allowed it to become peculiarly liable to take fire by neglecting to clear away combustible matter accumulating thereon. The gist of the action is negligence.[52]

§ **236 The effect of a statute.**— "When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage results from the use of such thing, independently of negligence, the party using it is not responsible."[53] In this case, touching upon the question of the duty of the land-owner to protect himself and his outlying property from the danger incident to the proximity of the railroad track, one of the judges said:— "It

52 Vaughan v. Taff Vale Ry. Co., 3 Hurl. & N. 742; on appeal, 5 Hurl. & N. 678; Hammersmith, &c., Ry. Co. v. Brand, L. R. 4 H. L. 171; Piggot v. Eastern Counties Ry. Co., 3 Man., G. & S. 230; Aldridge v. Great Western Ry. Co., 3 Man., G. & S. 515; Bliss v. London, &c., Ry. Co., 2 Fost. & Fin. 341; Dimmock v. North Staffordshire Ry. Co., 4 Fost. & Fin. 1058. *Cf.* Blyth v. Birmingham Water Works Co., 11 Exch. 783, where Martin, B., in answer to an argument by counsel, says that if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers, and are liable for the consequences. Shaw v. Roberds, 6 Adol. & E. 83, per Denham, C. J.

53 Vaughan v. Taff Vale Ry. Co., 3 Hurl. & N. 742; 5 Hurl. & N. 678.

would require a strong authority to convince me that, because a railway runs along my land, I am bound to keep it in a particular state;" and another said:— "The plaintiff used his land in a natural and proper way for the purposes for which it was fit; the defendants come to it, he being passive, and do it a mischief." In this country the weight of authority sustains the English rule as declared in the case just cited. "The conclusion from the cases," said the Supreme Court of Pennsylvania,[54] "is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act, or omitted some duty which is the proximate cause of his injury concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements, in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence."[55]

§ 237. A further statement of the rule in the United States.— In a leading case in New Jersey it is said:— "In the leading case in Illinois,[56] it is assumed that the same duty which will compel the railway company to clear its railway of combustibles, imposes an equal obligation on the owner of the contiguous land, but the distinction is obvious. The company uses a dangerous agent, and must provide proper safeguards; the land-owner does nothing of the kind, and has the right to remain quiescent."[57] This view, as to the duty of an owner of land contiguous to a railway track, is approved in several other States. It is the

[54] Philadelphia, &c., R. Co. v. Hendrickson, 80 Penn. St. 182; 21 Am. Rep. 97.

[55] Patton v. St. Louis, &c., Ry. Co., 87 Mo. 117; 56 Am. Rep. 446. See, also, Philadelphia, &c., R. Co. v. Schultz, 93 Penn. St. 341; Lehigh Valley R. Co. v. McKeen, 90 Penn. St. 122; 35 Am. Rep. 644; Penn. R. Co. v. Hope, 80 Penn. St. 373; 21 Am. Rep. 100; Penn. R. Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 431.

[56] Chicago, &c., R. Co. v. Simonson, 54 Ill. 504; 5 Am. Rep. 155, Breese, J.

[57] Salmon v. Delaware, &c., R. Co., 38 N. J. Law, 5; 20 Am. Rep. 356; *sub nom.*, Delaware, &c., R. Co. v. Salmon, 39 N. J. Law, 299; 23 Am. Rep. 214. See, also, Morris & Essex R. Co. v. State, 36 N. J. Law, 553; Rev. Stat. of N. J. (1877), 911, §§ 13, 14.

rule in Massachusetts,[58] Virginia,[59] West Virginia,[60] New Hampshire,[61] Connecticut,[62] New York,[63] Missouri,[64] Tennessee,[65] California,[66] Delaware,[67] Nebraska,[68] Kansas,[69] North Carolina,[70] South Carolina,[71] Indiana,[72] Maryland,[73] Georgia,[74] and Wisconsin.[75]

[58] Ross v. Boston, &c., R. Co., 6 Allen, 87. See, also, Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 423; Hart v. Western, &c., R. Co., 13 Metc. 99; 46 Am. Dec. 719; Perley v. Eastern R. Co., 98 Mass. 414; Ingersoll v. Stockbridge, &c., R. Co., 8 Allen, 438; Gen. Stats. of Mass., chap. 63, § 101, giving the railway companies an insurable interest in the property along their routes.

[59] Richmond, &c., R. Co. v. Medley, 75 Va. 499; 40 Am. Rep. 734.

[60] Snyder v. Pittsburgh, &c., R. Co., 11 W. Va. 14.

[61] Rowell v. Railroad, 57 N. H. 132; 24 Am. Rep. 59; Gen. Stats. of N. H., chap. 148, §§ 8, 9.

[62] Burroughs v. Housatonic R. Co., 15 Conn. 124; 38 Am. Dec. 64, and the note.

[63] Fero v. Buffalo, &c., R. Co., 22 N. Y. 209; Cook v. Champlain Trans. Co., 1 Denio, 91; Webb v. Rome, &c., R. Co., 49 N. Y. 420; 10 Am. Rep. 389; Collins v. New York, &c., R. Co., 5 Hun, 499; Bevier v. Delaware, &c., Canal Co., 13 Hun, 254.

[64] Fitch v. Pacific, &c., R. Co., 45 Mo. 322; Smith v. Hannibal, &c., R. Co., 37 Mo. 287; Coates v. Missouri, &c., R. Co., 61 Mo. 38. The burden of proof is on the railroad company to show that it used all proper appliances. Clemens v. Hannibal, &c., R. Co., 53 Mo. 366; 14 Am. Rep. 460; Palmer v. Mo. Pac. R. Co., 76 Mo. 217.

[65] Burke v. Louisville, &c., R. Co., 7 Heisk. 451; 19 Am. Rep. 618.

[66] Flynn v. San Francisco, &c., R. Co., 40 Cal. 14; 6 Am. Rep. 595.

[67] Jefferis v. Phila., &c., R. Co., 3 Houst. 447.

[68] Burlington, &c., R. Co. v. Westover, 4 Neb. 268.

[69] St. Joseph, &c., R. Co. v. Chase, 11 Kan. 47; Kansas, &c., R. Co. v. Owen, 25 Kan. 419; Missouri, &c., R. Co. v. Cornell, 30 Kan. 35.

[70] Doggett v. Richmond, &c., R. Co., 78 N. C. 305.

[71] McCready v. South Carolina R. Co., 2 Strobh. (Law) 356.

[72] Louisville, &c., R. Co. v. Richardson, 66 Ind. 43; 32 Am. Rep. 94; Pittsburgh, &c., R. Co. v. Noel, 77 Ind. 110; Pittsburgh, &c., R. Co. v. Hixon, 77 Ind. 111; Pittsburgh, &c., R. Co. v. Jones, 86 Ind. 496; 44 Am. Rep. 334; Louisville, &c., R. Co. v. Krinning, 87 Ind. 351; Louisville, &c., R. Co. v. Hagan, 87 Ind. 602.

[73] Baltimore, &c., R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72; Rev. Code of Maryland (1878), 723, § 1.

[74] Macon, &c., R. Co. v. McConnell, 27 Ga. 481.

[75] "Owners of land have the right to remain passive, and use and enjoy their property as they will so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned. * * * The company cannot say:—'Do this or that with your property, or I will destroy it by the negligent or improper use of my fire.'" Dixon, C. J., in Kellogg v. Chicago, &c.,

§ 238. Vaughan v. Taff Vale Ry. Co.—the doctrine of this case criticised.—In several States the rule of Vaughan v. Taff Vale Ry. Co. is denied, and it is held that the presence of the railway imposes additional burdens and responsibility, as to the use of adjacent property, upon the owners thereof, and that a variety of acts and omissions, not otherwise negligent, becomes so by reason of the juxtaposition of railroad tracks. This is the view taken by the courts of Illinois, although the decisions in point found in the reports of that State appear, many of them, to have been applications of the local rule of comparative negligence, rather than any very explicit repudiation of the English rule.[76] In Iowa,[77] Vermont,[78] and Michigan,[79] the courts have seemed to incline to rules in opposition to the weight of authority. This tendency has, in Illinois and Iowa, been checked by legislation,[80]

R. Co., 26 Wis. 223; 7 Am. Rep. 69. But see Murphy v. Chicago, &c., R. Co., 45 Wis. 222; Caswell v. Chicago, &c., R. Co., 42 Wis. 193; Martin v. Western, &c., R. Co., 23 Wis. 437; Erd v. Chicago, &c., R. Co., 41 Wis. 65; Ward v. Milwaukee, &c., R. Co., 29 Wis. 144.

[76] Illinois, &c., R. Co. v. Mills, 42 Ill. 409; Illinois, &c., R. Co. v. Frazier, 47 Ill. 505; Ohio, &c., R. Co. v. Shanefelt, 47 Ill. 497; Chicago, &c., R. Co. v. Simonson, 54 Ill. 504; 5 Am. Rep. 155; Great Western, &c., R. Co. v. Haworth, 39 Ill. 347; Bass v. Chicago, &c., R. Co., 28 Ill. 9; Illinois, &c., R. Co. v. Nunn, 51 Ill. 78; Toledo, &c., R. Co. v. Pindar, 53 Ill. 447; 5 Am. Rep. 57; Toledo, &c., R. Co. v. Maxfield, 72 Ill. 95, in which it is held that if one erects his building on or near a railroad track, he must assume some of the hazards to which his property is exposed. To be safe, he should build at a reasonable distance from the track. Rev. Stats. of Ill. (1880), 1161, chap. 114, § 89. A land-owner's erection and use of a building for ordinary purposes near a railroad track, although it is more exposed to fire than if it were at a greater distance, is not negligence and will not deprive him of a right of action against the railroad company for the loss of the building by fire, resulting from sparks escaping from a locomotive through the company's negligence. Cincinnati, &c., R. Co. v. Barker, 94 Ky. 71; 21 S. W. Rep. 347.

[77] Kesee v. Chicago, &c., R. Co., 30 Iowa, 78; 6 Am. Rep. 643; Ormond v. Central, &c., R. Co., 58 Iowa, 742; Slosson v. Burlington, &c., R. Co., 60 Iowa, 215; Small v. Chicago, &c., R. Co., 55 Iowa, 582. See, also, Rev. Code of Iowa, § 1289.

[78] Bryant v. Central, &c., R. Co., 56 Vt. 710. See, also, Gen. Stats. of Vermont (1862), 233, § 78.

[79] Marquette, &c., R. Co. v. Spear, 44 Mich. 169; 38 Am. Rep. 242.

[80] The *prima facie* inference of negligence which is declared by Rev. Stats. Ill. (1889), chap. 114, § 89, to arise from the fact that damage has been caused by fire communicated from a locomotive

and it may be believed that at present no court in this country is squarely committed to any rule which contradicts the English doctrine. For the owner of a warehouse near a railway track to leave the windows open in a room in which he had stored husks, rags, cobs and other inflammable material, was held, in Illinois, contributory negligence.[81] But where only one pane of glass was allowed to remain out of a plaintiff's window in a house adjoining a railroad track, it has been held, in Wisconsin, not such contributory negligence as to prevent a recovery, and the court intimates that even a whole window open would not be any worse in point of negligence.[82] And in Indiana it is expressly held that an open window, under such circumstances, into which sparks from a locomotive flew and set fire to the building, is not such negligence as to defeat an action.[83]

§ 239. The rule as to combustibles, shavings, dried grass, etc.— In New York it is not negligence to leave the doors open, even though the floor is covered with shavings, in a house adjoining the tracks,[84] nor, in Pennsylvania and Delaware, to suffer the roof of a building situated near the track to get into such a condition that sparks can be blown through and set fire to what is

engine is not rebutted by proof that the engine was provided with the best and most approved appliances, unless it is also shown that such appliances were at the time in suitable order and repair, and that there was no negligence in their use. Chicago, &c., R. Co. v. Goyette, 133 Ill. 21; 24 N. E. Rep. 549. See, also, Chicago, &c., R. Co. v. Hunt, 24 Ill. App. 744. Under Code Iowa, § 1289, a railroad company is liable for setting a fire on its right of way, which destroyed certain stacks of hay of plaintiff, though he was guilty of contributory negligence in failing to protect them by plowing around them. West v. Chicago, &c., Ry. Co., 77 Iowa, 654; 42 N. W. Rep. 512; Engle v. Chicago, &c., R. Co., 77 Iowa, 661; 42 N. W. Rep. 512.

81 Great Western, &c., R. Co. v. Haworth, 39 Ill. 347. *Cf.* Fero v. Buffalo, &c., R. Co., 22 N. Y. 209.

82 Martin v. Western, &c., R. Co., 23 Wis. 437. See, also, Rowell v. Railroad, 57 N. H. 132; 24 Am. Rep. 69; Ross v. Boston, &c., R. Co., 6 Allen, 87.

83 Louisville, &c., R. Co. v. Richardson, 66 Ind. 43; 32 Am. Rep. 94. *Cf.* Murphy v. Chicago, &c., R. Co., 45 Wis. 222; 30 Am. Rep. 721, where it was held to be contributory negligence to permit an accumulation of hay and shavings between two buildings, and under one of them, the side of which next to the railroad was left open below the sills.

84 Fero v. Buffalo, &c., R. Co., 22 N. Y. 209. Nor for the owner of a varnish factory to set out of doors a lot of varnish and ben-

within.[85] But it has been held in Pennsylvania that one who stores a large quantity of lumber by a railroad siding, partly for convenience in loading and partly for storing and seasoning, with full knowledge of the danger to which it is exposed from inflammable rubbish accumulated upon the track, is guilty of negligence precluding his recovery if the lumber is set fire to in a dry season from sparks from the engines of the railroad company, even though there is negligence on the part of the company.[86] In New Jersey it is not negligence to allow leaves and dried grass and other such combustible stuff to accumulate on land lying near the track of a railway.[87] So, in Missouri,[88] California,[89] West Virginia,[90] Virginia,[91] Pennsylvania,[92] Indiana,[93] and Wisconsin,[94] but in Vermont such accumulations are questions for a jury, in respect of the negligence involved.[95] To allow shavings and other combustible rubbish to accumulate about an unfinished house near a railway track is negligence,[96] while, in some of the Western States, to place stacks of grain and ricks of straw upon one's own land near the track

zine, thus using his premises in the usual mode. Kalbfleisch v. Long Island R. Co., 102 N. Y. 520; 55 Am. Rep. 832. So, also, in Ross v. Boston, &c., R. Co., 6 Allen, 87.

85 Phila., &c., R. Co. v. Hendrickson, 80 Penn. St. 183; 21 Am. Rep. 97; Jefferis v. Phila., &c., R. Co., 3 Houst. 447.

86 Post v. Buffalo, &c., R. Co., 108 Penn. St. 585. But see Gulf, &c., Ry. Co. v. McLean, 74 Tex. 646, and Gibbons v. Wisconsin Valley R. Co., 66 Wis. 161, where on a similar state of facts the question of contributory negligence was held to be a proper one for the jury.

87 Salmon v. Delaware, &c., R. Co., 38 N. J. Law, 5; 20 Am. Rep. 356; Delaware, &c., R. Co. v. Salmon, 39 N. J. Law, 299; 23 Am. Rep. 214; Northern Pacific R. Co. v. Lems, 7 U. S. App. 254; 51 Fed. Rep. 658.

88 Smith v. Hannibal, &c., R. Co., 37 Mo. 287; Fitch v. Missouri, &c., R. Co., 45 Mo. 322.

89 Flynn v. San Francisco, &c., R. Co., 40 Cal. 14; 6 Am. Rep. 595.

90 Snyder v. Pittsburgh, &c., R. Co., 11 W. Va. 15.

91 Richmond, &c., R. Co. v. Medley, 75 Va. 499; 40 Am. Rep. 734.

92 Penn. R. Co. v. Schultz, 93 Penn. St. 341.

93 Pittsburgh, &c., R. Co. v. Jones, 86 Ind. 496; 44 Am. Rep. 334.

94 Kellogg v. Chicago, &c., R. Co., 26 Wis. 223; 7 Am. Rep. 69; Erd v. Chicago, &c., R. Co., 41 Wis. 65.

95 Bryant v. Central, &c., R. Co., 56 Vt. 710.

96 Coates v. Missouri, &c., R. Co., 61 Mo. 38; Murphy v. Chicago, &c., R. Co., 45 Wis. 222; 30 Am. Rep. 721; Macon, &c., R. Co. v. McConnell, 27 Ga. 481.

is not negligence.[97] And he is not required to burn off or plow the land on which hay is stacked.[98] When a fire commences from a spark from a locomotive, on the company's own land in an accumulation of dried leaves and grass, and thence spreads to a similar accumulation upon the adjoining land of the plaintiff, the defendant may show that plaintiff's property was in no better condition than its own—and that, therefore, if the fire originally escaped from the locomotive without negligence on the part of the company, the plaintiff was, in that regard, equally in fault.[99]

§ 240. The obligation of the plaintiff herein.—Conceding the plaintiff's freedom from any duty to use his property with reference to the presence of the railroad, and while he may use his property as he wishes, without anticipating danger from that source, yet, when the fire is kindled, and his property is in

[97] St. Joseph, &c., R. Co. v. Chase, 11 Kan. 47; Burlington, &c., R. Co. v. Westover, 4 Neb. 268. *Cf.* Collins v. New York, &c., R. Co., 5 Hun, 499, holding that it was a proper question for the jury whether or not the plaintiff was contributorily negligent in allowing the bedding and manure of a stable to accumulate within two feet of the track during a hot, dry season.

[98] Louisville, &c., Ry. Co. v. Hart, 119 Ind. 273; 21 N. E. Rep. 753; Hoffman v. Chicago, &c., Ry. Co., 40 Minn. 60; 41 N. W. Rep. 301. "The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land; nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad; he is required to take only such precautions as a person of reasonable prudence under similar circumstances would take to prevent the destruction of his property. The land was hay land, and for hay to lie upon it in winrows was only to use it in the ordinary manner. It is not shown that there was anything negligent in the manner of using the land or storing the hay. It is argued that while the evidence shows that a fire-break had been plowed around the land, it was insufficient. But in this respect against the case is closely analogous to Burlington & M. R. Co. v. Westover (4 Neb. 268), where the court held that it was not *per se* contributory negligence to fail to provide such fire-break." Union Pacific Ry. Co. v. Ray, 46 Neb. 750, 755; 65 N. W. Rep. 773.

[99] Ohio, &c., R. Co. v. Shanefelt, 47 Ill. 497; Fitch v. Pacific, &c., R. Co., 45 Mo. 325. See, also, Atchison, &c., R. Co. v. Stanford, 12 Kan. 354; 15 Am. Rep. 362; Poeppers v. Missouri, &c., R. Co., 67 Mo. 715; 29 Am. Rep. 518; Hoag v. Lake Shore, &c., R. Co., 85 Penn. St. 293.

peril, it is negligence not to use his best efforts to avoid damage. He must not be supine. He must put the fire out, or rescue his goods, if he can. Failing to do this, he is negligent.[1] And where a plaintiff owned and operated a warehouse near the main line of a railway, and had a switch from that line running to his warehouse, upon which the company used a locomotive, in doing his business, that threw off sparks, and the plaintiff, after noticing the defect in the locomotive and complaining of its use to the company, still continued to allow its use upon his property, such acquiescence on his part, as to the continued employment of the defective engine, was held negligence sufficient to bar his recovery as against the company.[2] Where a railway

[1] And where the plaintiff knew that the place where the fire started, and from whence it spread to his land, was a place where fire had often caught from locomotive sparks, he was contributorily negligent in not cutting the grass and weeds and making the danger less imminent. Snyder v. Pittsburgh, &c., R. Co., 11 W. Va. 15; Eaton v. Oregon Ry. & Nav. Co., 19 Or. 391; Little Rock, &c., R. Co. v. Hecht, 38 Ark. 357; Chicago, &c., R. Co. v. Pennell, 94 Ill. 448; Kellogg v. Chicago, &c., R. Co., 26 Wis. 223; Illinois, &c., R. Co. v. McClelland, 42 Ill. 355; Toledo, &c., R. Co. v. Pindar, 53 Ill. 447; 5 Am. Rep. 57; McMarra v. Chicago, &c., R. Co., 41 Wis. 69; Doggett v. Richmond, &c., R. Co., 78 N. C. 305; Richter v. Harper, 95 Mich. 221; 54 N. W. Rep. 768. But an instruction that plaintiff cannot recover if he made no attempt to put out the fire is error, as making no reference to plaintiff's ability to cope with the same. Tilley v. St. Louis, &c., Ry. Co., 49 Ark. 535; 6 S. W. Rep. 8. It is also the duty of the company to exercise such care to prevent the spread of the fire as a prudent man would deem proper under the circumstances. Missouri Pac. Ry. Co. v. Platzer, 73 Tex. 117; 11 S. W. Rep. 160. See, also, on the duty of the company, Eighme v. Rome, &c., R. Co., 10 N. Y. Supl. 600. The owner of growing crops, destroyed by fire negligently communicated from a locomotive, cannot recover of the railroad company therefor, if his servant entrusted with the care of the premises, was able, when he discovered the fire, to extinguish it or prevent its spreading, and wilfully or negligently failed to do either. Illinois Central R. Co. v. McKay, 69 Miss. 139; 12 So. Rep. 447.

[2] Marquette, &c., R. Co. v. Spear, 44 Mich. 169; 38 Am. Rep. 242. But see Kendrick v. Towle, 60 Mich. 363; 27 N. W. Rep. 567, where the plaintiff had warned the defendant that its engine endangered his property on account of the way it emitted sparks, and the court held that increased care was due from the defendant, and that the plaintiff was not chargeable with contributory negligence by letting combustible material accumulate on his property near the track.

company has negligently set fire to the property of one person, and the fire has spread to the property of another, the question at once arises whether, in an action against the company for damages resulting from the communicated fire, the negligence that kindled the first fire is not too remote to enable the action to be maintained; or, in other words, when the railway company has set A.'s property on fire negligently, and the fire spreads to B.'s or C.'s property and burns it up, can B. or C. maintain an action against the railway company?

§ 241. The analogy of the "Squib case."—This is precisely the question that arose in what is known as the "Squib case,"[3]— the question of proximate and remote cause. The courts, both in England and the United States, are now agreed that in such a case the action will lie.[4] It has never been pretended that such

[3] Scott v. Shephard, 2 Wm. Black. 892.

[4] O'Neill v. New York, &c., Ry. Co., 115 N. Y. 579; 22 N. E. Rep. 217; Adams v. Young, 44 Ohio St. 80; Piggot v. The Eastern Counties Ry. Co., 3 Man., G. & S. 230; 54 Eng. Com. Law, 229; Smith v. London, &c., Ry. Co., L. R. 5 C. P. 98; Fent v. Toledo, &c., R. Co., 59 Ill. 349; 14 Am. Rep. 13 [a very instructive opinion by Lawrence, C. J.]; Hart v. Western, &c., R. Co., 13 Metc. 99 (by Shaw, C. J.); 46 Am. Dec. 719; Perley v. Eastern R. Co., 98 Mass. 414; Cleveland v. Grand Trunk Ry. Co., 42 Vt. 449. In Poeppers v. Missouri, &c., R. Co., 67 Mo. 715; 29 Am. Rep. 518, a prairie was set on fire by sparks from a locomotive. The fire burnt all night, but very slowly, the wind not being high. In the morning the wind rose and blew with great violence, carrying the fire some five miles farther. Held, that as the rise of the wind was a thing which a prudent man might reasonably anticipate, it could not be regarded as the intervention of a new agency, and hence the company was liable for all the injury caused. Henry v. Southern, &c., R. Co., 50 Cal. 176; Burlington, &c., R. Co. v. Westover, 4 Neb. 268; Hooksett v. Concord, &c., R. Co., 38 N. H. 242; Troxler v. Richmond, &c., R. Co., 74 N. C. 377; Anderson v. Wasatch, &c., R. Co., 2 Utah, 518; Delaware, &c., R. Co. v. Salmon, 39 N. J. Law, 299; 23 Am. Rep. 214; Small v. Chicago, &c., R. Co., 55 Iowa, 582; Atchison, &c., R. Co. v. Bales, 16 Kan. 252. While the plaintiff, in such cases, is bound to prove to the satisfaction of the jury that the fire was occasioned by the negligence of the defendant, he is not bound to prove this beyond what is termed a reasonable doubt, as applied to the trial of criminal causes. Baltimore, &c., R. Co. v. Shipley, 39 Md. 251; Webb v. Rome, &c., R. Co., 49 N. Y. 420; 10 Am. Rep. 389; Penn. R. Co. v. Hope, 80 Penn. St. 373; 21 Am. Rep. 100; Lehigh Valley R. Co. v. McKeen, 90 Penn. St. 122; 35 Am.

an action could not be maintained, except in two overruled cases.[5] In Kuhn v. Jewett, Receiver,[6] it appeared that a railway train, laden with petroleum, was wrecked through the negligence of the defendant, and the oil escaping, took fire, ran down into a stream of water, and was borne down in a blaze against the plaintiff's stable some distance below, in consequence of which the stable was destroyed. The defendant was held liable, and the Vice-Chancellor said:— "There can be no doubt, I think, if in this instance the flames of the burning oil had been carried by the wind directly from the point of collision to the petitioner's building, and it had thus been set on fire and destroyed, that the injury would, in judgment of law, have been the natural and direct, or proximate result of the collision. So, too, if the burning oil had descended from the point where it was first ignited by the mere force of its own gravity, upon the petitioner's building and destroyed it, the connection between causes and effect would have been so close and direct that the defendant's liability could not have been successfully questioned. So, also, if the fire had been carried from the place of its origin to the petitioner's building by a train of combustible matter, deposited in its track by the operation of the laws of nature, the petitioner's injury, I think it could not have been doubted, would have been esteemed the direct result of the defendant's negligence. These principles must rule this case. Their application is obvious, for, although water is almost universally used as a means to extinguish fire, and it seems, at first blush, absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that, as an agency for the transmission of burning oil, it is just as certain and effectual in its operation as the wind, in carrying flame, or a spark, or combustible matter, in spreading a fire. In keeping up the continuity between cause and effect it may be just as certain and effectual in its operation as any other material force."

Rep. 644. *Cf.* Insurance Co. v. Tweed, 7 Wall. 44; Milwaukee, &c., R. Co. v. Kellogg, 94 U. S. 469; Insurance Co. v. Transportation Co., 12 Wall. 199; Insurance Co. v. Seaver, 19 Wall. 542. See, also, Chicago, &c., R. Co. v. Pennell, 110 Ill. 435, and a thorough discussion of the subject in Shearman & Redfield on Negligence (5th ed.), § 666.

[5] Ryan v. New York, &c., R. Co., 35 N. Y. 210; Penn. R. Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 431.

[6] 33 N. J. Eq. 647.

§ 242. The rule in Pennsylvania.— Upon a precisely similar state of facts, however, the Supreme Court of Pennsylvania held that even if the defendants were negligent in wrecking their train, still the damage to the plaintiff was too remote to warrant a recovery.[7] But this, in my judgment, is wholly incorrect. Upon what principle of legal ratiocination can it be determined that when fire, negligently kindled by a railway company, is borne through the air upon a burning shingle, or passes over the dried grass of a prairie and sets fire to my house, the company is liable, but when it is floated down in burning oil upon the waters of a creek and sets fire to my property, the company is not liable? The Pennsylvania court is not likely to be followed upon this point.

[7] **Hoag v. Lake Shore, &c., R. Co., 85 Penn. St. 293; 27 Am. Rep. 653.**

CHAPTER X.

HIGHWAYS OTHER THAN RAILWAYS; THE LAW OF THE ROAD.

§ 243. Liability of municipal corporations for injuries from defective highways.
244. Duty of corporate officials.
245. Liability for injuries to runaway horses occasioned by defects in the streets.
246. Traveler's own negligence contributing to the injury.
246a. Presumption that highway is safe.
247. Not negligent to use a defective highway.
248. Qualifications of this rule.
249. The obligation of the traveler on a defective highway.
250. Injuries from excavations in the highway.
251. Right of pedestrian in the roadway.
252. Deviation from the highway.
253. Duty of the municipal authorities herein.
254. The rule further stated.
255. Further illustrations.
256. Trespass upon the highway.
257. Illustrations of this rule.
258. Leaving horses untied and unattended on the highway.
259. The same subject continued.
260. Unskilful or reckless driving.
261. Sunday traveling.
262. The New England rule.
263. The Massachusetts rule illustrated.
§ 264. The same subject continued.
265. The rule in Maine and Vermont.
266. The Rhode Island rule.
267. These New England Sunday law decisions criticised.
268. Pedestrians crossing the highway.
269. The same subject continued.
270. Icy sidewalks.
271. The same subject continued.
272. Mere slipperiness not a defect in the highway.
273. The duty of the traveler on an icy highway.
274. The liability of the owner of property in respect to icy pavements.
275. The foregoing rules summarized.
276. Injuries to persons in the highway from something falling from the adjoining property.
277. The same subject continued.
278. Children injured upon the highway.
279. This rule further illustrated.
280. The rule in New Hampshire.
281. The author's criticism.
282. Collisions upon the highway.
283. The same subject continued.
284. Injuries upon ferry boats.

§ 243. Liability of municipal corporations for injuries from defective highways.— At common law no action lies against a municipal corporation for damages occasioned by defective highways.[1] "It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals, but *quasi* corporations, created by the legislature for purposes of public policy, are subject by the common law to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect unless the action has been given by some statute."[2] Accordingly, inasmuch as among the most important duties which the law imposes upon municipal corporations is that of making and maintaining roads and streets,[3] and because every member of the community has a personal interest in the condition of the highway, the right to bring a civil action against the corporation for an injury resulting from a breach of this duty has generally been conferred by statute.[4]

[1] Shirley's Leading Cases, 279; Elliott on Roads and Streets, 40; Russell v. Men of Devon, 2 T. R. 667; Bartlett v. Crozier (by Chancellor Kent), 17 Johns. 449; 8 Am. Dec. 428; Riddle v. Proprietors, 7 Mass. 169; 5 Am. Dec. 35; Mower v. Inhabitants of Leicester, 9 Mass. 247; 6 Am. Dec. 63; Hill v. Boston, 122 Mass. 344; 23 Am. Rep. 332; Adams v. Wicasset Bank, 1 Greenl. 361; Reed v. Belfast, 20 Me. 246; Farnum v. Concord, 2 N. H. 392; Eastman v. Meredith, 36 N. H. 284; Hyde v. Jamaica, 27 Vt. 443; State v. Burlington, 36 N. H. 541; Chidsey v. Canton, 17 Conn. 475; Taylor v. Peckham, 8 R. I. 349; 2 Dillon on Municipal Corporations, §§ 761, 764.

Abbett v. Johnson County, 114 Ind. 61; 16 N. E. Rep. 127; Mower v. Inhabitants of Leicester, 9 Mass. 247; 6 Am. Dec. 63. *Cf.* Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Providence v. Clapp, 17 How. (U. S.) 167; Jones v. Inhabitants of Waltham, 4 Cush. 299; 50 Am. Dec. 783; Parker v. Boston & Maine R. Co., 3 Cush. 107; 50 Am. Dec. 709; Marini v. Graham, 67 Cal. 130.

[3] Bullock v. Mayor, &c., of New York, 99 N. Y. 654; 1 East. Rep. 170, and cases cited; Shearman & Redfield on Negligence (5th ed.), §§ 332, 337.

[4] 2 Dillon on Municipal Corporations, § 786; Richards v. Enfield, 13 Gray, 344; City of Lexington v. McQuillan, 9 Dana, 513; 35 Am. Dec. 159. These statutes extend to cities as well as towns (or townships), and also to sidewalks, where they constitute a part of the public highways. Providence v. Clapp, 17 How. (U. S.) 161, 167; Nelson v. Village of Canisteo, 100 N. Y. 89; Kellogg v. Janesville, 34 Minn. 132; Milarkey v. Foster, 6 Or. 378; 25 Am. Rep. 531; Dutton v. Weare 17 N. H. 34; 43 Am. Dec. 590; Elliott on Roads and Streets, chap. 23, and the cases generally cited *supra.*

§ 244. Duty of corporate officials.— Ordinary care must be exercised by the officers and servants of the corporation to keep the highways in a safe and convenient condition for travelers,[5] and the duty and responsibility of the corporation with respect to the condition of the highway are not limited to the traveled path, but extend to the whole width of the way.[6] But ditches, properly constructed for the drainage of the highway at the sides of the traveled way, cannot be regarded defects, as matter of law — nor is the city liable for a failure to place railings between such ditches or drains and the thoroughfare proper.[7] Except in the States of New Jersey,[8] Texas,[9] Michigan,[10] and South Caro-

[5] Moore v. Kenockee Tp., 75 Mich. 332; 42 N. W. Rep. 944; Goodfellow v. Mayor, &c., 100 N. Y. 15. It is some evidence of negligence on the part of a city that a decayed tree falls upon a person traveling along the street. Gubasko v. New York, 12 Daly (N. Y.) 183. The question of reasonable care is one of fact upon which the finding of the jury is conclusive. Burrell v. Uncapher, 117 Penn. St. 373; 11 Atl. Rep. 619; Hopkins v. Town of Rush River, 70 Wis. 10; 34 N. W. Rep. 909. A slight inclination in a sidewalk is not a defect for which a city is liable. Sehroth v. City of Prescott, 63 Wis. 652. The town is not bound to guard against extraordinary accidents; only reasonable skill and care is required. Bishop v. Township of Schuylkill (Penn.), 8 Atl. Rep. 449; Jackson Tp. v. Wagner, 127 Penn. St. 184; 17 Atl. Rep. 903; 24 W. N. C. 217. Photographs of a defective highway are competent evidence at a trial. Barker v. Town of Perry, 67 Iowa, 146; Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Gould v. City of Topeka, 32 Kan. 485; 49 Am. Rep. 496; Johnson v. Whitefield, 18 Me. 218; 36 Am. Dec. 721; Savage v. Bangor, 40 Me. 176; 63 Am. Dec. 658. But see George v. Haverhill, 110 Mass. 511.

[6] Johnson v. Whitefield, 8 Me. 218; 36 Am. Dec. 721; Durant v. Palmer, 39 N. J. Law, 544; Vale v. Bliss, 50 Barb. 358; Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Street v. Holyoke, 105 Mass. 85. *Contra*, Perkins v. Inhabitants of Fayette, 68 Me. 152, which holds that a town need keep only a width of a highway in a smooth condition, sufficient to render the passing over it safe and convenient. 28 Am. Rep. 84. "It is only such portions of the street or highway as have been used by the public for travel therein which are required to be kept free from defect." Fitzgerald v. City of Berlin, 64 Wis. 207. And see Angell on Highways, § 232.

[7] Morse v. Inhabitants of Belfast, 77 Me. 44; 1 East. Rep. 67.

[8] Pray v. Mayor, &c., 32 N. J. Law, 394.

[9] City of Navasota v. Pearce, 46 Tex. 525; 26 Am. Rep. 279.

[10] Detroit v. Blakeby, 21 Mich. 84; 4 Am. Rep. 450; McCutcheon v. Homer, 43 Mich. 483; 38 Am. Rep. 212.

lina,[11] it is not denied that a municipal corporation is liable to private individuals for any injury which results from the failure of the corporation or its agents to keep the streets and ways in a safe and proper condition.[12] The obligation of the corporation is as great in respect of obstructions as defects, and the traveler who is injured because of an obstruction permitted to be in the highway, may have his action against the town[13] in the same way and to the same extent as in case of injury from a defect in the highway. And, to an action of this sort, it is not a defense that the obstruction was necessary for the repair of the street.[14]

§ 245. Liability for injuries to runaway horses occasioned by defects in the streets.— Upon the question whether municipal corporations are liable for an injury to a runaway horse or his owner, occasioned by a defect in a street, the courts are not agreed. In several jurisdictions it is held that highways need not be so constructed that travelers and their horses shall be safe when the horses run away or become unmanageable. This is

[11] Young v. Charleston, 20 S. C. 116; 47 Am. Rep. 827.

[12] Gould v. City of Topeka, 32 Kan. 485; 49 Am. Rep. 496; Browning v. City of Springfield, 17 Ill. 143; 63 Am. Dec. 345, and the note; O'Neill v. New Orleans, 30 La. Ann. 220, holding that while the city is not an insurer against accidents, it yet is liable for those injuries which result from its neglect to maintain, in a safe condition, sidewalks and bridges within its limits. "Sidewalks are to be used by common people, and only a few of them are expected to possess the skill of a Blondin." 31 Am. Rep. 221. Noble v. City of Richmond, 31 Gratt. 271; 31 Am. Rep. 726; Drew v. Town of Sutton, 55 Vt. 586; 45 Am. Rep. 644; Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274; Dowd v. Chicopee, 116 Mass. 95, and the cases generally cited *supra*.

[13] Dutton v. Weare, 17 N. H. 34; 43 Am. Dec. 590; French v. Brunswick, 21 Me. 29; 38 Am. Dec. 250; Bennett v. Fifield, 13 R. I. 139; 43 Am. Rep. 17; Snow v. Adams, 1 Cush. 447; Barber v. Roxbury, 11 Allen, 320.

[14] Jacobs v. Bangor, 16 Me. 187; 33 Am. Dec. 652. But a person injured by an accident occasioned by an authorized public work, constructed and kept in repair in a lawful manner, has no legal remedy; as, where one fell into a cattle-guard near the highway, at a railway crossing, properly constructed and maintained. Jones v. Inhabitants of Waltham, 4 Cush. 299; 50 Am. Dec. 783; Hawks v. Northampton, 116 Mass. 423. *Cf.* Bailey v. Mayor of New York, 3 Hill, 531; 38 Am. Dec. 669; Davis v. Leominster, 1 Allen, 184; Reardon v. City, 66 Cal. 492; 19 Am. Law Rev. 492. But see, also, City v. Neuding, Sup. Ct. Ohio (1885), 19 Am. Law Rev. 492.

the rule in Massachusetts,[15] Maine,[16] Wisconsin,[17] and West Virginia.[18] But in New York,[19] Pennsylvania,[20] Georgia,[21] Maryland,[22] Missouri,[23] Indiana,[24] Connecticut,[25] New Hampshire,[26] Vermont,[27] and Texas,[28] it is held that where it appears that the corporation was negligent in constructing or maintaining the highway, and such negligence was a cause of the injury, the action may be sustained, and the mere fact of the runaway is not a defense.[29] The negligence of the town is not the proximate

15 Davis v. Inhabitants of Dudley, 4 Allen, 558; Titus v. Inhabitants of Northbridge, 97 Mass. 258; Fogg v. Inhabitants of Nahant, 98 Mass. 576. But where the defect consisted in a wall of insufficient height and the plaintiff lost control of his horse for a moment only, and would have regained it had the wall been a sufficient barrier, the town was held liable. Hinckley v. Town of Somerset, 145 Mass. 326; 14 N. E. Rep. 166.

16 Moulton v. Inhabitants of Sanford, 51 Me. 127; Perkins v. Inhabitants of Fayette, 68 Me. 152; Aldrich v. Gorham, 77 Me. 287.

17 Doeher v. Fitchburg, 22 Wis. 675; House v. Inhabitants of Fulton, 29 Wis. 296; 9 Am. Rep. 568; Goldsworthy v. Town of Linden, 75 Wis. 24; 43 N. W. Rep. 656.

18 Smith v. County Court, 33 W. Va. 713; 11 S. E. Rep. 1.

19 Where a trench was dug in the course of repairs, and travel suspended over that part of the road, the mere neglect to furnish a warning of the danger is not a breach of duty toward the owner of a horse running away without a driver. Stacy v. Town of Phelps, 47 Hun, 54; Ivory v. Town of Deer Park, 116 N. Y. 476; 22 N. E. Rep. 1080; Ring v. City of Cohoes, 77 N. Y. 83; 33 Am. Rep. 574, a case where plaintiff was driving a blind horse up one of defendant's streets; the horse became frightened and could not be restrained by the driver. Held, that this last fact was no defense.

20 Wagner v. Township of Jackson, 133 Penn. St. 61; Hey v. City of Philadelphia, 81 Penn. St. 44; 22 Am. Rep. 733.

21 City of Atlanta v. Wilson, 59 Ga. 644; 27 Am. Rep. 396; 60 Ga. 473.

22 Baltimore, &c., Turnpike Co. v. Bateman, 68 Md. 389; 13 Atl. Rep. 54; Kennedy v. County Commrs., 69 Md. 65; 14 Atl. Rep. 524.

23 Hull v. City of Kansas, 54 Mo. 601; 14 Am. Rep. 487.

24 Brooksville, &c., Turnpike Co. v. Pumphrey, 59 Ind. 78; 26 Am. Rep. 76.

25 Baldwin v. Turnpike Co., 40 Conn. 238. The burden of proof of negligence is on the plaintiff. Button v. Frink, 51 Conn. 342; 50 Am. Rep. 24.

26 Winship v. Enfield, 42 N. H. 197.

27 Hunt v. Town of Pownall, 9 Vt. 411.

28 Balbridge, &c., Bridge Co. v. Cartrett, 75 Tex. 628; 13 S. W. Rep. 8.

29 *Cf.* Sherwood v. City of Hamilton, 37 Up. Can. (Q. B.) 410, which contains an extensive review of the cases bearing on the subject, and Elliott on Roads and Streets, 448. A defect which

cause of injuries suffered by one who is wilfully thrown into a pit by another person.[30]

§ 246. Traveler's own negligence contributing to the injury.— In the earliest case in which contributory negligence is pleaded as a defense[31] to an action for damages growing out of the defendant's neglect, it was held that a traveler who suffers an injury from a defect, or obstruction, in the highway, must, in order to recover damages, be able to show that he himself exercised ordinary care to avoid the injury. In that case Lord Ellenborough said: — "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."[32] This is the general rule of law as to contributory negligence, which applies, as of course, to actions brought by travelers for injuries received by reason of defects or obstructions upon the highway,[33] and is not affected by an omis-

causes a horse to run away upon a railroad track for over a mile, where it is killed by a train, is not the proximate cause of the injury. West Mahanoy v. Watson, 116 Penn. St. 344; 9 Atl. Rep. 430.

30 Alexander v. Town of New Castle, 115 Ind. 51; 17 Atl. Rep. 200.

31 Butterfield v. Forrester, 11 East, 60, and see § 8, *supra*.

32 See the opinion in this case in full in § 9, *supra*.

33 Smith v. Smith, 2 Pick. 621; 13 Am. Dec. 464; Thompson v. Bridgewater, 7 Pick. 190; Lane v. Crombie, 12 Pick. 177; Adams v. Carlisle, 21 Pick. 147; Carsley v. White, 21 Pick. 255; Palmer v. Andover, 2 Cush. 605; Kirby v. Boylston Market, 14 Gray, 251; Hibbard v. Thompson, 109 Mass. 288; Reed v. Northfield, 13 Pick. 94; 23 Am. Dec. 662; Horton v. Ipswich, 12 Cush. 493; Johnson v. Whitefield, 18 Me. 286; 36 Am. Dec. 721; French v. Brunswick, 21 Me. 29; 38 Am. Dec. 250; Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Lumis v. Philadelphia Traction Co., 181 Penn. St. 268. In Gerald v. City of Boston, 108 Mass. 580, plaintiff, instead of crossing the street to avoid an obstruction, went around it on the part of the highway used for carriages only, and was injured by a defect in the road. Held, that whether he was justified in so doing, and whether his conduct was reasonable and prudent must be left to the jury. Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274; Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191; City of Vicksburg v. Hennessy, 54 Miss. 391; 28 Am. Rep. 354; Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; King v. Thompson, 87 Penn. St. 365; 30 Am. Rep. 364; Bruker v. Town of Covington, 69 Ind. 33; 35 Am. Rep. 202; Town of Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; City of Montgomery v. Wright, 72 Ala. 411; 47 Am. Rep. 422; Erie v.

sion to accept such cases in the statute giving the right of action.[34]

§ 246a. **Presumption that highway is safe.**— A person using a public highway is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the day-time or night-time, relying upon the assumption that the corporation

Magill, 101 Penn. St. 616; 47 Am. Rep. 739. In City of Bloomington v. Perdue, 99 Ill. 329, where the person injured was a young lady, it was held that the standard of caution to be adopted was not "what ordinary young ladies would do," but rather "what a woman of ordinary prudence would do." City of Huntington v. Breen, 77 Ind. 29; Henry Co. Turnpike Co. v. Jackson, 86 Ind. 111; 44 Am. Rep. 274; Wilson v. Trafalgar, 93 Ind. 287; McLaury v. City of McGregor, 54 Iowa, 717; Munger v. Marshalltown, 56 Iowa, 216; 59 Iowa, 763; Cressy v. Postville, 59 Iowa, 62; Parkhill v. Brighton, 61 Iowa, 103; followed in McGinty v. City of Keokuk, 66 Iowa, 725; Osage City v. Brown, 27 Kan. 74; City of Salina v. Trosper, 27 Kan. 545; Corbett v. City of Leavenworth, 27 Kan. 673; Maultby v. City of Leavenworth, 28 Kan. 745. "The way in which an accident happens usually shows, after it is over, that it might have been avoided if the injured party had been possessed with the forethought to escape it by taking some other route. But ordinary prudence is not inspired with such forethought, and the law does not impute negligence for a failure to foresee and escape such dangers. It is for the jury to say whether, under all the circumstances, his conduct was not ordinarily prudent." Soewer v. City of Sedalia, 77 Mo. 431, 446, per Martin, C.; Drew v. Town of Sutton, 55 Vt. 586; 45 Am. Rep. 644; Reynolds v. Burlington, 52 Vt. 300; Fassett v. Roxbury, 55 Vt. 552; Durant v. Palmer, 39 N. J. Law, 544; Maloy v. New York, &c., R. Co., 58 Barb. 182; Templeton v. Montpelier, 56 Vt. 328; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; Weston v. Elevated R. Co., 73 N. Y. 595; Aurora v. Dale, 90 Ill. 46; Hutchinson v. Collins, 90 Ill. 410; Aurora v. Hillman, 90 Ill. 61. One who crosses a bridge with an unusually heavy load does so at his own risk. Fulton Iron Works v. Kimball, 52 Mich. 146. A driver of a loaded team may be in the exercise of reasonable care, although he is lying down upon his load, wrapped up in blankets. Parish v. Eden, 62 Wis. 272; Schonhoff v. Jackson Branch R. Co., 97 Mo. 151; 10 S. W. Rep. 618; Abernethy v. Van Buren, 52 Mich. 383; Yordy v. Marshall County, 80 Iowa, 405; 45 N. W. Rep. 1042; Clapp v. Town of Ellington, 3 N. Y. Supl. 516; 22 Abb. N. C. 387; Woodbury v. City of Owosso, 64 Mich. 239; 31 N. W. Rep. 130; Miller v. Pennsylvania R. Co. (Penn.), 8 Atl. Rep. 209. In Pennsylvania intoxication is negligence *per se*. Hershey v. Township of Millcreek (Penn.), 9 Atl. Rep. 452.

[34] Laney v. Chesterfield County, 29 S. C. 140; 7 S. E. Rep. 56.

whose duty it is to keep the streets in a safe condition for travel have performed that duty, and that he is exposed to no danger from its neglect.[35]

§ 247. Not negligent to use a defective highway.—When the highway is out of order it is held, as a general rule, not negligent to use it in as prudent a way as practicable, which is to say that using a defective highway is not negligence as a matter of law. It would be an extraordinary rule that made it negligence not to stay indoors whenever the highway is out of repair.[36] But when

[35] Pettengill v. The City of Yonkers, 116 N. Y. 558, 565; 22 N. E. Rep. 1095; Tucker v. Salt Lake City, 10 Utah, 173, 178; 37 Pac. Rep. 261; Robinson v. City of Cedar Rapids, 100 Iowa, 662; 69 N. W. Rep. 1064; Mayor, &c., of Birmingham v. Starr, 112 Ala. 98; 20 So. Rep. 424. A person has a right to assume the safety of the sidewalk on which he is walking until warned of danger; and where the jury finds that a person who in broad day falls into an open coalhole, which is unguarded, as required by city ordinance, is not guilty of contributory negligence, such finding is conclusive. Jennings v. Van Schaick, 108 N. Y. 530; 15 N. E. Rep. 424. The rule that a traveler on a street may rely on the assumption that the municipality has performed its duty in keeping it safe does not apply to a skater on a river as against one having a right to cut ice thereon. Sickles v. New Jersey Ice Co., 153 N. Y. 83; 46 N. E. Rep. 1042. But the presumption has no application where the danger is known and obvious. Chisholm v. The State of New York, 141 N. Y. 246, 249; 36 N. E. Rep. 184; Weston v. City of Troy, 139 N. Y. 281; 34 N. E. Rep. 780. Whether one who was injured while driving on the highway at night was guilty of contributory negligence in forgetting a defect which he had noticed the morning before is a question for the jury, and the case should not be permitted to turn solely upon the question whether he in fact did or did not remember the defect. Bouga v. Township of Weare, 109 Mich. 520; 67 N. W. Rep. 557. A pedestrian's knowledge that the town is laying water mains is not sufficient to give notice of an excavation at a particular place near a crossing. Hall v. Town of Mansou, 99 Iowa, 698; 68 N. W. Rep. 922.

[36] City Council of Montgomery v. Wright, 72 Ala. 411; 47 Am. Rep. 422; City of Huntington v. Breen, 77 Ind. 29; Henry Co. Turnpike Co. v. Jackson, 86 Ind. 111; 44 Am. Rep. 274; Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Osage City v. Brown, 27 Kan. 74; City of Salina v. Trosper, 27 Kan. 545; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; Weston v. Elevated R. Co., 73 N. Y. 595. So a city may become liable for an injury from the slippery condition of a sidewalk by reason of ice upon it. Dooley v. City of Meriden, 44 Conn. 117; 26 Am. Rep. 433; Aurora

the condition of the highway is such that it is obviously dangerous to go upon it, and it appears that the plaintiff might easily have taken another course and avoided the danger, there can be no recovery in case of an injury. To go upon such a highway, under such circumstances, is negligence sufficient to bar an action for damages.[37] Mere knowledge, however, of defects or danger in the highway, on the part of the person injured thereby, is not conclusive evidence of negligence contributing to the injury.[38] As, for instance, where one has proceeded so far in a

v. Hillman, 90 Ill. 61; Reed v. Northfield, 13 Pick. 94; 23 Am. Dec. 662; Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; Nave v. Flack, 90 Ind. 205; 46 Am. Rep. 205. That plaintiff was running through a public street, on a dark night, to assist in extinguishing a fire, when he fell into a ditch and received the injury complained of, does not show contributory negligence. Noblesville Gas & Imp. Co. v. Loehr, 124 Ind. 79; 24 N. E. Rep. 579.

[37] Merrill v. North Yarmouth, 78 Me. 200; 57 Am. Rep. 794; City of Erie v. Magill, 101 Penn. St. 616; 47 Am. Rep. 739; Fleming v. City of Lockhaven, Sup. Ct., Penn., 15 W. N. C. 216; Schaefler v. City of Sandusky, 33 Ohio St. 246; 31 Am. Rep. 533; City of Centralia v. Krouse, 64 Ill. 19. Here the principle of *volenti non fit injuria* applies. Durkin v. City of Troy, 61 Barb. 437; Parkhill v. Brighton, 61 Iowa, 103; Wilson v. City of Charlestown, 8 Allen, 137; Corbett v. City of Leavenworth, 27 Kan. 673; Lettoon v. Texas & Pacific Ry. Co., 48 La Ann. 807; 19 So. Rep. 759. See, however, Pomfrey v. Saratoga Springs, 34 Hun (N. Y.) 607, where it was held that the defendant was not entitled to a charge that if plaintiff could see the obstruction he should have gone around it, the question for the jury being whether, on all the facts, there was negligence on the plaintiff's part. See, also, Cairncross v. Village of Pewankee, 86 Wis. 181; 56 N. W. Rep. 648.

[38] Alleghany County v. Broadwaters, 69 Md. 533; 16 Atl. Rep. 223; Harris v. Township of Clinton, 64 Mich. 447; 31 N. W. Rep. 425, two good cases. See, also, § 37, *supra*, and the notes. Wiggin v. St. Louis, 135 Mo. 558; 37 S. W. Rep. 528; City of Highlands v. Raine, 23 Colo. 295; 47 Pac. Rep. 283; Village of Clayton v. Brooks, 150 Ill. 97, 105; 37 N. E. Rep. 574; Reed v. Northfield, 13 Pick. 94; 23 Am. Dec. 662; Marble v. Worcester, 4 Gray, 404; Frost v. Waltham, 12 Allen, 86; Snow v. Housatonic R. Co., 8 Allen, 450; Henry Co. Turnpike Co. v. Jackson, 86 Ind. 111; 44 Am. Rep. 274; Estelle v. Lake Crystal, 27 Minn. 243; Kelly v. Railroad Co., 28 Minn. 98; Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; Griffin v. Auburn, 58 N. H. 121; Thomas v. Mayor, 28 Hun, 110; County Commissioners v. Burges, 61 Md. 29; Bullock v. City of New York, 99 N. Y. 654, holding that the city was under the duty to maintain its sidewalks in a reasonably safe condition for public use, and though defective, persons still had the right to walk on them, though they knew of the de-

narrow pass before being warned of danger ahead that he is unable to turn back.[39]

§ 248. Qualification of this rule.— But it has been held in Indiana that a person injured by an obstruction in the highway, of which he has knowledge, and which he attempts to pass in the night, when it was too dark for him to see it, has no remedy, such conduct being negligence *per se*.[40] So, where one attempts in the dark to pass an open cellar-way in a sidewalk, knowing, but for the moment forgetting, about it, it is such contributory negligence as will defeat his recovery for injuries sustained by falling into it.[41] And so, it has been held in Pennsylvania that a person who has knowledge of the dangerous condition of a public highway, and ventures to drive over it, assumes the risk of personal injuries resulting from the bad condition of the road.[42] In City of Bloomington v. Perdue,[43] it was held that a young woman who was injured by a fall upon a defective pavement, which induced a more serious internal disorder, but who, from ignorance of the nature of her affection, did not promptly call in a physician, was not, on that account, guilty of contributory negligence; that the disease superinduced by the fall was a proxi-

fects, and whether they were careless in so using them would be a question for the jury. Maultby v. City of Leavenworth, 28 Kan. 745; Loewer v. City of Sedalia, 77 Mo. 431; Templeton v. Montpelier, 56 Vt. 328; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; City Council of Montgomery v. Wright, 72 Ala. 411; 47 Am. Rep. 422; Town of Albion v. Hetrick, 90 Ind. 545; 46 Am. Rep. 230; Nave v. Flack, 90 Ind. 205; 46 Am. Rep. 205. A passenger upon a street has a right to use its sidewalks, although knowing it is in an unsafe condition, and, if injured, it is a question for the jury whether he was guilty of any carelessness which contributed to the injury. McPherson v. City of Buffalo, 13 App. Div. (N. Y.) 502, 504; Bullock v. The Mayor, 99 N. Y. 654.

[39] Atwater v. Town of Veteran, 6 N. Y. Supl. 907.

[40] President and Trustees of the Town of Mount Vernon v. Desouchett, 2 Ind. 586; 54 Am. Dec. 467. So, also, in Iowa as to a sidewalk in bad condition. McGinty v. City of Keokuk, 66 Iowa, 725.

[41] Bruker v. Town of Covington, 69 Ind. 33; 35 Am. Rep. 202. And see King v. Thompson, 87 Penn. St. 365; 30 Am. Rep. 364; Parkhill v. Brighton, 61 Iowa, 103; followed in McGinty v. City of Keokuk, 66 Iowa, 725; Aurora v. Dale, 90 Ill. 46; Hutchison v. Collins, 90 Ill. 410; Kelly v. Doody, 116 N. Y. 575; 22 N. E. Rep. 1084.

[42] Winner v. Oakland Township, 158 Penn. St. 405; 27 Atl. Rep. 1110.

[43] 99 Ill. 329.

mate effect of the fall, and that an action for damages therefor would lie against the city.[44]

§ 249. The obligation of the traveler on a defective highway.— While contributory negligence is not to be presumed from knowledge of the existence of a defect in a sidewalk, such knowledge enjoins upon the party possessing it a degree of care commensurate therewith.[45] The law imposes upon him the duty of ordinary care.[46] And in proportion as the risk of injury increases, must his care and diligence to avoid injury be increased. It is, therefore, held that a traveler is bound to exercise greater care and attention in passing over a highway while it is undergoing repairs, by which it is partly obstructed, than he would be required to exercise under ordinary circumstances,[47] and more care in going about in the darkness of the night than in the day-time.[48] But when one drives from the country into

[44] "I must close this amusing subject," says Mr. Irving Browne, at the end of his chapter on Negligence, in "Humorous Phases of the Law," p. 216, "with the case of Bovee v. Town of Danville, 53 Vt. 190, an action for injuries from a defective highway, one of the injuries being a miscarriage, whereby twins prematurely came into the world, and proved love's labor lost. The trial court charged that plaintiff, the mother, was entitled to recover, among other things, for any injury to her feelings occasioned by the misfortune. Ross, J., in reviewing this part of the charge, uses this language: — 'Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and *would not* be comforted, a question of *continuing* damage is presented, too delicate to be weighed by any scales which the law has yet invented.'"

[45] Dittrich v. The City of Detroit, 98 Mich. 245; 57 N. W. Rep. 125.

[46] If one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered. City of Beatrice v. Reid, 41 Neb. 214; 59 N. W. Rep. 770.

[47] Jacobs v. Bangor, 16 Me. 187; 33 Am. Dec. 652.

[48] Crofts v. Waterhouse, 3 Bing. 319; Davis v. Falconbridge, an English County Court case, reported, on this point, in 45 Am. Rep. 650, note; Bruker v. Covington, 69 Ind. 33; 35 Am. Rep. 202; Maloy v. New York, &c., R. Co., 58 Barb. 182; King v. Thompson, 87 Penn. St. 365; 30 Am. Rep. 364;

a city, it is not contributory negligence for him to drive through a public street and through what appears to be a mere pool of water standing there, there being in fact a concealed hole two and one-half feet deep under the pool.[49]

§ 250. Injuries from excavations in the highway.—Where one, by permission of the city authorities, has dug up the sidewalk, or some portion of it, in excavating for a vault, or other proper purpose, and has built a bridge or passage-way over his excavation somewhat higher than the rest of the walk, he is bound to make the passage reasonably safe, but not exactly as safe as though there were no excavation; and, in passing such a place, it is the duty of travelers to exercise somewhat more than their usual care and caution.[50] But when one unlawfully places an

Parkhill v. Brighton, 61 Iowa, 103; followed in McGinty v. City of Keokuk, 66 Iowa, 725; Pierce v. Whitcomb, 48 Vt. 127; 21 Am. Rep. 120; Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; Rector v. Pierce, 3 Thomp. & C. 416; Durant v. Palmer, 39 N. J. Law, 544. Contributory negligence is not shown by proof that after knowing of the condition of the street, the plaintiff traveled upon it after dark. Village of Clayton v. Brooks, 150 Ill. 97; 106, 107; 37 N. E. Rep. 574; Moltly v. Leavenworth, 28 Kan. 745. Testimony to prove that plaintiff's wife was in ill health, and his anxiety to reach home, when it is admitted that he was able to leave home to attend to his ordinary business, is inadmissible as an element of proof to excuse the plaintiff in incurring the risk which he might not otherwise have taken. Harris v. Township of Clinton, 64 Mich. 447; 31 N. W. Rep. 425.

[49] Hedges v. Kansas, 18 Mo. App. 62

[50] Clifford v. Dam, 81 N. Y. 56. One who, duly licensed by city authorities, removes a sidewalk in order that he may build, and constructs a temporary bridge for the use of persons passing, is bound to make the bridge reasonably safe for travelers. Nolan v. King, 97 N. Y. 565; 49 Am. Rep. 561; Finegan v. Moore, 46 N. J. Law, 602. A ditch dug in the street of a borough to lay a water pipe from a spring to a dwelling-house by authority of a municipal license, is not necessarily a public nuisance, rendering the licensee liable for the negligence of an independent contractor in performing the work. Smith v. Simmons, 103 Penn. St. 32. One may temporarily obstruct a sidewalk for the purpose of removing merchandise from his store, without becoming liable for an injury sustained by one who, rather than wait, attempts to pass around the obstruction on the steps of defendant's store. Welsh v. Wilson, 101 N. Y. 254; 54 Am. Rep. 698. When a merchant blocked a sidewalk by placing a skid across it during prohibited hours and pro-

obstruction in the highway, whereby an injury is occasioned, he is, of course, liable.[51] Where a municipal ordinance requires the owner of materials forming an obstruction in a street to prepare and place lights thereon with such care and diligence as reasonably to secure their burning till daylight, such owner is liable to third persons for injuries incurred through negligence in the performance of this duty, either by himself or by a contractor in his employ, even if the lights were extinguished by an unknown cause.[52] And, where one suffers an injury from an obstruction in the street, for which obstruction he is himself responsible, he cannot recover.[53]

ceeded to unload goods from a truck, it was held to be a proper question for the jury, whether a person was negligent in attempting to climb over the skid instead of going around by the horses' heads or waiting until the obstruction was removed. Lee v. Nixey, 63 L. T. 285; 54 J. P. 807; McGuire v. Spence, 91 N. Y. 303; 43 Am. Rep. 668; Wasmer v. Delaware, &c., R. Co., 80 N. Y. 212; 36 Am. Rep. 608. Where such excavation is unauthorized, it is a nuisance, and those responsible for it become liable to any person injured thereby, irrespective of any question of negligence. Irvine v. Wood, 51 N. Y. 224; 10 Am. Rep. 603; Rehberg v. Mayor, &c., of New York, 91 N. Y. 137; 43 Am. Rep. 657; Brusso v. City of Buffalo, 90 N. Y. 679. For a contrary doctrine see City of Lincoln v. Walker, 18 Neb. 244, in which it is held that in such a case the pavement must be kept in as safe a condition as though there were no excavation. See, also, Cahill v. Layton, 57 Wis. 600; 46 Am. Rep. 46; Nave v. Flack, 90 Ind. 205; 46 Am. Rep. 205.

[51] His liability does not necessarily relieve the town. Township of North Manheim v. Arnold, (Penn.), 13 Atl. Rep. 444. One who causes a ditch six feet deep, and two and a half feet wide, to be dug across the traveled portion of a highway, the probable effect of which is to injure third persons, is not relieved from liability for injuries thence arising, because he has let the work to a contractor over whom he has no control in the mode of doing it. Ohio South. R. Co. v. Morey (Ohio), 24 N. E. Rep. 269. A telephone company, having a license to erect and maintain wires, must remove them within a reasonable time when they become encumbered with ice and fall into the street. Nichols v. Minneapolis, 33 Minn. 430; 53 Am. Rep 56. It is no defense that there was a good and unobstructed sidewalk on the opposite side of the street. Stuart v. Havens, 17 Neb. 211; Clark v. Chambers, 3 L. R. (Q. B. Div.) 327; Milarkey v. Foster, 6 Or. 378; 25 Am. Rep. 531; Bennett v. Lovell, 12 R. I. 166; 34 Am. Rep. 628.

[52] Wilson v. White, 71 Ga. 506; 51 Am. Rep. 269.

[53] Sioux City v. Weare, 59 Iowa, 95. *Cf.* Born v. Albany Plank Road, 101 Penn. St. 334.

§ 251. **Right of pedestrian in the roadway.**— A pedestrian has the right to walk in the roadway if he prefers it. Lord Denham said: — "A man has a right to walk in the road if he pleases. It is a way for foot passengers as well as for carriages." His lordship, however, wisely added: — "But he had better not, especially at night, when carriages are passing along."[54] It is also the right of a pedestrian to cross the road or street at any point, not only at regular crossings, but elsewhere.[55] But a pedestrian, while he has equal, has no superior or prior rights in the roadway of a street in a city over vehicles.[56] It is, therefore, not such an act of negligence as will bar a recovery for one to walk in the roadway, or attempt to cross the highway elsewhere than at a regular crossing. But where the plaintiff started into the street to enter a street car, and saw an ice-wagon coming up the same track about fifty feet ahead of the car, but after that he did not look to see which side the wagon went to give place to the car, and was run over by it, it was held that he was guilty of contributory negligence.[57] It is the duty of pedes-

[54] Boss v. Litton, 5 Car. & P. 407. A person heedlessly standing in the carriage-way of a public street after night-fall, engaged in conversation, cannot recover for injuries received from a carelessly driven vehicle, when it appears that the driver did not see the plaintiff in time to avoid the collision. Evans v. Adams Exp. Co., 122 Ind. 362; 23 N. E. Rep. 1039; Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Coombs v. Purrington, 42 Me. 332, in which Appleton, J., says:— "It would be a novel doctrine to hold that foot-passengers have no right to walk in the street, or, that walking therein was *prima facie* evidence of want of ordinary care, or from that fact *alone* negligence might be inferred." But see the dissenting opinion by Cutting, J., in which he draws a distinction between walking *along* a carriage-way, and walking *across*. Gerald v. Boston, 108 Mass. 584. See, also, McLaury v. City of McGregor, 54 Iowa, 717; Aurora v. Hillman, 90 Ill. 61.

[55] Raymond v. City of Lowell, 6 Cush. 524; Simons v. Gaynor, 89 Ind. 165; Cottrell v. Starkey, 8 Car. & P. 691; Springett v. Ball, 4 Fost. & Fin. 472; Collins v. Dodge, 37 Minn. 503; 35 N. W. Rep. 368, where plaintiff, to avoid an obstruction in the walk, turned into an unimproved street in the night-time.

[56] Belton v. Baxter, 54 N. Y. 245; 13 Am. Rep. 578; 58 N. Y. 411; Barker v. Savage, 45 N. Y. 191; 6 Am. Rep. 66.

[57] Brooks v. Schwerin, 54 N. Y. 343. A charge that, ordinarily, the law requires the same diligence from the driver of a carriage as from a foot-passenger was held to be erroneous in Carter v. Chambers, 79 Ala. 223. See Shearman & Redfield on Negli-

trians and persons in vehicles alike, when on the highway, to exercise ordinary care, and there is, it seems, no peculiar application of the general rules of law in point in this class of cases.[58]

§ 252. Deviation from the highway.— In actions against municipal corporations, in cases where a traveler has sustained an injury upon the highway because of some defect or obstruction therein, it is a general rule that a deviation from the generally traveled track or path will be such negligence as to prevent a recovery. The corporation is to be held responsible for the condition of the highway, not for that of the adjoining land. When the traveler, therefore, leaves the highway, and thereby sustains an injury, he has no action against the town.[59] But when the traveled part of the highway is obstructed, it may not be negligent to deviate from the road. It is a proper question for the jury.[60] So it is held not contributory negligence to turn somewhat out of the wrought part of the road to get better sleighing,[61] and so, also, when a bridge is impassable, it is not negligent to take a by-road to get across the stream.[62]

§ 253. Duty of the municipal authorities herein.— It is the duty of the town, or other municipal corporations, at any point in the

gence (5th ed.), § 654; Chisholm v. Knickerbocker Ice Co., 1 N. Y. Supl. 743; Weil v. Wright, 8 N. Y. Supl. 776; Deegan v. Chapel, 6 N. Y. Supl. 166; Cowan v. Snyder, 5 N. Y. Supl. 340; Kendall v. Kendall, 147 Mass. 482; 18 N. E. Rep. 233; Corey v. Northern Pac. R. Co., 32 Minn. 457.

58 Thompson on Negligence, 378, § 6.

59 City of Scranton v. Hill, 102 Penn. St. 378; 48 Am. Rep. 211; Zettler v. Atlanta, 66 Ga. 195; Larrabee v. Peabody, 128 Mass. 561; Ramsey v. Rushville, 81 Ind. 394; Leslie v. Lewiston, 62 Me. 468. In Kelly v. Fon du Lac, 31 Wis. 179, and Fitzgerald v. City of Berlin, 64 Wis. 207, the corporation is only held responsible for defects on the traveled track, and not for the whole width of the highway. Hence, even if a defect be in the way proper, but on the side, a person deviating from the track and suffering injury cannot recover. Ozier v. Hinesburgh, 44 Vt. 220; McLaury v. City of McGregor, 54 Iowa, 717; Drew v. Sutton, 55 Vt. 586; 45 Am. Rep. 644; Elliott on Roads and Streets, 641, 642. *Cf.* Aurora v. Hillman, 90 Ill. 61.

60 Ramsey v. Rushville, 81 Ind. 394.

61 Joyner v. Great Barrington, 118 Mass. 463. But see Rice v. Montpelier, 19 Vt. 470; Green v. Danby, 12 Vt. 338; Wheeler v. Westport, 30 Wis. 392, and Marshall v. Ipswich, 110 Mass. 522.

62 Erie v. Schwingle, 22 Penn. St. 384; Briggs v. Guilford, 8 Vt. 264.

highway where, for any reason, there is danger that travelers may be exposed to injury because of high embankments, or because of any other peril of the way, to make and maintain a suitable fence or railing,[63] and for any failure so to do, which results in injury to a traveler lawfully pursuing his journey, the corporation is liable. But the traveler, in order to recover, must have been using the highway not as a convenience in caring for his stock, but strictly for traveling. It was accordingly held, in Vermont, that the town was not liable to one whose horse was injured in falling into a gulf upon the side of the road as he was backing it out of a shed, where it had been left merely for convenience.[64] The corporation is bound to guard against the ordinary dangers of travel in this respect, but not against extraordinary or remote dangers — *e. g.*, a town is not bound to erect barriers merely to prevent travelers from straying from the highway and from falling into a pit that they may reach by stray-

[63] Baltimore, &c., Turnpike Co. v. Cassell, 66 Md. 419; Maxim v. Town of Champion, 4 N. Y. Supl. 515; 50 Hun, 88; Carver v. Detroit, &c., Plank-Road Co., 69 Mich. 616; 25 N. W. Rep. 183. A city street broke off in a wall twenty-five feet high, which in the night-time was not guarded or lighted. Held, that the jury was justified in finding that one found injured at the bottom of the wall was not guilty of contributory negligence. Nowell v. New York, 52 N. Y. Super. Ct. 382; Drew v. Town of Sutton, 55 Vt. 586; 45 Am. Rep. 644; City of Chicago v. Hesing, 83 Ill. 204; 25 Am. Rep. 378; Hey v. Philadelphia, 81 Penn. St. 44; 22 Am. Rep. 733; Collis v. Dorchester, 6 Cush. 396; Britton v. Cummington, 107 Mass. 347; Page v. Bucksport, 64 Me. 51; 18 Am. Rep. 239; Clapp v. City of Providence, 17 How. (U. S.) 161; Savage v. Bangor, 40 Me. 176; Baldwin v. Greenwoods Turnpike Co., 49 Conn. 238; 16 Am. Rep. 33, where a person, whose horse became frightened through the breaking down of the carriage, ran away, and fell over the side of a bridge by reason of a defect in the railing, was allowed to recover for the injuries the animal received. Munson v. Town of Derby, 37 Conn. 298; 9 Am. Rep. 332; Houfe v. Fulton, 29 Wis. 296; 9 Am. Rep. 568; Manderschid v. City of Dubuque, 29 Iowa, 73; 4 Am. Rep. 196; Oliver v. Worcester, 102 Mass. 489; 3 Am. Rep. 485; Niblett v. Nashville, 12 Heisk. 684; 27 Am. Rep. 755.

[64] Sykes v. Town of Pawlet, 43 Vt. 446; 5 Am. Rep. 295. Along the side of the traveled part of a highway, and within the limits of its location, was an open ditch made for drainage of the road. Plaintiff in passing from a schoolhouse to the road, in the darkness, fell into this ditch and was injured. Held, that he had not become a traveler upon the road, and the town was not liable for the injury. Brown v. Skowhegan, 82 Me. 273; 19 Atl. Rep. 399. See,

ing.[65] But while an action, in such a case, may not lie against the corporation, the owner of land adjoining a highway is liable if he digs a pit so near the traveled way that one in passing along falls in and is thereby injured. Such pitfalls, unfenced and unguarded, in close proximity to a traveled road or street, are nuisances for which the owner of the land is liable;[66] and a barbed wire fence may be constructed so negligently as to make the owner liable for injuries to animals lawfully at large in attempting to pass from the highway into the field.[67]

§ 254. The rule further stated.— This is the law notwithstanding the general rule that the owner of land adjoining a highway is not liable for a failure to keep his premises in a safe condition

also, Rice v. Montpelier, 19 Vt. 470. In Varney v. Manchester, 58 N. H. 430; 42 Am. Rep. 592, the plaintiff, who was six years old at the time of the accident, testified that she was standing by the side of a ditch dug for a sewer, and fell in, that she was playing tag with another girl. A verdict ordered for the defendant was sustained on the ground that the plaintiff was using the highway as a play-ground. Bassett v. City of St. Joseph, 53 Mo. 290; 14 Am. Rep. 446.

[65] A town is not bound to erect a barrier on a highway to protect travelers from falling over a dangerous bank thirty-four feet distant from the traveled part, and nine and a half feet from the line of the highway as located. Barnes v. Chicopee, 138 Mass. 67; 52 Am. Rep. 259; Puffer v. Orange, 122 Mass. 389; 23 Am. Rep. 368; Murphy v. Gloucester, 105 Mass. 470; Warner v. Holyoke, 112 Mass. 362; Sparhawk v. Salem, 1 Allen, 30; Adams v. Natick, 13 Allen, 429; Chapman v. Cook, 10 R. I. 304; 14 Am. Rep. 686; Davis v. Hill, 41 N. H. 329; Keys v. Village of Marcellas, 50 Mich. 439; 45 Am. Rep. 52; Taylor v. Peckham, 8 R. I. 352; 5 Am. Rep. 578.

[66] Jones v. Nichols, 46 Ark. 207; 55 Am. Rep. 575. So where one allows a portion of his premises adjoining the street to be used by the public as part of the highway, and makes an excavation near by, he will be liable if he does not take reasonable care in protecting passers-by from falling in. Beck v. Carter, 68 N. Y. 283; 23 Am. Rep. 175; Homan v. Stanley, 66 Penn. St. 464; 5 Am. Rep. 389; Sanders v. Reister, 1 Dak. 151; Vale v. Bliss, 50 Barb. 358; Haughey v. Hart, 62 Iowa, 96; 49 Am. Rep. 138; Young v. Harvey, 16 Ind. 314; Addison on Torts, 201; Shearman & Redfield on Negligence (5th ed.), § 347; Durant v. Palmer, 39 N. J. Law, 544; Hadley v. Taylor, L. R. 1 C. P. 53; Barnes v. Ward, 9 C. B. 392; 19 L. J. (C. P.) 195; Corby v. Hill, 4 C. B. (N. S.) 556; Hounsell v. Smyth, 7 C. B. (N. S.) 731. See, also, Moynihan v. Whidden, 143 Mass. 287; Wood on Nuisance, § 289.

[67] Sisk v. Crump, 112 Ind. 504; 14 N. E. Rep. 381.

for mere trespassers. It is, indeed, a rule of law that if a person traveling on the highway deviates therefrom and falls into a pit on my land, he shall not hold me responsible for his bruises,[68] but I must not set traps or dig pitfalls upon my land close to the roadside, and leave them unfenced and unguarded for my neighbors to fall into. The mere technical trespass involved in stepping off from the highway and onto the land is not a defense to an action for injuries sustained through such neglect on the part of an owner of land adjacent to the highway.[69] And, moreover, when a traveler goes from the highway upon adjoining land from necessity, because the highway is temporarily impassable, as from snow drifts, he is not guilty of any trespass whatever, but only does what he has a right to do, if he do no unnecessary damage.[70] This rule is insisted upon in the English cases. "Highways," said Lord Mansfield, "are for the public service, and, if the usual track is impassable, it is for the general good that people should be entitled to pass in another line."[71] And in Comyn's Digest it is said: — "A passenger may break the fence and go *extra viam* as much as is necessary to avoid the bad

[68] Beck v. Carter, 68 N. Y. 283; Victoria v. Baker, 67 N. Y. 366; Gillespie v. McGowen, 100 Penn. St. 144; 45 Am. Rep. 365; Severy v. Nickerson, 120 Mass. 306; 21 Am. Rep. 514; Indermaur v. Dames, L. R. 1 C. P. 274; L. R. 2 C. P. 311; Sweeny v. Old Colony R. Co., 10 Allen, 368; Sullivan v. Waters, 14 Ir. C. L. Rep. 460; Southcote v. Stanley, 1 Hurl. & N. 247; Housell v. Smyth, 7 C. B. (N. S.) 731; 97 Eng. Com. Law, 731; Howland v. Vincent, 10 Metc. 371; Harlow v. Humiston, 6 Cow, 189; Stafford v. Ingersol, 3 Hill, 38; Wells v. Howell, 19 Johns. 385. *Cf.* Toll Bridge Co. v. Langrell, 47 Conn. 228.

[69] Sanders v. Reister, 1 Dak. 151; Murray v. McShane, 52 Md. 217; 36 Am. Rep. 367.

[70] Campbell v. Race, 7 Cush. 408; 54 Am. Dec. 728, and the note; Morey v. Fitzgerald, 56 Vt. 487; 48 Am. Rep. 811; Holmes v. Seely, 19 Wend. 507. While this is so in regard to a public highway, it is held in Williams v. Safford, 7 Barb. 309, that the grantee of a *private* way which has become dangerous and impassable, cannot, without being a trespasser, go on the adjoining close, and thus pass around the obstruction. Newkirk v. Sabler, 9 Wend. 652; Carey v. Rae, 58 Cal. 163; Henn's Case, W. Jones, 296; Ponfret v. Ricroft, 1 Saund. 323, note 3; Absor v. French, 2 Show. 28; Young v. ——, 1 Ld. Raym. 725; Taylor v. Whitehead, 2 Doug. 645; Bullard v. Harrison, 4 Man. & Sel. 387; 2 Blackstone's Commentaries, 36; 3 Kent's Commentaries, 424; 3 Cruise's Digest, 89; Wellbeloved on Ways, 38; Woolrych on Ways, 50; Angell on Highways, § 353; Thompson on Highways, 3; 2 Waterman on Trespass, § 703.

[71] Taylor v. Whitehead, 2 Doug. 749.

way."[72] Very few cases are found in the reports in this country upon this point, but there are, among the few adjudications upon the subject, none that contradict the English rule. But where a town voluntarily provides a temporary passage-way over land adjoining a highway obstructed by snow drifts, it is not liable for defects in the former if the statute prescribes no duty in such a case.[73]

§ **255. Further illustrations.**—In King v. Thompson,[74] it was held that an opening in the sidewalk fifteen inches wide and three feet long in front of a cellar window, which was designed for the lighting and ventilation of the cellar, and made in the manner usual in Allegheny City, is not *per se* a nuisance, and that when the street is lighted, and one, passing by in the night, steps into the opening and is thereby injured, the question of his contributory negligence is one proper to go to the jury.[75] But when one, in a blinding snow storm, steps into a hole in the pavement, for which he has no reason to be on the lookout, it is not contributory negligence and he may recover from the town.[76] Nor is there necessarily contributory fault in failing to notice an open cellar-way while looking into a shop window,[77] and when the plaintiff fell into a hole in the sidewalk badly covered up, or so covered as to mislead one coming upon it, it was held that he might have his action against the owner of the adjoining property, whose duty it was to keep the sidewalk, as to this opening, reasonably safe for travelers.[78] The employment of a man

[72] Tit. Chimin, D. 6.

[73] Bogie v. Town of Waupun, 75 Wis. 1; 43 N. W. Rep. 667.

[74] 87 Penn. St. 365; 30 Am. Rep. 364. The doors of cellar-ways in city sidewalks may be lawfully open both by day and by night, and in cases of injury questions of negligence are for the jury. Day v. Mt. Pleasant, 70 Iowa, 193.

[75] *Cf.* Dillon on Municipal Corporations, § 794; Stewart v. Alcorn, 2 Week. Notes Cas. (Penn. 1876) 401.

[76] Aurora v. Dale, 90 Ill. 46.

[77] Houston v. Traphagen, 47 N. J. Law, 23.

[78] The city is also liable after notice of the defect. Peoria v. Simpson, 110 Ill. 294; 51 Am. Rep. 683; Calder v. Smalley, 66 Iowa, 219; 55 Am. Rep. 270; Landrue v. Lund, 38 Minn. 538; 38 N. W. Rep. 699; Dickson v. Hollister, 123 Penn. St. 421; 23 W. N. C. 128; 16 Atl. Rep. 484; Jennings v. Van Schaick, 108 N. Y. 530; 15 N. E. Rep. 424. Whether it is negligent to keep a trap-door open and unguarded in the sidewalk on a much frequented street is a question for the jury. Smith v. Wildes, 143 Mass. 556; 10 N. E. Rep. 446. The fact that the plaintiff was walk-

of supposed skill and experience to make a cover for a coal hole does not excuse an abutting owner for failure to have it reasonably secure.[79] But where one maintains a hatchway in a pavement in a public street, unsafe for travelers, and a stranger takes the cover off, and one, being injured thereby, recovers damages from the occupant of the property, the latter cannot recover indemnity from the intermeddler, upon the principle *in pari delicto, etc.*[80] In Indiana, moreover, where one attempts in the night-time to pass an open cellar-way in the sidewalk, of which he knew, but which, for the moment, he had forgotten, he is held guilty of contributory negligence sufficient to bar a recovery for injuries sustained by falling into the cellar.[81] It was held in New York, two judges dissenting, that where there was no affirmative evidence of negligence on the part of a person killed by falling into a hatchway, and no eye-witness of the accident, and the defendant's negligence was clear, a non-suit was improper, as it was for the jury to determine the degree of care which the deceased was bound to exercise, to infer the motive which led him to the hatchway, and to pass upon the question of negligence.[82]

§ 256. Trespass upon the highway.—The use of the highway for games or sports, dangerous to travelers, is a trespass, and

ing fast on a lighted sidewalk in the evening when he fell over the unguarded door of a manhole does not warrant a non-suit. Wells v. Sibley, 9 N. Y. Supl. 343; Hutchison v. Collins, 90 Ill. 410; Calder v. Smalley, 66 Iowa, 219; 19 Am. Law Rev. 664.

79 Dickson v. Hollister, 123 Penn. St. 421; 16 Atl. Rep. 484.

80 Churchill v. Holt, 131 Mass. 67; 41 Am. Rep. 191. But see, also, 127 Mass. 165; 34 Am. Rep. 355, and Gray v. Gas Light Co., 114 Mass. 149; 19 Am. Rep. 344. The occupant of a building in which is an opening to an elevator shaft facing on a public street, but separated from the sidewalk by a lintel three inches high and eighteen inches wide, is not responsible for injuries received by a passer-by who is accidentally pushed into the opening by third persons. McIntire v. Roberts, 149 Mass. 450; 22 N. E. Rep. 13. Where a coal hole was properly made and safely covered the owner was not liable for injuries from the wrongful act of a stranger who broke the stone support, the proprietor having no notice or knowledge of the defect. Wolf v. Kilpatrick, 101 N. Y. 146; 54 Am. Rep. 672.

81 Bruker v. Town of Covington, 69 Ind. 33; 35 Am. Rep. 202. *Cf.* President, &c., of Mt. Vernon v. Dusouchett, 2 Ind. 586; 54 Am. Dec. 467, and the note. And see, also, Dillon on Municipal Corporations, § 789.

82 Galvin v. New York, 112 N. Y. 223; 19 N. E. Rep. 675.

renders the parties guilty of it liable for all damages occasioned thereby. "The highway is established for the convenience of travelers, and the use of it for any game or sport, that actually exposes or puts to hazard the personal safety of the traveler thereon, is not justifiable, and subjects the party thus using the road improperly to the payment of all damages occasioned thereby to the traveler."[83] And so, where one using the highway not as a traveler,[84] but for purposes of play or sport, receives an injury from a defect in a highway, it is contributory negligence, and no action will lie against the corporation whose duty it is to keep the highway in repair.[85] But, in another line of cases, it appears that mere collateral violations of law upon the highway, not contributing to the injury, will not always bar a recovery; as, where two persons were speeding their horses upon the highway, in violation of a rule as to fast driving, and one purposely ran into the other and injured his sleigh, it was held that the injured party might have his action, in spite of the collateral violation of law on his part.[86]

§ 257. Illustrations of this rule.— So, also, where the action was against the city, and the plaintiff, having driven through the streets at a rate of speed forbidden by a municipal ordinance was injured by a defect in the street, it appearing that the rate of speed did not contribute to the injury, such illegal driving did

[83] Vosburgh v. Moak, 1 Cush. 453; 48 Am. Dec. 613.

[84] The obligation of the municipality to keep the highways in repair is enforceable only in favor of *bona fide* travelers. Richards v. Enfield, 13 Gray, 344. See, also, 2 Dillon on Municipal Corporations, § 786. The use of a velocipede on a public sidewalk is not necessarily and universally unlawful. Purple v. Greenfield, 138 Mass. 1.

[85] McCarthy v. Portland, 67 Me. 167; 24 Am. Rep. 23; Blodgett v. Boston, 8 Allen, 237; Harper v. Milwaukee, 30 Wis. 365; Higginson v. Nahant, 11 Allen, 530. See, also, Stickney v. Salem, 3 Allen, 374; Stinson v. Gardner, 42 Me. 248; Sykes v. Pawlett, 43 Vt. 446; 5 Am. Rep. 295; and, for a contrary rule, in favor of one who stopped his horses by the way to pick some berries, and the horses, becoming frightened, backed down a steep bank negligently left unfenced, see Britton v. Cunningham, 107 Mass. 347; and see, also, Babson v. Rockport, 101 Mass. 93; Gregory v. Adams, 14 Gray, 242.

[86] Welch v. Wesson, 6 Gray, 505. *Cf.* Schultz v. Milwaukee, 49 Wis. 254; 35 Am. Rep. 779, and note. See, also, § 45, *supra*.

not prevent a recovery.[87] And where one placed his team in the street in a manner forbidden by a municipal ordinance, and was run into and injured by the negligence of the defendant, it was held that he might recover, the position of the plaintiff's team not appearing to have contributed to the collision.[88] The maintenance of a fruit stand, a permanent structure, upon the sidewalk in the street of a city, so constructed as to encroach upon the highway, is a nuisance, and that without reference to whether it essentially interferes with the comfortable enjoyment of the sidewalk by travelers or not.[89]

§ 258. Leaving horses untied and unattended on the highway.— Upon the question whether or not it is negligent to leave horses untied and unattended in the public highway, there is not entire unanimity in the decisions. In Norris v. Kohler,[90] on the one hand, it was said:— "Leaving the horses unfastened in a public street is undoubted negligence, and so it has been often held," which is the rule declared in several other cases,[91] whereas, in Wasmer v. Delaware, &c., R. Co.,[92] on the other

[87] Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274. *Cf.* Heland v. Lowell, 3 Allen, 407. It is not *per se* culpable negligence to drive rapidly through a city street. Carter v. Chambers, 79 Ala. 223.

[88] Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191. But see, also, Le Baron v. Joslin, 41 Mich. 313; State v. Edens, 85 N. C. 522; Turner v. Holtzman, 54 Md. 148; 39 Am. Rep. 361.

[89] State v. Berdetta, 73 Ind. 185; 38 Am. Rep. 117, an interesting and learned opinion. See, also, the annotation in the report. In concluding his opinion, the judge said:—"Surely, no man can justly claim that he can seize the public sidewalks of a large city and build thereon permanent structures for private use. But, more than this, he who does seize a part of the public highway for private purposes knows, not merely as a matter of law, but as matter of fact, that he is invading the rights of all the citizens of the State, for all have a right to the free use of every part of the highway."

[90] 41 N. Y. 42.

[91] Deville v. Southern Pacific R. Co., 50 Cal. 383; Morris v. Phelps, 2 Hilt. 38; Buckingham v. Fisher, 70 Ill. 121; Loeser v. Humphrey (Sup. Ct. Ohio), 32 Alb. L. J. 56; Gray v. Second Avenue R. Co., 65 N. Y. 561. Where a team is left unhitched on a public street, in violation of a city ordinance, and runs away and injures a person, the owner is liable. Bott v. Pratt, 33 Minn. 323; 53 Am. Rep. 47. *Cf.* Southworth v. Old Colony, &c., R. Co., 105 Mass. 342; 7 Am. Rep. 528; Davis v. Dudley, 4 Allen, 557.

[92] 80 N. Y. 212; 36 Am. Rep. 608.

hand, it was said:— "There is no absolute rule of law that requires one who has a horse in the street to tie him, or to hold him by the reins. It would, doubtless, be careless to leave a horse in a street wholly unattended, without tying him to something. But it is common for persons doing business in streets with horses to leave them standing in their immediate presence, while they attend to the business, and it is not unlawful for them to do so. It is commonly safe so to do, and accidents are rarely occasioned thereby;" and in that case it was held that it was not contributory negligence for one peddling kindling wood to leave his horse untied, and go a short distance away from the wagon to solicit a customer, although the horse, being frightened by an approaching railway train, ran upon the track, and the owner going after it in pursuit was run over and killed, and this, although there was also a city ordinance forbidding any man to leave his horse in the street unless securely tied.[93]

§ 259. The same subject continued.— A horse unlawfully at large upon a highway is a nuisance, and its owner is liable for any damage done by it, whether the horse is vicious or not.[94] But where a horse escapes from a proper enclosure without fault on the part of the owner, and does damage, it seems that the owner is not liable.[95] When the plaintiff's horse is frightened by some unusual object, likely to frighten horses, upon the highway for which the defendant is legally responsible, and the horse, being so terrified, does damage, runs away, or causes other injury to the plaintiff, the defendant is liable.[96] But what a

[93] See, also, Southworth v. Old Colony, &c., R. Co., 105 Mass. 342; Titcomb v. Fitchburg R. Co., 12 Allen, 254; Albert v. Bleecker St. R. Co., 2 Daly, 389; Griggs v. Fleckenstein, 14 Minn. 81; Strett v. Laumier, 34 Mo. 469; Elliott on Roads and Streets, 628.

[94] Baldwin v. Ensign, 49 Conn. 113; 44 Am. Rep. 205; Decker v. Gammon, 44 Me. 322; Barnes v. Chapin, 4 Allen, 444. The owner is bound to keep such animals, at all times and in all places, properly secured; and is responsible to any one who without fault on his part is injured by them. Lyons v. Menick, 105 Mass. 76; Dickson v. McCoy, 39 N. Y. 400; Goodman v. Gay, 15 Penn. St. 188; Fallon v. O'Brien, 12 R. I. 518; 34 Am. Rep. 713; Lee v. Riley, 18 C. B. (N. S.) 722; Moak's Underhill's Torts, 296, 297, citing Southall v. Jones, 5 Vict. L. R. 402.

[95] Con v. Burbridge, 13 C. B. (N. S.) 430; Fallon v. O'Brien, 12 R. I. 518. *Cf.* Holden v. Shattuck, 34 Vt. 336.

[96] Bennett v. Lovell, 12 R. I. 166; 34 Am. Rep. 628, and note; Forshay v. Glen Haven, 25 Wis. 288;

city has licensed, for a consideration, cannot be treated as a nuisance, and accordingly there is no action against the city for damages sustained by reason of one's horse becoming frightened at an exhibition of wild animals lawfully upon the highway;[97] nor when the plaintiff's house was set on fire and burned up by licensed fireworks upon a holiday;[98] nor when the plaintiff was gored by a cow lawfully at large upon the street of a city.[99] A defective vehicle or harness, if the defect is known to the plaintiff, is a defense to an action for damages for an injury from a defective highway. It is contributory negligence to go upon the highway with such a conveyance.[1] "The plaintiff," said

3 Am. Rep. 73; Ayer v. City of Norwich, 39 Conn. 376; 12 Am. Rep. 396; Winship v. Enfield, 42 N. H. 199; Bartlett v. Hooksett, 48 N. H. 18; Chamberlain v. Enfield, 43 N. H. 358; Knight v. Goodyear Rubber Co., 38 Conn. 438; 9 Am. Rep. 406; Ring v. City of Cohoes, 77 N. Y. 83; 33 Am. Rep. 574; Brooksville v. Pumphrey, 59 Ind. 78; 26 Am. Rep. 76. But see, *contra*, Keith v. Easton, 2 Allen, 552, wherein plaintiff's horse became frightened at a large vehicle used as daguerreotype saloon, which stood partly within the limits of a highway. It was held that the town was not liable for injuries sustained by the horse in running away. The test adopted by the court was, whether the cause of fright was a defect in one of the proper attributes of a way, for which only the town could be liable. Such a daguerreotype saloon was held to be entirely without the attributes of a road. The court *inter alia* said:— "Cattle or horses running at large might frighten the traveler's horse; the sight of flags displayed; the goods displayed in front of shops; the gathering of agricultural fairs, military trainings, and other public occasions, may any or all of them tend to frighten many passing horses; yet it would be a novel doctrine to hold that highway surveyors may interfere in such cases under their authority to repair highways, or that the attributes of a way include them because they may frighten horses." Kingsbury v. Dedham, 13 Allen, 186; Macomber v. Nichols (Cooley, C. J.), 34 Mich. 212; 22 Am. Rep. 522; Favor v. Boston, &c., R. Co., 114 Mass. 350; 19 Am. Rep. 364; Rivers v. City Council of Augusta, 65 Ga. 376; 38 Am. Rep. 787; Little v. City of Madison, 42 Wis. 643; 24 Am. Rep. 435; Cole v. City of Newburyport, 129 Mass. 594. And see, also, Harris v. Mobbs, 3 L. R. Exch. Div. 268; Watkins v. Reddin, 2 Fost. & Fin. 629; Smith v. Stokes, 4 Best & S. 84; Hill v. Board of Aldermen of Charlotte, 72 N. C. 55; 21 Am. Rep. 451.

97 Cole v. City of Newburyport, 129 Mass. 594; Little v. City of Madison, 49 Wis. 605.

98 Hill v. Board of Aldermen of Charlotte, 72 N. C. 55; Tindley v. City of Salem, 137 Mass. 171.

99 Rivers v. City Council of Augusta, 65 Ga. 376.

1 Jenks v. Wilbraham, 11 Gray, 142; Allen v. Hancock, 16 Vt. 230;

Shepley, C. J., " must show that the accident occurred wholly by the defect of the road, and without any fault on his part."[2] But if the defect in the conveyance is unknown to the plaintiff, it is not as a rule a defense to his action.[3]

§ 260. Unskillful or reckless driving.— Unskillful or reckless driving is also such negligence on the part of a plaintiff as will prevent a recovery in case it contributes to produce the injury;[4] but, in case it does not appear to have contributed to occasion the

Farrar v. Greene, 32 Me. 574; Moore v. Abbott, 32 Me. 46. In an action for injuries caused by the upsetting of a stage in which plaintiff was riding, through obstructions in the highway, an instruction that if either of the horses drawing the vehicle was balky or otherwise unmanageable it was negligence to drive them, was properly refused. Chamberlain v. Town of Wheatland, 7 N. Y. Supl. 190. Where the harness was in good condition and the rein broke because of the driver's efforts to restrain the horse, it did not prevent a recovery. Phillips v. New York, &c., R. Co., 6 N. Y. Supl. 621; Springett v. Ball, 4 Fost. & Fin. 472; Thompson on Negligence, 1208, § 55.

[2] Farrar v. Greene, 32 Me. 574; and see Cotterill v. Starkey, 8 Car. & P. 691.

[3] Palmer v. Andover, 2 Cush. 600; Hodge v. Bennington, 43 Vt. 450; Tucker v. Henniker, 41 N. H. 317; Winship v. Enfield, 42 N. H. 197; Tuttle v. Farmington, 58 N. H. 126. But see, *contra*, Anderson v. Bath, 42 Me. 346; Perkins v. Fayette, 68 Me. 152; Davis v. Dudley, 4 Allen, 557; Titus v. Northbridge, 97 Mass. 258; Houfe v. Fulton, 29 Wis. 296; Hawes v. Fox Lake, 33 Wis. 438. See, also, Thompson on Negligence, 1085, § 3; Shearman & Redfield on Negligence (5th ed.), § 378; Elliott on Roads and Streets, 452, 626.

[4] Flower v. Adams, 2 Taunt. 314; Pittsburgh, &c., R. Co. v. Taylor, 104 Penn. St. 306; 49 Am. Rep. 580; Kuhn v. Township of Walker, 97 Mich. 306; 56 N. W. Rep. 556. Any person driving a horse, on the street, especially an uncertain and unbroken animal, when likely to meet a car, should exercise very great care and prudence so as to cope with the occasion with safety, and, if he fails to do so, he enters on a reckless experiment at his own risk. At the same time he is not to be debarred from reasonable opportunities in a reasonable manner to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to them if he can. Flewelling v. Lewiston & Auburn Horse R. Co., 89 Me. 585, 594-595; 36 Atl. Rep. 1056. The fire department is subject to a city ordinance which prohibits immoderate driving in the streets the same as the general public. Morse v. Sweenie, 15 Ill. App. 486; Peoria Bridge Association v. Loomis, 20 Ill. 235; Acker v. County of Anderson, 20 S. C. 495; Cassidy v. Stockbridge, 21 Vt. 391.

mischief, the plaintiff may, nevertheless, recover.[5] So it is held that permitting a woman to drive a horse upon a highway is not conclusive upon the question of the plaintiff's want of care.[6] The law inclines to require the same degree of care of a woman as of a man;[7] but it is said that a woman driving a horse upon a highway may be presumed to be somewhat wanting in the amount of knowledge, skill, dexterity, steadiness of nerve, and coolness of judgment — in short, that reasonable degree of competency which we may presume in a man, and that a person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies.[8]

§ **261. Sunday traveling.**— "*Dies dominicus non est juridicus*," but with this qualification Sunday, at common law, differed from no other day in the week. Courts might not lawfully sit upon that day; service of process and arrest in civil causes were prohibited, and no judicial act could be done,[9] but business

[5] Heland v. Lowell, 3 Allen, 407; Stuart v. Machias Port, 48 Me. 477; Welch v. Wesson, 6 Gray, 505; Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274. And see, also, § 45, *supra*. In Alger v. Lowell, 3 Allen, 402, it is held that an action lies against a city to recover damages sustained by being pushed from a public street down an unguarded declivity, if it was not done by the wilful act or negligence of the crowd, or any person therein. The fact that the plaintiff was intoxicated, however, would have to go to the jury in order to determine whether any contributory negligence was present.

[6] Cobb v. Standish, 14 Me. 198; Bigelow v. Rutland, 4 Cush. 247; Babson v. Rockport, 101 Mass. 93; Blood v. Tyngsboro, 103 Mass. 509.

[7] Hassenger v. Michigan, &c., R. Co., 48 Mich. 205; 42 Am. Rep. 470, an instructive opinion by Judge Cooley; Fox v. Glastenbury, 29 Conn. 204; Snow v. Provincetown, 120 Mass. 580.

[8] Daniels v. Clegg, 28 Mich. 33. *Cf.* City of Bloomington v. Perdue, 99 Ill. 329.

[9] See, upon this point, in general, Hiller v. English, 4 Strobh. (Law) 486; Story v. Elliot, 8 Cow. 27; 18 Am. Dec. 423; Coleman v. Henderson, Littell's Select Cases (Ky.) 171; 12 Am. Dec. 290, and note; True v. Plumley, 36 Me. 466; Swan v. Broome, 3 Burr, 1597; 2 Bl. 527; 1 Wm. Bl. 526; MacKalley's Case, 9 Co. 66; Cro. Jac. 279. In Isaacs v. Beth Hamedash Society, 1 Hilt. 469, however, it was held that an award drawn up on Sunday, the arbitrators all being Jews, but not dated and delivered up until the next day, was valid. Van Riper v. Van Riper, 1 Southard (N. J.) 156; 7 Am. Dec. 576; Proffatt on Jury Trial, § 455; Browne's "Humorous Phases of the Law," 14.

transactions of every kind upon that day were valid.[10] Lord Mansfield said that Sunday is a *dies non juridicus*, not made so by statute but by a canon of the church incorporated into the common law.[11] Prior to the year A. D. 517, however, the Christians used all days alike for the hearing of causes, not sparing Sunday itself. This they did for two reasons; *first*, to rebuke the heathen superstition as to lucky and unlucky days, and *second*, that, by keeping their own courts always open, they prevented Christian suitors from resorting to the heathen tribunals.[12] "But, in the year 517, a canon was made: '*Quod nullus episcopus vel infra positus die dominico causas judicare praesumat;*' and this canon was ratified in the time of Theodosius, who fortified it with an imperial constitution: '*Solis die* [*quem dominicum recte dixere majores*] *omnium omnio litium et negotiorum quiescat intentio.*' Other canons were made, in which vacations were appointed. These, and other canons and constitutions, were received and adopted by the Saxon kings of England. They were all confirmed by William the Conqueror, and Henry II, and so became part of the common law of England."[13] By statute 29 Car. II.[14] which has been copied in most of the States of the Union, it is provided, *inter alia*, that: — "No tradesman, artificer, workman, labourer or other person whatsoever shall do or exercise any worldly labour, business or work, of their ordinary calling, upon the Lord's day, or any part thereof, work of necessity and charity only excepted."

§ 262. **The New England rule.**— The adjudications in the several States, and in England, under these statutes are very numerous,[15] but with them, for the purposes of this treatise, we are not concerned, except so far as in the New England States

10 Comyns v. Boyer, Cro. Eliz. 405; Rex v. Brotherton, Stra. 702; Prinsor's Case, Cro. Car. 602; Waite v. Hundred of Stoke, Cro. Car. 496. See, also, City Council v. Benjamin, 2 Strobh. 508; 49 Am. Dec., 608, and the note.

11 Swan v. Broome, 3 Burr, 1597.

12 Sir Henry Spelman, quoted by Lord Mansfield in Swan v. Broome, 3 Burr, 1597.

13 Story v. Elliot, 8 Cow. 27; 18 Am. Dec. 423, an interesting opinion, in which the learning upon this point is fully set out.

14 Chap. 7, § 1.

15 Many cases are collected in Browne's "Humorous Phases of the Law," 14-47. See, also, Myers v. Meinrath, 101 Mass. 366; 3 Am. Rep. 368, and note. Raising subscriptions on the Lord's day to purchase a church was held to be a work of charity. Allen v. Duffie, 43 Mich. 1; 38 Am. Rep. 159, and note; State v. Larry, 7 Baxt. 95;

it has been held that the wrong-doing involved in traveling upon the Lord's day, whenever it is not a work of "necessity or charity," is a defense to actions brought by travelers for injuries from defective highways, collisions or any other misadventure upon such Sunday journey. This anomalous and erratic doctrine was first announced by Chief Justice Shaw of Massachusetts, in the case of Bosworth v. Inhabitants of Swansey.[16] It was an action brought by a person injured, while traveling upon Sunday, by a defect in a highway, and it was held, as an application of the local statute, which provides that "no person shall travel on the Lord's day, except from necessity or charity," and that "every person so offending shall be punished by a fine not exceeding ten dollars for every offense," that the traveler, in order to maintain his action, must show that he was traveling from necessity or charity, and that a failure so to do would prevent any recovery. In many subsequent cases this rule has been applied by the Massachusetts courts — and it is settled law in that State that, when one travels on a Sunday, except upon an errand of "necessity or charity," he can maintain no action for any injury that he may sustain by reason of a defect in the highway, or from collision, or railway accident, or other misadventure. In effect, such a traveler, in Massachusetts, takes his life in his hand, and goes forth at his own proper peril.

§ 263. The Massachusetts rule illustrated.—It is held, for example, not to be a traveling from necessity or charity to go, on Sunday, to see whether a house, into which you propose to move on Monday, has been properly cleaned and put in order;[17] nor to walk along the streets of Boston to see your employer for the purpose of getting him to change your hours of labor on week days;[18] nor to ride in the street cars from one city to another to call upon a stranger;[19] nor to travel about for the purpose of furnishing fresh meat to market-men;[20] nor for the purpose of selling pigs;[21] nor to go to see your friend, on the way home from

32 Am. Rep. 555. and note; Robeson v. French, 12 Metc. 24; 45 Am. Dec. 236; Coleman v. Henderson, Littell's Select Cases (Ky.) 171; 12 Am. Dec. 290, and the note.

16 10 Metc. 363; 43 Am. Dec. 441.

17 Smith v. Boston, &c., R. Co., 120 Mass. 492.

18 Connolly v. Boston, 117 Mass. 64.

19 Stanton v. Metropolitan R. Co., 14 Allen, 485.

20 Jones v. Andover, 10 Allen, 18.

21 Bradley v. Rea, 103 Mass. 188; 4 Am. Rep. 524.

a funeral (when you venture out on Sunday to a funeral you must go straight there and straight back);[22] nor for a traveling insurance agent, whose sick sister had written to him to meet her and carry her home, to go on Sunday by rail to a point at which he expected to receive another letter from that sister as to their proposed journey home together,[23] nor to perform the ordinary duties of a street car conductor.[24] In each of these cases the plaintiff found himself remediless. So, also, where the plaintiff had merely tied his horse by the roadside and another drove against it he could not recover, inasmuch as, although the plaintiff was attending a camp meeting, it did not clearly appear that he attended from religious motives;[25] and if one lets a horse for a Sunday drive and the horse is injured, by the neglect of the person who hires it, the owner cannot recover.[26]

§ 264. **The same subject continued.**—On the contrary, the Massachusetts courts have held it a journey made from "necessity or charity," within the contemplation of the statute, for one to drive his horse upon the highway on Sunday morning to get a maid-servant, in order that she might prepare necessary food for the family during the day,[27] or for one to take a walk merely for exercise, and to get the air.[28] And when one travels from one town to another to visit a sick friend whom he thinks may need his assistance,[29] or goes on Sunday to a camp meeting of spiritualists,[30] he is entitled to go to the jury on the question,

22 Davis v. Somerville, 128 Mass. 594; 35 Am. Rep. 399.

23 Bucher v. Fitchburg R. Co., 131 Mass. 156; 41 Am. Rep. 216.

24 Day v. Highland Street R. Co., 135 Mass. 113; 46 Am. Rep. 447. But see Sunday cases in § 299, note, *infra*.

25 Lyons v. Desotelle, 124 Mass. 387.

26 Gregg v. Wyman, 4 Cush. 322. But the court has receded from this position in the later case of Hall v. Corcoran, 107 Mass. 251; 9 Am. Rep. 30, in which it was held, when the owner of a horse let it, on the Lord's day, to be driven for pleasure to a particular place, and the hirer drove it to a different place and in doing so injured it, that, although the contract of hiring was illegal and void, the owner might, nevertheless, maintain tort for the conversion of the horse. In the opinion, Judge Gray reconsiders at length the question presented in Gregg v. Wyman, which was overruled by a unanimous court. *Cf.* Nodine v. Doherty, 46 Barb. 59.

27 Crossman v. City of Lynn, 121 Mass. 301.

28 Hamilton v. City of Boston, 14 Allen, 475.

29 Doyle v. Lynn, &c., R. Co., 118 Mass. 195; 19 Am. Rep. 431.

30 Feital v. Middlesex R. Co., 109 Mass. 398; 12 Am. Rep. 720.

whether he was traveling lawfully or not. It is also lawful, under the statute, to travel on Sunday for the purpose of visiting a sick child, or other near relative.[31] And where the defendant's dog frightened the plaintiff's horse so that it ran away and broke his buggy, the plaintiff was allowed his action, although he was riding at the time unlawfully upon the Sabbath day.[32] In this case it is said that the plaintiff's unlawful traveling on the Lord's day will not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustains.[33] But this, in my opinion, is not the law in Massachusetts upon this point, and even if it were, it hardly helps things much, since in Hall v. Corcoran[34] it is expressly declared that in these cases the illegal Sunday traveling "necessarily contributes" to the injury — from which the inference is that there is no escape.[35]

§ 265. The rule in Maine and Vermont.—The Massachusetts doctrine upon this point obtains in Maine, where one who travels on Sunday to visit a friend, in violation of the statute, cannot maintain an action against the town for injuries from a defective highway.[36] But if a woman walks only about a mile in a town, for exercise on Sunday, she is held not a traveler in such a sense as to bar her recovery against the town for injuries suffered during such a walk from a defect in the street,[37] and when a man walking on the Lord's day for exercise went into a beer shop and drank a glass of beer, and on resuming his walk was injured by a defect in the highway, it was held that he might

31 Pearce v. Atwood, 13 Mass. 324, 350; Gorman v. Lowell, 117 Mass. 65.

32 White v. Lang, 128 Mass. 598; 35 Am. Rep. 402. *Cf.* on this point Schmid v. Humphrey, 48 Iowa, 652; 30 Am. Rep. 414.

33 White v. Lang, 128 Mass. 598; 35 Am. Rep. 402, by Morton, J.

34 107 Mass. 251; 9 Am. Rep. 30.

35 See, also, as indicating the attitude of this court upon this general question, McGrath v. Merwin, 112 Mass. 467; 17 Am. Rep. 119; Wallace v. Merrimack, &c., Co., 134 Mass. 95; 45 Am. Rep. 301, wherein the general Massachusetts rule is applied to one who, in sailing his yacht on Sunday, was negligently injured in a collision. *Cf.* Myers v. Meinrath, 101 Mass. 366; 3 Am. Rep. 368; 3 Allen, 165; Commonwealth v. Sampson, 97 Mass. 407.

36 Cratty v. Bangor, 57 Me. 423; 2 Am. Rep. 56. See, also, Hinckley v. Penobscot, 42 Me. 81; Tillock v. Webb, 56 Me. 100.

37 O'Connell v. City of Lewistown, 65 Me. 34; 20 Am. Rep. 673. *Cf.* Hamilton v. Boston, 14 Allen, 475.

recover.[38] A woman visiting at plaintiff's house on a cold, windy Sunday in December, informed him that she had to go home that night, a distance of two miles. He thereupon took her home with his horse and sleigh. It was held that the act was not unlawful, it being justifiable on the ground of necessity or as a deed of charity; and plaintiff was not precluded from recovering for damages caused by his horse slipping on a street.[39] But if one lets his horse for a pleasure drive on Sunday, and the horse is injured by the hirer's neglect, the owner is remediless.[40] Vermont is the only other State in the Union where this theory prevails. In that State the Massachusetts rule upon this subject is followed, and there is no recovery for injuries received from a defect in the highway by one who is traveling on Sunday in violation of the statute.[41] But where the plaintiff traveled eight miles on Sunday, from one town to another, to visit his two little sons from whom he was separated during the week, and whose mother was dead, and was injured by a defect in the highway, it was held that a recovery would not be defeated by the Vermont statute, which prohibits travel on Sunday except for attendance at places of moral instruction and from necessity.[42]

§ 266. The Rhode Island rule.— In Baldwin v. Barney[43] it was held by the Supreme Court of Rhode Island, that where one driving carefully on Sunday on a highway in the State of Massa-

[38] "Unless the beer contributed to the injury," the court adds. Davidson v. City of Portland, 69 Me. 116; 31 Am. Rep. 253. See, also, Atkinson v. Sellers, 5 C. B. (N. S.) 442; Taylor v. Humphreys, 10 C. B. (N. S.) 429; Regina v. Rymer, 13 Cox's C. C. 378; Peplow v. Richardson, 4 L. R. (C. P.) 168.

[39] Buck v. City of Biddeford, 82 Me. 433; 19 Atl. Rep. 912.

[40] Parker v. Latner, 60 Me. 528; 11 Am. Rep. 210. But see Morton v. Gloster, 46 Me. 520; and see, also, Hall v. Corcoran, 107 Mass. 251; 9 Am. Rep. 30; Stewart v. Davis, 31 Ark. 518; 25 Am. Rep. 576; Nodine v. Doherty, 46 Barb. 59; Frost v. Plumb, 40 Conn. 111; 16 Am. Rep. 18; Smith v. Rollins, 11 R. I. 464; 23 Am. Rep. 509.

[41] Johnson v. Town of Irasburgh, 47 Vt. 28; 19 Am. Rep. 111.

[42] McClary v. Lowell, 44 Vt. 116; 8 Am. Rep. 366. Note that in Pennsylvania it is a work of necessity or charity for a child to visit his father on Sunday, and to make a journey in a wagon so to do. Logan v. Matthews, 6 Penn. St. 417. But in Massachusetts it is in doubt, whether a young fellow may lawfully travel on a Lord's day to visit his sweetheart. Buffington v. Swansey, 2 Am. Law Rev. 235, cited in Browne's "Humorous Phases of the Law," 17.

[43] 12 R. I. 392; 34 Am. Rep. 670.

chusetts was negligently run into and injured, he could maintain an action in Rhode Island against the person who injured him, without showing that he was traveling at the time of the injury upon an errand either of necessity or charity.[44] In the opinion in this case, Chief Justice Durfee explicitly repudiates the Massachusetts doctrine, which has found no favor outside of the three States in New England that have been long committed to it. It is generally denied throughout the Union in both the State and the Federal Courts.[45].

§ 267. These New England Sunday law decisions criticised.— The objections to such a rule suggest themselves, but Chief Justice Dixon, in Sutton v. Town of Wauwatosa,[46] has drawn the indictment in a very quotable fashion as follows:— "The cases may be summed up, and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: First, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily con-

[44] This is a good case for people in Massachusetts to make a note of, if they are given to taking drives on Sunday.

[45] Philadelphia, &c., R. Co. v. Philadelphia, &c., Towboat Co., 23 How. (U. S.) 209, wherein it is said that "the Massachusetts decisions upon the Sunday law depend on the peculiar legislation and customs of the State, *more than on any general principles of law or justice.*" Carroll v. Staten Island R. Co., 58 N. Y. 126; Platz v. City of Cohoes, 89 N. Y. 219; 42 Am. Rep. 286; Commonwealth v. Louisville, &c., R. Co., 80 Ky. 291; 44 Am. Rep. 475; Phila., &c., R. Co. v. Lehman, 56 Md. 209; 40 Am. Rep. 415; Yonoski v. State, 79 Ind. 393; 41 Am. Rep. 614; Loeb v. City of Attica, 82 Ind. 175; 42 Am. Rep. 494; Black v. City of Lewiston (Idaho), 13 Pac. Rep. 80. In Wilkinson v. State, 59 Ind. 416; 26 Am. Rep. 84, it was held to be a work of necessity to gather melons on a Sunday, so as to prevent waste. But in Whitcomb v. Gilman, 35 Vt. 297, the court would not commit itself into saying that it was necessary to make maple sugar on "the Lord's day," to prevent the loss of sap. The learned judge seemed to think that a religious man would provide against any emergency on the Saturday before. [*Cf.* with this case, Whitcomb v. Gilman, 35 Vt. 287]; Sutton v. Town of Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534; Mohney v. Cook, 26 Penn. St. 342; Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670; Cooley on Torts, § 157. See, also, § 175, *supra.*

[46] 29 Wis. 21; 9 Am. Rep. 534.

nected with, or leading to, or causing, or producing the wrongful act complained of; and, secondly, that the fault, want of due care, or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the operation of the first principle, the defendant cannot exonerate himself, or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other, and independent wrong or violation of law. Wrongs or offenses cannot be set off against each other in this way. 'But we should work a confusion of relations, and lend a very doubtful assistance to morality,' say the court in Mohney v. Cook, 'if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he, too, is a public offender.' Himself guilty of a wrong not dependent on, nor caused by that charged against the plaintiff, but arising from his own voluntary act, or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both, that such a defense should be allowed to prevail. It would extend the maxim *ex turpe causa non oritur actio* beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

§ 268. **Pedestrians crossing the highway.**— Pedestrians have no superiority of right at street crossings over teams. Persons upon the highway on foot in the act of crossing, and those upon the highway riding upon vehicles, have the right of way in common, each equally with the other, and in its exercise each is bound to use ordinary care for his own safety, and to avoid doing injury to any others who may be in the exercise of the equal right

of way with them.[47] The pedestrian has, however, the right to cross the street at any point, and is by no means restricted to the regular crossings,[48] although he is entitled to a somewhat higher measure of care on the part of a driver of a team when he attempts to cross at a regular crossing.[49] It is the duty, as we have seen,[50] of one upon the highway who attempts to cross a railway track upon the same level as the roadway, to look attentively up and down the track in order to see whether or not a train is approaching. So, in some jurisdictions it is held to be the duty of a pedestrian, upon attempting to cross a highway, and especially in attempting to cross the street of a city, to look carefully up and down the street in order not to put himself into the way of approaching vehicles, and that failure so to do is negligence as a matter of law.[51] But, in Massachusetts and in Georgia, such a failure is only evidence of negligence, and the plaintiff is entitled to have it go to the jury.[52] The

[47] Cotton v. Wood, 8 C. B. (N. S.) 568; Barker v. Savage, 45 N. Y. 191; 6 Am. Rep. 66; Belton v. Baxter, 54 N. Y. 245; 13 Am. Rep. 578; Brooks v. Schwerin, 54 N. Y. 343; Myers v. Dixon, 3 Jones & S. 390; Beach v. Parmenter, 23 Penn. St. 196; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; 18 N. E. Rep. 108. The rule requiring one exercising his lawful rights in a place where the exercise of the lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed will endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made. Newark Passenger Ry. Co. v. Block, 55 N. J. Law, 605; 27 Atl. Rep. 1067.

[48] Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Simons v. Gaynor, 89 Ind. 165; Cotterill v. Starkey, 8 Car. & P. 691. And see Boss v. Litton, 5 Car. & P. 407.

[49] Williams v. Richards, 3 Car. & Kir. 81.

[50] § 180 *et seq.*, *supra*.

[51] Barker v. Savage, 45 N. Y. 191; 6 Am. Rep. 66; Baker v. Pendergast, 32 Ohio St. 494; 30 Am. Rep. 620. See, also, Sheehan v. Edgar, 58 N. Y. 631; Woolf v. Beard, 8 Car. & P. 373; Perrin v. Devendorf, 22 Ill. App. 284. But see Connolly v. Knickerbocker Ice Co., 114 N. Y. 104, 108; 21 N. E. Rep. 101.

[52] Shapleigh v. Wyman, 134 Mass. 118; Bower v. Wellington, 126 Mass. 391; Williams v. Grealy, 112 Mass. 79; Purtell v. Jordan, 156 Mass. 573, 577; 31 N. E. Rep. 652; Benjamin v. Holyoke Street

same rule applies where a person is walking along the highway, and the law does not require him to look in all directions.[53]

§ 269. The same subject continued.— One must not take desperate chances, or make nice calculations as to his ability to dodge approaching vehicles, in attempting to cross the crowded thoroughfares in New York. Accordingly, where one attempted to cross a street by rushing in front of a passing street car, but was run over by a cart which he had seen and calculated that he should be able to dodge, such conduct at a crossing was held contributory negligence in an action by the injured party against the owner of the cart.[54] But it is not negligent, *in se*, said the Supreme Court of Louisiana, to wear a sun-bonnet in the street which may prevent a woman from seeing perfectly in all directions.[55] In crossing the streets of a crowded city, a person is bound to use reasonable care; and if he have ample time to get across, although a vehicle is approaching, he is not guilty of contributory negligence if he fail in attempting to do so.[56] Aged and infirm persons, it is to be remembered, have the same rights upon the highway as yound, and active, and agile persons,[57] and it is not negligence *per se* for a blind man to walk the streets of a city unattended.[58] But it devolves upon such

Ry. Co., 160 Mass. 3; 35 N. E. Rep. 95; Orr v. Garabold (Ga.), 11 S. E. Rep. 778. *Cf.* Stock v. Wood, 136 Mass. 353. It has repeatedly been held that the mere failure of a pedestrian to look and listen for approaching teams, as he passes over a crosswalk at the junction of two streets, is not necessarily such negligence as will prevent recovery if he is run over by a passing team. Murphy v. Armstrong Transfer Co., 167 Mass. 199, 200; 45 N. E. Rep. 93.

53 Wiel v. Wright, 8 N. Y. Supl. 776; Undhejem v. Hastings, 38 Minn. 485; 38 N. W. Rep. 448.

54 Belton v. Baxter, 54 N. Y. 245; 13 Am. Rep. 578.

55 Shea v. Reems, 36 La. Ann. 969.

56 Fenton v. Second Ave. R. Co., 9 N. Y. Supl. 162; 56 Hun, 99.

57 Shapleigh v. Wyman, 134 Mass. 118; Boss v. Litton, 5 Car. & P. 407; Barker v. Savage, 45 N. Y. 191; 6 Am. Rep. 66.

58 Neff v. Town of Wellesley, 148 Mass. 487; 20 N. E. Rep. 111. A man nearly eighty years old, blind in one eye and partially deaf, has a right to drive unattended a horse attached to a wagon upon a street in a city on which an electric railway runs, and to enter upon a railway in attempting to cross from one side of the street to the other, but in so doing he must use a degree of care and caution commensurate with the circumstances of the case. Robbins v. Springfield Street Ry. Co., 165 Mass. 30; 42 N. E. Rep. 334.

persons to exercise the greater care in proportion to their disability,[59] *e. g.*, a pedestrian, far advanced in years, must not venture upon an icy sidewalk when he might just as well have taken a safer course on the other side of the street,[60] and one whose eye-sight is poor must exercise greater caution than one who sees perfectly.[61] When a pedestrian is run over in a public street and injured by one of a coasting party who accidentally struck him with his sled, the coasting going on without any license from the city authorities, there is no action against the city;[62] nor for a similar injury received by a person while crossing Boston Common along one of the paths where coasting was going on.[63]

§ 270. Icy sidewalks.— A very considerable amount of litigation has been occasioned by the presence of ice and snow upon the highways and in the streets of towns and cities. In this section it is proposed to consider the rules of law upon that subject so far as they impinge upon the law of contributory negligence. In those States where ice and snow are likely to accumulate in large quantities upon the public highways, the proper authorities are usually required, by statute or municipal

[59] Winn v. City of Lowell, 1 Allen, 177; Simms v. South Carolina Ry. Co., 27 S. C. 268; 3 S. E. Rep. 301; Davenport v. Ruckman, 37 N. Y. 568; Peach v. Utica, 10 Hun, 477; Sleeper v. Sandown, 52 N. H. 244; City of Centralia v. Krouse, 64 Ill. 19. A person waiting for a street car is not bound to anticipate that a vehicle driven at an excessive rate of speed and which was not in sight when he left the sidewalk would run down upon him. Petersen v. Hubbell, 12 App. Div. (N. Y.) 372, 377.

[60] City of Centralia v. Krouse, 64 Ill. 19.

[61] Peach v. Utica, 10 Hun, 477. A street sweeper, employed in the public service, cannot exercise the same care while in the street as an individual would, but such a sweeper is bound to use reasonable care to avoid being run over. Smith v. Bailey, 14 App. Div. (N. Y.) 283.

[62] While the use of a public highway in a city for coasting may be a public nuisance, its suppression is a police duty, and not a duty in which the corporation as such has a particular interest, or from which it derives any special benefit in its corporate capacity; and for the non-performance of such duty by its agents, the corporation is not liable. Schultz v. Milwaukee, 49 Wis. 254; 35 Am. Rep. 779; Faulkner v. Aurora, 85 Ind. 130; 44 Am. Rep. 1; Ray v. Manchester, 46 N. H. 59; Pierce v. New Bedford, 129 Mass. 534; 37 Am. Rep. 387; Hutchinson v. Concord, 41 Vt. 271.

[63] Steele v. City of Boston, 128 Mass. 583. See, also, Clark v. Waltham, 128 Mass. 567.

ordinance in respect of obstructions from those causes, to exercise ordinary care and diligence to keep the highways in a reasonably safe and convenient condition. When the highways are blocked up or encumbered with snow, it must be removed or trodden down to the extent of rendering the road or street passable. It may be supposed that this would be the duty, at least, of a municipal corporation, even in the absence of an express statutory requirement, under that more general rule of law that the highways are to be kept in reasonably good and convenient condition. Upon the question how far ice and snow upon a sidewalk will constitute a "defect," we look to the case of Providence v. Clapp,[64] as the leading authority. This case arose under the Rhode Island statute requiring towns to keep the highways in order, which, also, specifically required the removal of snow and ice when it obstructed passage along the way. It seems that the plaintiff, walking upon the street in the night, slipped and fell and injured himself upon a ridge of trodden snow and ice in the middle of the sidewalk, and it was held that, without reference to any specific requirement in the statute as to the removal of snow and ice from the pavement, it was the duty of the city to use ordinary care and diligence to restore the street, after a fall of snow, to a reasonably safe and convenient condition, and that whether the street is in that condition or not is a proper question for the jury. It is a fair conclusion from the opinion in that case that, while snow when it first falls, or ice when it first forms, and until the municipality has had a reasonable time to remove the obstruction and restore the highway to a safe and convenient condition, are not defects or obstructions for which the corporation may be held liable, the accumulation of ice or snow, if it causes injury, after a reasonable time has elapsed in which it might have been removed, is such a defect in the highway as will render the city liable.

§ 271. **The same subject continued.**— The court in the case considered in the preceding section stated the law as follows: — "The treading down of snow when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or encumbered, may, in some sense and for the time being, have the effect to remove the obstructions; but as it respects sidewalks and their uses, this remedy would be, at best,

[64] 17 How. (U. S.) 161.

temporary, and, in case of rain or extreme changes of weather, would have the effect to increase rather than remove it. * * * The just rule of responsibility and the one, we think, prescribed by the statute, whether the obstruction be by snow or any other material, is the removal or abatement so as to render the highway, street or sidewalk at all times safe and convenient, regard being had to its locality and uses."[65] It is the general rule, in accordance with this view, that snow and ice are not *per se* defects for which a city may be held responsible, but that accumulations of snow or ice, after a reasonable time has elapsed within which they might have been removed, are actionable obstructions and defects.[66] And when one is injured by reason of such an accumulation, if he himself, at the time of the injury, were in the exercise of due care under the circumstances, he may maintain an action against the corporation whose duty it was to keep the highway in order.[67]

§ 272. Mere slipperiness not a defect in the highway.— It is also a sound rule that mere slipperiness, arising from a smooth surface of ice or snow upon a sidewalk, is not such a defect as will render the city liable to one who sustains injuries from a fall

[65] Providence v. Clapp (by Nelson, J.), 17 How. (U. S.) 161.

[66] "The fault for which the town is chargeable, consists in permitting the defect to remain, not in causing it to exist." Billings v. Worcester, 102 Mass. 329; 3 Am. Rep. 460.

[67] McLaughlin v. City of Corry, 77 Penn. St. 109; 18 Am. Rep. 432; Dooley v. City of Meriden, 44 Conn. 117; 26 Am. Rep. 433; Luther v. Worcester, 97 Mass. 269; Seeley v. Town of Litchfield, 49 Conn. 134; 44 Am. Rep. 213; Billings v. Worcester, 102 Mass. 329; 3 Am. Rep. 460; Nason v. Boston, 14 Allen, 508. In Collins v. City of Council Bluffs, 32 Iowa, 324, the court said:—"It cannot be doubted that a city would be liable for negligently permitting ditches washed in the street by floods from the rains. These would be effects of natural causes. So the deposits of snow from natural causes, if permitted to remain; and damage to one using the street resulting therefrom renders the city liable. * * * To repair means to restore to a good state after partial destruction. A street may be destroyed by depositing obstructions upon its surface, as well as by excavating below its surface." 7 Am. Rep. 200; Todd v. City of Troy, 61 N. Y. 506; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; Mosey v. Troy, 61 Barb. 580; Mayor v. Marriott, 9 Md. 160; Cook v. City of Milwaukee, 24 Wis. 270; Cloughessy v. City of Waterbury, 51 Conn. 405; 19 Am. Law Rev. 492. See Elliott on Roads and Streets, 459, 460.

thereon.[68] But when the construction or shape of the pavement is such as to hold the water, and so render accumulations of ice inevitable or probable in cold weather, for slipperiness so caused the city may be liable;[69] and so, also, when a pedestrian using due care is injured by falling on a portion of a city sidewalk made of glass and iron, and worn smooth and slippery, and it appears that the slipperiness of the pavement was the sole cause of his fall, he may maintain an action against the city for damages for the injury he sustained.[70] So much for the duty and liability of the town, or other municipal corporation whose duty it is to keep the highway in order, with respect of ice and snow.

§ 273. The duty of the traveler on an icy highway.—Turning to the reciprocal obligations of the traveler upon the highway, at times when the presence of ice and snow render traveling especially or unusually hazardous, we find that many cases insist upon the rule that when a person voluntarily attempts to pass over a sidewalk which he knows to be dangerous by reason of the ice or snow upon it, when he might avoid it, he is guilty of such contributory fault as will prevent a recovery from the corpora-

[68] Cook v. City of Milwaukee, 24 Wis. 270; 1 Am. Rep. 183; Stanton v. Springfield, 12 Allen, 566; Johnson v. Lowell, 12 Allen, 572; Gilbert v. Roxbury, 100 Mass. 185; Durkin v. Troy, 61 Barb. 437; City of Chicago v. McGiven, 78 Ill. 352; City of Chicago v. Bixby, 84 Ill. 82; 25 Am. Rep. 429; McKellar v. City of Detroit, 57 Mich. 158, holding that the Michigan statute allowing actions to be brought for injuries from defective highways, only applies to injuries that are "due to defects from being out of repairs, and not to such as are caused by the mere accumulation of snow and ice." In Providence v. Clapp, 17 How. (U. S.) 161, the law is so construed as to exonerate the town from liability unless express notice is given of the existence of the slippery ice accumulations. *Cf.* Billings v. Worcester, 102 Mass. 329; 3 Am. Rep. 460; Kenney v. City of Cohoes, 16 N. Y. Week. Dig. 206; Kelly v. Newman, 62 How. Pr. 156.

[69] Stanton v. Springfield, 12 Allen, 566. And see Billings v. Worcester, 102 Mass. 329; Adams v. Town of Chicopee, 147 Mass. 440; 18 N. E. Rep. 231.

[70] Cromarty v. City of Boston, 127 Mass. 329; 34 Am. Rep. 381. See, also, Crocheren v. North Shore, &c., Ferry Co., 1 N. Y. Super. Ct. 446; 56 N. Y. 656; and Borough of Mauch Chunk v. Kline, 100 Penn. St. 119; 45 Am. Rep. 364, wherein a municipality is held not liable for an injury to one who slipped upon the icy surface of cobble stones in a street crossing.

tion whose duty it is to keep the way in a safe condition, in case of an injury because of such an attetmpt.[71] When there is snow and ice upon the ground it is the duty of pedestrians to exercise increased care and caution in going about. They must in each instance exercise ordinary care under the circumstances in determining whether to proceed or return, when confronted with a dangerous pavement or roadway, and if they are guilty of negligence in concluding to proceed they cannot recover in case they receive injuries.[72] But it must be an exceptional case where an attempt to pass over an icy sidewalk can be said to be negligent, as matter of law.[73] And it is not necessarily negligent for one who knows there is ice upon the pavement to attempt to pass over it, even at night. In such a case one is bound to exercise only ordinary care and prudence.[74] The fact that a woman sixty

[71] Shaefler v. City of Sandusky, 33 Ohio St. 246; 31 Am. Rep. 533; City of Erie v. Magill, 101 Penn. St. 613; 47 Am. Rep. 739; City of Quincy v. Barker, 81 Ill. 300; 25 Am. Rep. 278; Thomas v. New York, 28 Hun, 110, where it appears that the plaintiff on the Saturday preceding the accident had been in the same locality, and had crossed the street on seeing an accumulation of ice on the sidewalk. The accident happened on the next Tuesday, the plaintiff testifying that the sidewalk was then crowded, and that he did not see the ice until after he fell. The court left the question of contributory negligence to the jury, instructing them that if they believed that the plaintiff's attention was diverted by the crowd, or by any other circumstance, or mental condition, not involving a failure to observe ordinary care, they should bring a verdict for the plaintiff. Wilsou v. City of Charleston, 8 Allen, 137; Durkin v. Troy, 61 Barb. 437; City of Centralia v. Krouse, 64 Ill. 19; Twogood v. Mayor, 11 Daly, 167. See, also, City of Aurora v. Hillman, 90 Ill. 61; Lovenguth v. City of Bloomington, 71 Ill. 238; Osage City v. Brown, 27 Kan. 74. Plaintiff cannot recover for injury by falling on an icy sidewalk, though he was careful in passing over it, if the teamway in the road, parallel to the sidewalk, was safe and could have been used by him. Cosner v. City of Centerville, 90 Iowa, 33; 57 N. W. Rep. 636.

[72] Horton v. Ipswich, 12 Cush. 488.

[73] Dipper v. Inhabitants of Milford, 167 Mass. 555, 558; 46 N. E. Rep. 122; Dewire v. Bailey, 131 Mass. 169.

[74] Evans v. City of Utica, 69 N. Y. 166; 25 Am. Rep. 165; Dewire v. Bailey, 131 Mass. 169; 41 Am. Rep. 219; Weston v. Elevated Ry. Co., 73 N. Y. 595. *Cf.* Henry County Turnpike Co. v. Jackson, 86 Ind. 111; 44 Am. Rep. 274; Kelly v. Railroad Co., 28 Minn. 98; Griffin v. Auburn, 58 N. H. 121. A person passing over an icy sidewalk is bound to exercise such care and prudence as prudent persons ordinarily would in passing over such a place; and it is for the jury to determine

years old, and weighing two hundred pounds, noticed before attempting to ascend a street crosswalk that it was rough and slippery, and that she must step two feet over a ditch and glare ice, is not conclusive evidence that she did not exercise due care.[75] Nor, in an action against a town by a husband and wife, for injuries sustained by the wife, by falling on a ridge of ice, which was a plain defect in the highway, will the husband's knowledge of the bad condition of the pavement at that point and that his wife was going there, coupled with his failure to warn her of the risk and caution her to beware of it, prevent a recovery from the town.[76]

§ 274. The liability of the owner of property in respect to icy pavements.— The owner of city property is not liable for injuries sustained by one in passing over the pavement in front of his premises and slipping on ice formed by water dripping from his house, there being no defect in the premises, no obstruction of the sidewalk by the adjacent owner, and no duty imposed upon him, either by ordinance or statute, to keep the pavement free from ice;[77] but the city may, of course, in such a case, be liable upon the grounds already set forth.[78] Neither is a street car company which, in the lawful and orderly exercise of its franchise, clears the snow from its tracks, liable to the owner of adjacent property for injury done him, by reason of the snow so

whether he was going with that care and caution that the circumstances required. Hallie v. City of Gloversville, 4 App. Div. (N. Y.) 343, 347.

[75] Gilbert v. Boston, 139 Mass. 313.

[76] The husband himself, were he injured, could recover if the jury were satisfied that he had used ordinary care. Street v. Inhabitants of Holyoke, 105 Mass. 82; 7 Am. Rep. 500. *Cf.* Mahoney v. Metropolitan R. Co., 104 Mass. 73; Whittaker v. West Boylston, 97 Mass. 273.

[77] Moore v. Gadsden, 87 N. Y. 84; 41 Am. Rep. 352. Where the lot-owner is required by the city to repair the sidewalks, it is simply a method of exercising the power of taxation, by which he is made the agent of the city to expend the amount of the tax, the responsibility for the performance of the work remaining where the authority to control it is found. City of Keokuk v. Independent District of Keokuk, 53 Iowa, 352; 36 Am. Rep. 226; Wenzlick v. McCotter, 87 N. Y. 122; 41 Am. Rep. 358.

[78] Reich v. Mayor, &c., 17 N. Y. Week. Dig. 140; Kenney v. City of Cohoes, 16 N. Y. Week. Dig. 206; Kelly v. Newman, 62 How. Pr. 156; Mosey v. Troy, 61 Barb. 580; Mayor, &c. v. Marriott, 9 Md. 160, and the cases cited to this point, *supra.*

cleared from the street railway track obstructing the flow of water in the gutter and causing it to back up upon the adjoining property.[79] The question whether or not one who leaves the sidewalk and takes to the roadway on foot, and is injured by coming upon a pile of snow in the street, is in a position to complain of such pile of snow as a defect, must be left to the jury.[80] It is much questioned whether city ordinances, or, as they are called in New England, by-laws, requiring the owners or occupants of houses upon public highways to clear the snow from before their houses, are valid. Chief Justice Shaw, in an early case in Massachusetts, thought they were, and so decided,[81] and such regulations have been upheld in that State by subsequent decisions, in no degree, however, relieving the city or town from its proper responsibility for the condition of its ways.[82] But a contrary view is more usually taken, and such ordinances have, as a rule, found little favor.[83]

§ 275. The foregoing rules summarized.— The weight of authority brings us to the following conclusions upon this subject: that ice and snow upon the highway are not *in se* defects for which the town is liable; that wherever the town is bound to maintain the public highways, it is bound to clear away or remove, within a reasonable time, snow that falls or ice that forms upon the traveled portion of the public ways, and that for a failure so to do an action may be maintained; that for mere slipperiness, the result of natural causes, there can be no liability, or, in other words, that a municipal corporation is not liable to suits for damages because water will freeze upon the ground in cold weather; that the traveler must exercise somewhat more than his usual care and prudence in going about when there is snow and ice upon the ground; that it is contributory negligence on his part to go upon pavements, or parts of the highway that he knows to be dangerous by reason of the presence of ice or

79 Short v. Baltimore City Passenger Ry. Co., 50 Md. 73; 33 Am. Rep. 298.

80 Gerald v. Boston, 108 Mass. 584. *Cf.* Hall v. Lowell, 10 Cush. 260; Stanton v. Springfield, 12 Allen, 566.

81 Goddard, Petitioner, &c., 16 Pick. 504; 28 Am. Dec. 259.

82 Kirby v. Boylston Market Association, 14 Gray, 252.

83 Gridley v. City of Bloomington, 88 Ill. 554; 30 Am. Rep. 566. But see, also, City of Hartford v. Talcott, 48 Conn. 525; 40 Am. Rep. 189.

snow, when he might avoid it and take another course; that mere knowledge that the pavement is icy or slippery is not sufficient to fasten negligence upon one who goes upon it; and that city ordinances which require every man to sweep the snow from before his own door are of somewhat questionable validity.

§ 276. Injuries to persons in the highway from something falling from the adjoining property.— It is the duty of the owners of property adjoining a public highway to take reasonable and ordinary care to prevent anything from falling into the highway to the injury of persons who are lawfully there. Accordingly, when buildings whose walls are upon the street become ruinous, and are likely to fall, it is the duty of the owner to take proper steps to prevent them from falling into the highway.[84] Such a building is, moreover, a public nuisance, for which an indictment will lie;[85] and when one, in the exercise of due care in using the highway, is injured by something falling from such a ruinous and tumble-down structure, he may have his action against the owner or occupant of the property.[86] And there is a like rule when something falls out of a window and injures one passing along the highway beneath;[87] and so when a hanging sign falls upon the head of a passer-by,[88] there is an action against the owner or occupant of the property, but not against the city as for a defect in the highway.[89] It seems, however, that the municipality is liable for injuries to passers-by from defectively hung awnings over the pavement,[90] and from weak show-boards erected next

[84] Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530 (by Dwight, C.); Rector of the Church of the Ascension v. Buckhardt, 3 Hill, 193.

[85] Regina v. Watts, 1 Salk. 357.

[86] Murray v. McShane, 52 Md. 217; 36 Am. Rep. 367. See, also, generally the cases cited *supra*. But where the falling of a wall was a mere accident, there being no negligence on the part of the owner, he was not liable. Mohoney v. Libbey, 123 Mass. 20; 25 Am. Rep. 6.

[87] Byrne v. Boadle, 2 Hurl. & C. 722.

[88] Salisbury v. Herchenroder, 100 Mass. 458. The defendant in using a hanging sign was violating a municipal ordinance. It would seem that the case would have been differently decided had it not been for this fact. 8 Am. Rep. 354.

[89] Taylor v. Peckham, City Treasurer, &c., 8 R. I. 349; 5 Am. Rep. 578; Hewiston v. City of New Haven, 37 Conn. 475; 9 Am. Rep. 342; Jones v. Boston, 104 Mass. 75; 6 Am. Rep. 194.

[90] It was the duty of the surveyors of the highway to see that everything thereon should be kept in repair. It was in their power to cause the removal of the awn-

to the sidewalk and blown down by the wind,[91] but not for snow that falls from an adjoining roof to the injury of a traveler.[92] When signs are negligently put up, the person who is responsible for the defective hanging is liable;[93] and so when buildings are so constructed as to project ice or snow upon the highway during a thaw, the owner of the property is liable for damage resulting to a passer-by;[94] or when, in erecting a wall upon property adjoining the highway, a brick is carelessly allowed to fall upon the head of a traveler,[95] an action may be maintained, but not in favor of trespassers or persons not exercising due care.[96]

§ 277. **The same subject continued.**—In Byrne v. Boadle,[97] it appears that an injury was caused by the falling of a barrel into

ing if it was defectively attached. Failing to take any steps, the city assumed all liability. Drake v. Lowell, 13 Metc. 292; Day v. Milford, 5 Allen, 98.

91 Langan v. City of Atchison, 35 Kan. 318; 11 Pac. Rep. 38.

92 Hixon v. Lowell, 13 Gray, 59; Rowell v. City of Lowell, 7 Gray, 100; Shipley v. Fifty Associates, 101 Mass. 251.

93 See generally the cases cited *supra*. The owner of the building is liable to one who is injured by the fall of an awning insecurely supported in violation of a city ordinance. Jessen v. Swelgert, 66 Cal. 182.

94 One who is unloading a wagon in a street, in a reasonable and proper manner, is rightfully in the highway as a traveler, so as to be entitled to recover for injuries caused by snow falling from a building. Smethurst v. Barton Square Church, 148 Mass. 261; 19 N. E. Rep. 387. One who sits down on a step to rest, and is injured by the fall of a cake of ice, is not, necessarily, guilty of contributory negligence. The question is for the jury. Kaples v. Orth, 61 Wis. 531. Where, through defendant's negligence, snow falls from his building and strikes plaintiff's horse, causing it to run away, the injuries received by the plaintiff in being thrown from the wagon to which the horse was attached are the proximate result of such negligence. Smethurst v. Barton Square Church, 148 Mass. 261. If the roof is so constructed that ice and snow collecting on it will naturally and probably fall upon the sidewalk, that is sufficient proof of negligence. Hannem v. Pence, 40 Minn. 127; 41 N. W. Rep. 657; Garland v. Towne, 55 N. H. 55; 20 Am. Rep. 164; Hixon v. Lowell, 13 Gray, 59. See, also, Kearney v. London, &c., Ry. Co., L. R. 6 Q. B. 759; Rylands v. Fletcher, L. R. 1 Exch. 265; affirmed, L. R. 3 H. L. 330; 3 Hurl. & C. 774; Bigelow v. Reed, 51 Me. 325.

95 Jager v. Adams, 123 Mass. 26; 25 Am. Rep. 7.

96 Zoebisch v. Tarbell, 10 Allen, 385; Roulston v. Clark, 5 E. D. Smith, 366; Stone v. Jackson, 16 C. B. 199; 32 Eng. Law & Eq. 349; Bolch v. Smith, 7 Hurl. & N. 736.

97 2 Hurl. & C. 722; 33 L. J. (Exch.) 13; 9 L. T. (N. S.) 450; 12 Week. Rep. 279.

the highway from the upper window of a shop. To the point of the proprietor's liability Baron Pollock said:—"There are many accidents from which the presumption of negligence cannot arise; but this is not true in all cases. * * * It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and, I think, that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be *prima facie* evidence of negligence."[98]

§ 278. **Children injured upon the highway.**—The general rules of law which require the exercise of especial care toward children of tender years when they are exposed or expose themselves to the danger of injury from the negligence of others,[99] and which, in some jurisdictions, impute the negligence of a parent or custodian to the infant who brings an action for damages for injuries sustained by reason of another person's want of care and caution,[1] are applicable, of course, in all respects, to actions brought for injuries which befall children upon the highway. The question often arises whether children may lawfully and properly play in the street, and whether, in case they are injured, while at play upon the highway, by the negligence of the driver of a vehicle or otherwise, there can be a recovery, or whether such conduct on their part is not such contributory negligence as to bar the action. In New York it seems that children may lawfully play in the street;[2] and so in Pennsylvania[3] and in New

[98] See, also, Scott v. London Docks Co., 3 Hurl. & C. 596; 11 Jur. (N. S.) 204; 34 L. J. (Exch.) 17, 220; 11 Week. Rep. 410; 11 L. T. (N. S.) 148; 10 Jur. (N. S.) 1107; Maddox v. Cunningham, 68 Ga. 431; 45 Am. Rep. 500; Domat on Civil Law, § 1557.

[99] §§ 117, 122, *supra.*

[1] § 116 *et seq.*, *infra.*

[2] McGary v. Loomis, 63 N. Y. 104; 20 Am. Rep. 512; McGuire v. Spence, 91 N. Y. 303. *Cf.* Pearsall v. Post, 20 Wend. 111, 131; Cosgrove v. Ogden, 49 N. Y. 255; 10 Am. Rep. 361; Ihl v. Forty-second St. Ry. Co., 47 N. Y. 317; 7 Am. Rep. 450.

[3] Pittsburgh, &c., R. Co. v. Pearson, 72 Penn. St. 169; Kay v. Penn. R. Co., 65 Penn. St. 369; 3 Am. Rep. 628; Philadelphia, &c., R. Co. v. Long, 75 Penn. St. 257, in which the question is intelligently discussed. *Cf.* Smith v. Hestonville, &c., R. Co., 92 Penn. St. 450; 37 Am. Rep. 705; Gillespie v. McGowen, 100 Penn. St. 144; 45 Am. Rep. 365; Fairbanks v. Kerr, 70 Penn. St. 86; 10 Am. Rep. 664.

Hampshire,[4] while in Maine[5] and Massachusetts[6] the courts incline to the opposite view, and refuse a remedy to children who are injured while playing in the street. It appears, therefore, that the courts are not agreed upon the point.

§ 279. This rule further illustrated.— The New York rule was well announced by Chief Justice Church in McGary v. Loomis:[7] — "A point is made upon an exception to the remark of the judge that the child had the right to play on the sidewalk. This language was used in connection with the remark that the child had a right to be on the sidewalk, and the whole force of the remark as to the right to play was, that being on the sidewalk, the fact of playing there would not constitute contributory negligence so as to defeat a recovery. If it did not mean this it had no relevancy to the case, and was not for that reason error. There was no occasion for a charge as to the legal right of children to play on the sidewalk, to the exclusion of or interference with persons passing and repassing, nor was any such idea intended. That it is not unlawful, wrongful or negligent for children on the sidewalk to play is a proposition which is too plain for comment."[8] But, on the other hand, we find the Supreme Court of Maine saying:— "When children appropriate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road."[9] And, in Blodgett v. Boston,[10] the Supreme Judicial Court of Massachusetts said:— "We by no means intend to say that a child, who receives an injury caused by a defect in a street while passing over or through it, would be

4 Varney v. Manchester, 58 N. H. 430; 42 Am. Rep. 592; Petition of Mt. Washington Road Co., 35 N. H. 134.

5 Stinson v. City of Gardiner, 43 Me. 284.

6 Tighe v. Lowell, 119 Mass. 472; Lyons v. Brookline, 119 Mass. 491. *Cf.* Stickney v. Salem, 3 Allen, 374; Hunt v. Salem, 121 Mass. 294; Blodgett v. Boston, 8 Allen, 237; Stock v. Wood, 136 Mass. 353; Gibbons v. Williams, 135 Mass. 333. As to care required of child in crossing a street see Hayes v. Norcross, 162 Mass. 546; 39 N. E. Rep. 282.

7 63 N. Y. 104.

8 In the later case of McGuire v. Spence, 91 N. Y. 303, this right of children, upon general principles, to play in the street, is further insisted upon.

9 Stinson v. City of Gardiner, 42 Me. 248.

10 8 Allen, 237.

barred of all remedy against a town merely because he was also engaged in some childish sport or amusement. There would exist in such a case the important element that he was actually traveling over the way. But this element is wholly wanting in the case at bar. We have the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design to pass or repass over it for the purpose of travel within the meaning of the statute. It is to this precise case that we confine the expression of our opinion." In later cases in this State it is plainly declared to be the law that whenever children make a play-ground of the highway, they are remediless in case of injury from defects in the street.[11]

§ 280. **The rule in New Hampshire.**— "It being legally possible," said Chief Justice Doe, of New Hampshire, "to cease moving forward or backward in a street without discontinuing a traveler's use of the street, and it being possible for a child as well as an adult to make a traveler's use of it for recreation, there may be some doubt how the line is to be drawn between the law and the fact in such a case as Blodgett v. Boston. Of the case of a boy injured while using a portion of the highway solely for the purpose of enjoying the amusement of coasting, the court there say it would hardly be contended that the town could be held liable. Perhaps such a case should be considered in connection with the case of the boy's parents injured while using the same portion of the highway solely for the purpose of enjoying the amusement of a sleigh-ride. In the highway act there is no arbitrary rule of discrimination against the amusements of children, no prohibition of the use of gravitation as a motive power, and no requirement that a person going out to drive for amusement, or for fresh air and health of body or mind, shall not turn in the road more than once, or shall not go over the same route more than twice."[12]

§ 281. **The author's criticism.**— The sounder view, in my judgment, is, that it is not *in se* negligence for children to amuse themselves in the street nor, necessarily, negligent in parents to permit their children to do so. Much must depend upon the circumstances of each individual case. It is easy to see that for children of tender years to be allowed to play in Broadway, in

[11] See generally the cases cited *supra* to this point.

[12] Varney v. Manchester, 58 N. H. 430; 42 Am. Rep. 592.

the city of New York, might not improperly be held negligence as matter of law, while upon many other streets, even in the great cities, which are not greatly thronged with teams and children to amuse themselves. Any straiter rule than this pedestrians, it might as justly be held entirely prudent to allow would deny the children of the poor in the cities the benefit of air and exercise. If all children must go to the park, or be attended by a nurse to escape the imputation of negligence, how shall the children of parents whose lack of means forbids these luxuries, take exercise, and what is the parent of such children to do? The courts of Pennsylvania have taken an eminently just and humane view of this matter,[13] and what seems to be the only view that does not deny to poor parents the ordinary blessings of light and air for their children. This is not at all the same thing as to justify the use of the highway for sports or games to the inconvenience or trouble of travelers. The lawful purposes and uses of the king's highway are well defined. When sport, either of children or adults, interferes with the regular and proper use of the street, it is a nuisance for which the law provides an action or an abatement. Conceding this, it may well be insisted that children shall not, because they play in the highway without interfering with the rights of others, be, on that account, denied a remedy when they are injured through the carelessness or negligence of others. Aside from the question of the right of children to play upon the highway, there is, perhaps, nothing peculiar or worthy of mention in the law as it affects the rights and liabilities of this class of persons upon the highway, which, as properly pertaining to the subject-matter of this treatise, is not adequately considered elsewhere.

§ 282. **Collisions upon the highway.**— The law of the road in the United States requires travelers in vehicles, when they approach each other upon a highway, each to turn to the right, if it be reasonably practicable so to do, and statutes in most of the States prescribe it explicitly. These statutes usually provide that travelers shall, in passing, each turn to the right of "the center[14] of the road."[15] When one is on the wrong side of the

[13] Phila., &c., R. Co. v. Long, 75 Penn. St. 257; Pittsburgh, &c., R. Co. v. Pearson, 72 Penn. St. 169; Glassey v. Hestonville Street R. Co., 57 Penn. St. 172. *Cf.* O'Flaherty v. Union R. Co., 45 Mo. 70. See § 133, *supra*, and Elliott on Roads and Streets, 473.

[14] *Anglice*, middle.

[15] As to what this means, see

road at the time of a collision it is *prima facie* evidence of negligence upon his part,[16] but will not, as matter of law, defeat the action if it appears that it did not contribute to produce the injury for which the action is brought, and the plaintiff be himself free from the imputation of negligence in other respects.[17] It is, however, a circumstance, and a very strong one, for the court to consider in deciding whether the party acted with reasonable care.[18] But being upon the proper side of the road will not, of itself, be conclusive evidence of an exercise of due care and caution. One may be upon the right side and yet be wrong,[19] especially if it appears that by taking the other side, instead of rigidly adhering to the right, the injury might have been avoided.[20] The law of the road is said, in Pennsylvania, to apply

Earing v. Lansing, 7 Wend. 185; Palmer v. Barker, 3 Fairf. (Me.) 338; Smith v. Dygert, 12 Barb. 613; Jaquith v. Richardson, 8 Metc. 213. A bicycle is a "carriage" or "vehicle," within the meaning of these provisions. State v. Collins, 16 R. I. 371; 17 Atl. Rep. 131. A person in a carriage drawn by horses, and the rider of a bicycle have equal rights upon the highway; and allegations that defendant rode a bicycle in the center of the road at the rate of fifteen miles an hour, up to within twenty-five feet of the faces of plaintiff's horses, whereby they became frightened and ran away and injured plaintiff, do not state a cause of action. Holland v. Bartch, 120 Ind. 46; 22 N. E. Rep. 83.

16 Newman v. Ernst, 10 N. Y. Supl. 310; Burdick v. Worrall, 4 Barb. 596; Damon v. Inhabitants of Scituate, 119 Mass. 66; 20 Am. Rep. 315; Smith v. Gardiner, 11 Gray, 418; Spofford v. Harlow, 3 Allen, 176; Jones v. Andover, 10 Allen, 18. See, also, Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191.

17 O'Neil v. Town of East Windsor, 63 Conn. 150; 27 Atl. Rep. 237; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Parker v. Adams, 12 Metc. 415; 46 Am. Dec. 694; Simmonson v. Stellenmerf, 1 Edm. Sel. Cas. 194; Clay v. Wood, 5 Espin. 44; Chaplin v. Hawes, 3 Car. & P. 555; Wayde v. Lady Carr, 2 Dow. & Ry. 255, and the cases generally last cited; Finegan v. L. &. N. W. Ry. Co., 53 J. P. 663.

18 O'Neil v. Town of East Windsor, 63 Conn. 150; 27 Atl. Rep. 237.

19 Parker v. Adams, 12 Metc. 415; 46 Am. Dec. 694. A driver who fails to exercise due care while attempting to pass another driver coming from the opposite direction is not precluded thereby from recovering for injuries to his property resulting from a collision, where the conduct of the other party is wanton and wilful. Tyler v. Nelson, 109 Mich. 37; 66 N. W. Rep. 671.

20 Brooks v. Hart, 14 N. H. 307; Johnson v. Small, 5 B. Mon. 25; Goodhue v. Dix, 2 Gray, 181; Smith v. Gardiner, 11 Gray, 418;

only to travelers who approach each other in coming from opposite directions,[21] but in Louisiana it is held to apply equally to persons moving in the same direction when one attempts to pass the other.[22] When one traveler attempts, as he has a right to do, to pass another who is ahead of him and moving in the same direction, it is said that the one ahead is not under any legal obligation to turn to either side to allow the one behind to go on in front of him,[23] and that the one who attempts to pass does so at his peril, and is responsible for all damages which he thereby causes to the one whom he attempts to pass.[24] Irrespective of the statutory law of the road, the universal usage of vehicles in the highway to turn to the right, is a proper circumstance to be considered in determining whether the conduct of the party injured by a collision was that of a man of ordinary prudence.[25]

§ **283. The same subject continued.**— But, in an action against a town for injuries sustained through a defect in the highway while attempting to pass another traveler going in the same direction, it is distinctly declared that such attempt, if not made recklessly, is not *in se* negligent, and, accordingly, not contributory negligence which will prevent a recovery.[26] It is not

O'Malley v. Dorn, 7 Wis. 236. "As a matter of common practice, however, the fact that a person was driving on the wrong side would be strong evidence of negligence on his part." Hastings on Torts, 176.

[21] Bolton v. Colder, 1 Watts, 360.

[22] Avegno v. Hart, 25 La. Ann. 235; 13 Am. Rep. 133. The statute "law of the road" has no application to carriages meeting at the junction of two streets. Morse v. Sweenie, 15 Ill. App. 486.

[23] Bolton v. Colder, 1 Watts, 360.

[24] Avegno v. Hart, 25 La. Ann. 235; 13 Am. Rep. 133. See, also, Knowles v. Crampton, 55 Conn. 336; 11 Atl. Rep. 593, where the rule is applied when the team in advance is standing still.

[25] Laufer v. Bridgeport Traction Co., 68 Conn. 475; 37 Atl. Rep. 379.

[26] Fopper v. Wheatland, 59 Wis. 623; Mochler v. Town of Shaftsbury, 46 Vt. 580; 14 Am. Rep. 634. One cannot be charged with negligence in calling out on the highway to a driver that a team wants to pass him, although the sound frightens the driver's horse and brings about a collision. Pigott v. Lilly, 55 Mich. 150. Plaintiff, having turned out of the road to pass another traveler only so far as was necessary to pass, was not negligent in failing to see a wire running from a sunken stone in the road to a telegraph pole, and used to support the latter. Sheldon v. Western Union Tel. Co., 4 N. Y. Supl. 526; 51 Hun, 591.

negligent, said the Supreme Court of Kansas, not to be on the lookout for a runaway team that dashes up from behind, and runs against your vehicle and does you an injury;[27] but it is such contributory negligence as will prevent a recovery to hitch a horse by the roadside in such a way that the hind wheel of your buggy stands in the rut of the beaten track, so that another person in driving by runs into it without diverging to any degree from the track.[28] In New York the driver of an ambulance, being entitled to the right of way by statute, may assume that the driver of a wagon ahead of him will heed the ambulance bell, and if the ambulance driver is injured by a collision without negligence on his part, he may recover damages.[29] The law of the road does not usually apply to persons on horseback who must, as a rule, yield the road to a vehicle,[30] especially to one heavily loaded.[31] It is an almost unnecessary reiteration of elementary rules to say that contributory negligence, upon the part of one who brings his action for damages for injuries sustained upon the highway by reason of the negligence of another, is a defense in the same sense and to the same extent that it is in actions for any other class of injuries. There is nothing that I know peculiar in this respect in actions of this nature. The plaintiff must himself be free from fault contributing to produce or occasion the mischief of which he complains, or his right of action is gone.[32]

[27] Moulton v. Aldrich, 28 Kan. 300. A like rule applies when a traveler is overtaken by persons racing at a speed prohibited by ordinance. Potter v. Moran, 61 Mich. 60; 27 N. W. Rep. 854.

[28] Le Baron v. Joslin, 41 Mich. 313.

[29] Byrne v. Knickerbocker Ice Co., 56 N. Y. Super. Ct. 337; 4 N. Y. Supl. 531.

[30] Dudley v. Bolles, 24 Wend. 465.

[31] Washburn v. Tracy, 2 D. Chip. (Vt.) 128; 15 Am. Dec. 661; Beach v. Parmenter, 23 Penn. St. 196.

[32] Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Parker v. Adams, 12 Metc. 415; 46 Am. Dec. 694; Lane v. Crombie, 12 Pick. 177; Monroe v. Leach, 7 Metc. 274; Mabley v. Kittleberger, 37 Mich. 360; Moody v. Osgood, 54 N. Y. 488; Wynn v. Allard, 5 Watts & S. 521; Drake v. Mount, 33 N. J. Law, 441; Lane v. Bryant, 9 Gray, 245; Wood v. Luscombe, 23 Wis. 287; Larrabee v. Sewall, 66 Me. 376; Harpell v. Curtis, 1 E. D. Smith, 78; McLane v. Sharpe, 2 Harr. (Del.) 481; Fales v. Dearborn, 1 Pick. 344; Daniels v. Clegg, 28 Mich. 32; Brooks v. Hart, 14 N. H. 307; Knapp v. Salsbury, 2 Camp. 500; Jones v. Boyce, 1 Stark. 493; Chaplin v. Hawes, 3 Car. & P. 554; Pluckwell v. Wilson, 5 Car. & P. 375; Williams v. Holland, 6 Car. & P. 23; Wayde v. Lady Carr, 2 Dow. & R. 255.

§ 284. Injuries upon ferryboats.— A ferryman is a common carrier and, as such, becomes liable for the safety of his passengers and their baggage as soon as he signifies his readiness or willingness to receive them.[33] But when one, in taking his property upon a ferryboat, retains possession of it, the liability of the ferryman is thereby essentially modified. He is liable for negligence, but is not an insurer as to such property.[34] In view of the construction of ferryboats, and the habit of passengers to crowd toward the bow as the boat approaches the landing, it is held not necessarily negligent — that is, not negligent as matter of law, for a passenger on a ferryboat to stand near the bow as the boat is landing.[35] Nor is he in fault in standing near the

[33] May v. Hanson, 5 Cal. 360; 63 Am. Dec. 135; Richards v. Fuqua's Admr., 28 Miss. 792; 64 Am. Dec. 121; Griffith v. Cave, 22 Cal. 235; Clark v. Union Ferry Co., 35 N. Y. 485; Willoughby v. Horridge, 12 C. B. 745; Self v. Dunn, 42 Ga. 528; Albright v. Penn, 14 Tex. 290; Littlejohn v. Jones, 2 McMull, 365; 39 Am. Dec. 132; Sanders v. Young, 1 Head, 219; Wilson v. Hamilton, 4 Ohio St. 722; Miller v. Pendleton, 8 Gray, 547; Claypool v. McAllister, 20 Ill. 504; Chevalier v. Straham, 2 Tex. 115; 47 Am. Dec. 639, and the note; Slimmer v. Merry, 23 Iowa, 94; Angell on Carriers, § 82; Story on Bailments, § 496; 2 Kent's Commentaries, 599.

[34] Wyckoff v. The Ferry Co., 52 N. Y. 32; 11 Am. Rep. 650; Harney v. Rose, 26 Ark. 3; 7 Am. Rep. 595. The proprietor of a strictly ferry business is not necessarily a common carrier of property, and is bound only to due care and diligence as to property transported with the owner; but if he combines, as is frequently the case, with the business of a ferryman the carrying of merchandise without the presence of the owner, he is bound by the obligations of a common carrier as to such property, including the obligation to carry all merchandise delivered to him. City of New York v. Starin, 12 N. E. Rep. 631. A ferryman, receiving horses in charge of a driver for transportation, is not liable for an accident to them, in the absence of negligence on his part. The fact that between the apron of planks attached to the boat and thrown out at the landing and the boat there was a crack in which a frightened horse caught his leg and broke it, was held not to show negligence. Yerkes v. Sabin, 97 Ind. 141; 49 Am. Rep. 434. See, also, upon the general question of *when* the liability of a common carrier attaches to a ferryman, Blakeley v. Le Duc, 19 Minn. 187; Gourdine v. Cook, 1 Nott & M. 19; Cohen v. Hume, 1 McCord, 444; White v. Winisimmet Co., 7 Cush. 156; Wharton on Negligence, § 707.

[35] Peverly v. City of Boston, 136 Mass. 366; 49 Am. Rep. 37; Cleveland v. Steamboat Co., 68 N. Y. 306; Gannon v. Union Ferry Co., 29 Hun, 631; Hawks v. Winans, 74 N. Y. 609; 42 N. Y. Super. Ct. 451. But see, *contra*, Cunningham v. Lyness, 22 Wis. 245.

head of a stairway down which he is thrown by the concussion of the boat in entering the slip.[36] But where a child six years of age, in leaving a ferryboat constructed in the usual manner, fell through the guards where the boat fitted into the slip and was drowned, it appearing that no similar accident had ever happened, the ferry company was held not liable.[37] Where a ferryboat has two gangways by which passengers can leave, a passenger who attempts to leave by the gangway intended for teams, and who is injured by the guard-chain for such gangway being dropped on his leg while he is astride of it, is guilty of contributory negligence, and cannot recover from the owner of the boat.[38] If a person on leaving a ferryboat voluntarily joins a crowd which is so dense as to prevent him from seeing where he treads, and voluntarily proceeds with such crowd, and is injured by his foot being caught between the boat and the dock, such conduct, *per se*, manifests contributory negligence, and he should be non-suited.[39] And when one drove a spirited team upon a ferryboat and negligently suffered them to get away from him, whereupon they became frightened, plunged overboard, and were drowned, it was held, that in the absence of any proof of negligence on the part of the ferry company, they were not liable for the loss.[40] Where it was a common occurrence for passengers, in passing from the waiting-room down the passageway toward the boat, to be forced into the roadway by the pushing of the crowd, the company was held negligent in not providing against such accidents.[41]

[36] Bartlett v. New York, &c., Transp. Co., 8 N. Y. Supl. 309; 57 N. Y. Super. Ct. 348.

[37] Loftus v. Union Ferry Co., 84 N. Y. 455; 38 Am. Rep. 533. Plaintiff, in passing from defendant's waiting-room to its ferryboat, was struck by a swinging door. Held, that, as the door was an ordinary one, in plain view, and not part of defendant's machinery for transportation, plaintiff must prove his allegations of negligence. Hayman v. Pennsylvania R. Co., 118 Penn. St. 508. *Cf.* Dougan v. Champlain Trans. Co., 56 N. Y. 1. And see, also, Crocheron v. North Shore, &c., Ferry Co., 56 N. Y. 656.

[38] Graham v. Pennsylvania R. Co., 39 Fed. Rep. 596.

[39] Droyer v. N. Y., &c., Ry. Co., 48 N. J. Law, 373; 7 Atl. Rep. 417. It was decided to be a judicious act for a passenger to jump out of a cabin window after the boat had turned on its side and righted again with the cabins full of water. Ladd v. Foster, 31 Fed. Rep. 827.

[40] Dudley v. Camden & Phila. Ferry Co., 33 N. J. Eq. 25; 38 Am. Rep. 501. See, also, Evans v. Rudy, 34 Ark. 385; Yerkes v. Sabin, 97 Ind. 141; 49 Am. Rep. 434.

[41] Tonkins v. New York Ferry Co., 47 Hun, 562.

CHAPTER XI.

STREET RAILWAYS.

§ 285. Duties of street railway companies as common carriers.
286. Intoxicated passengers.
287. Duty as to pedestrians.
288. Walking upon a street railway track.
288a. Crossing street at other places than regular crossings.
289. The track not a highway.
290. The degree of care not the same as that required in case of steam railroads.
290a. Where cars operated by electricity or the cable.
291. Alighting from or boarding moving street cars.
§ 292. Where motive power is electricty or the cable.
293. Riding upon the platforms of street cars.
294. How far it is the duty of the passenger to ride inside the car when there is room.
295. Risks assumed by passengers riding in exposed position.
296. Passenger's hand or arm outside of the car window.
297. Free passengers and trespassers upon street cars.
298. The New England Sunday rule applied to street railways.

§ 285. Duties of street railway companies as common carriers.— In actions brought against street car companies, by passengers and others, for injuries sustained by reason of the negligence of the company's employees *in faciendo*, or *in non faciendo*, contributory negligence is very often a defense. We, therefore, in this and the following sections, proceed to consider the law in point as affecting that defense in actions of this nature. Street railway companies, as carriers of passengers, are common carriers and *ipso facto* bound to the full measure of a carrier's liability for the safety of those who ride in their cars. They are accordingly liable for injuries that result to their passengers from the negligence of their servants and agents within the scope of their proper employment.[1] Among the duties which the law imposes

[1] Holly v. Atlanta Street R. Co., 61 Ga. 215; 34 Am. Rep. 97; Balto. City Passenger R. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134; Putnam v. Broadway, &c., Ry. Co., 55 N. Y. 108; 14 Am. Rep. 190. *Cf.* Pittsburgh, &c., R. Co. v. Hinds, 53 Penn. St. 512; New Orleans, &c., R. Co. v. Burke, 53 Miss. 200; 24 Am. Rep. 689; Weeks v. New York, &c., R. Co., 72 N. Y. 50; 28 Am. Rep. 104. Where a passenger on a street railway car is injured by a sudden jerk of the

upon the street railway company is that of protecting its passengers from insult or assault, and for a failure in this regard the passenger may have his action, if the company's servants are in any respect negligent or blameworthy.[2] The company is also responsible for an unlawful assault or for an excess of force on the passenger by its employees acting in the line of their duty,[3] even though the act be wanton and malicious.[4] In Goddard v.

car, in transit, there is a presumption of negligence on the part of the carrier. Dougherty v. Missouri, &c., R. Co., 81 Mo. 325; 51 Am. Rep. 239; and where the injury is caused by a collision between the car and a bridge, the burden of disproving negligence is on the railroad company. Wilkerson v. Corrigan, &c., Street Ry. Co., 26 Mo. App. 144. The same rule applies when the cars collide. Smith v. St. Paul, &c., Ry. Co., 32 Minn. 1; 50 Am. Rep. 550. The utmost care and foresight are required in the construction and operation of the road. Watson v. St. Paul, &c., Ry. Co., 42 Minn. 46; 43 N. W. Rep. 904; McSwyny v. Broadway, &c., R. Co., 7 N. Y. Supl. 456; Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587; 13 N. E. Rep. 55. Where the driver, after giving up the reins to a substitute, carelessly knocked a passenger off the platform in leaving the car himself, the company was held liable. Commonwealth v. Brockton, &c., Ry. Co., 143 Mass. 501; 10 N. E. Rep. 506. A person acquires the rights of a passenger while stepping on a car that has stopped for him. McDonough v. Metropolitan R. Co., 137 Mass. 210; Smith v. St. Paul, &c., Ry. Co., 32 Minn. 1.

[2] See, also, generally the cases cited *supra*.

[3] Springer Transp. Co. v. Smith, 16 Lea, 498; 1 S. W. Rep. 280; Passenger R. Co. v. Young, 21 Ohio St. 518; 8 Am. Rep. 78; Higgins v. Watervliet, &c., R. Co., 46 N. Y. 23; 7 Am. Rep. 293; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; Jackson v. Second Ave. R. Co., 47 N. Y. 274; 7 Am. Rep. 448; Sherley v. Billings, 8 Bush, 147; Hoffman v. New York, &c., R. Co., 87 N. Y. 25; 41 Am. Rep. 337; Chicago, &c., R. Co. v. Flexman, 103 Ill. 546; Keokuk, &c., Packet Co. v. True, 88 Ill. 608; Goddard v. Grand Trunk Ry. Co., 57 Me. 202, holding that if the company retain the offending employee in their service after his misconduct is known to them, they will be liable to exemplary damages. 2 Am. Rep. 39; Carter v. Louisville, &c., R. Co., 98 Ind. 552; 49 Am. Rep. 780; Johnson v. Chicago, &c., R. Co., 58 Iowa, 348; Benton v. Chicago, &c., R. Co., 58 Iowa, 496; Nevin v. Pullman, &c., Car Co., 106 Ill. 222; 46 Am. Rep. 688; Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311; Ramsden v. Boston, &c., R. Co., 104 Mass. 117; 6 Am. Rep. 200; Limpus v. London Genl. Omnibus Co., 1 Hurl. & C. 541; Bayley v. Manchester, &c., Ry. Co., L. R. 7 C. P. 415; The Thetis, L. R. 2 A. & E. 365.

[4] Isaacs v. Third Ave. R. Co., 47 N. Y. 122, lays down a contrary doctrine, but that case is distinctly overruled by Stewart v. Brooklyn, &c., R. Co., 90 N. Y. 588. This exception to the general rule ex-

Grand Trunk Ry. Co.[5] the court, upon this point, said:— "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. If this duty to the passenger is not performed — if this protection is not furnished — but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible."

§ **286. Intoxicated passengers.**— It is held in New York that a street car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow passengers, although he is manifestly intoxicated, if, upon being admonished by the conductor, he remain quiet and unoffensive, and that the company is not to be held responsible for the results of a subsequent unlooked for attack committed by the drunken passenger upon the passenger whom he had previously insulted.[6] But in the District of Columbia it seems that when one appears to be drunk, being sick and unable to sit up properly, and vomiting, the con-

empting the master from liability for wanton and malicious acts of his servant rests upon the existence of a contract relation between the carrier and the passenger. In the case last cited, where a passenger was maliciously beaten by the driver of a horse car, this point was elucidated by the New York Court of Appeals as follows:—"By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to ensure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. * * * He was injured while in the defendant's car by the act of the agent to whom the defendant had entrusted the execution of the contract. It is the defendant's failure to carry safely and without injury that constitutes the breach, and it is no defense to say that that failure was the result of the wilful or malicious act of the servant." To the same effect are Bryant v. Rich, 106 Mass. 180, 190; North Chicago, &c., Ry. Co. v. Gastka, 128 Ill. 613; 21 N. E. Rep. 522; Lyons v. Broadway, &c., R. Co., 10 N. Y. Supl. 237.

[5] 57 Me. 202; 2 Am. Rep. 30.

[6] Putnam v. Broadway, &c., R. Co., 55 N. Y. 108; 14 Am. Rep. 190.

ductor may lawfully eject him from the car, and that, too, whether his sickness proceeds from drunkenness or not.[7] Where passengers are intoxicated and disorderly, and, upon being admonished by the conductor, refuse to be quiet, it is the plain duty of the conductor to compel them to leave the car. Street cars are for the exclusive use and benefit of sober and orderly folk. That a passenger is drunk will not, of itself, justify the conductor in ejecting him, but if, in addition to that, he is disorderly and refuses to be controlled, or is, by reason of his cups, disgusting and offensive to the other passengers, he has, being in that condition and so deporting himself, no right to ride, and the conductor may lawfully require him to leave the car.[8] Where it appeared that plaintiff had been drinking, was riding on the front platform, although without objection, and stepped to the lower step to permit persons to pass, and that a sudden movement of the car, by which he was injured, was not unusual, and should not have been unexpected, it was held that a nonsuit should have been granted.[9] It is not necessary that a passenger on a street car should tender the exact amount of his fare, but he must tender a reasonable amount, and the carrier must furnish change, and five dollars is such a reasonable amount.[10] And the act of a street car driver in delivering a passenger over to a

[7] Lemont v. Washington, &c., R. Co., 1 Mackey, 180; 47 Am. Rep. 238. See, also, 2 Mackey, 502; 47 Am. Rep. 268, upon another point which will interest the curious reader. *Cf.*, however, Conolly v. Crescent R. Co., 41 La. Ann. 57, where a passenger on a street car was stricken with apoplexy, which was attended with vomiting, causing inconvenience and discomfort to the other passengers. He was removed from the car and laid in the open street, with no effort to procure him attention. It was held that the mistake of the driver in supposing that the passenger was drunk, when the latter had ridden a considerable distance without misbehavior, and had been guilty of none except the vomiting occasioned by his illness, was decided not to relieve the company from liability.

[8] Lemont v. Washington, &c., R. Co., 1 Mackey, 180. And see, also, Pittsburgh, &c., R. Co. v. Hinds, 53 Penn. St. 512; Flint v. Norwich, &c., Trans. Co., 34 Conn. 554; 6 Blatchf. 158; Pearson v. Duane. 4 Wall. 605; Vinton v. Middlesex R. Co., 11 Allen, 304. Whether it is due care and proper exercise of this right for the conductor to attempt to remove the intoxicated person while the car is in motion, is not a question of law for the court, but of fact for the jury. Murphy v. Union Ry. Co., 118 Mass. 228; New Orleans, &c., R. Co. v. Burke, 53 Miss. 200; 24 Am. Rep. 689; Pittsburgh, &c., R. Co. v. Pillow, 76 Penn. St. 510; 18 Am. Rep. 424.

[9] Hayes v. Forty-second St., &c., R. Co., 97 N. Y. 259.

[10] Barrett v. Market St. Ry. Co., 81 Cal. 296.

policeman on the ground that he has not paid his fare and will not leave the car, is an act for which the company can be held liable by the passenger, if, in fact, he has paid his fare.[11] But a passenger who stands in a crowded street car without objection from the conductor, and who is injured by being thrown from the car while it is rounding a curve, is not precluded from maintaining an action against the street car company.[12]

§ 287. Duty as to pedestrians.— The driver of a street car must, like the driver of any other vehicle upon the highway, exercise ordinary care not to run over pedestrians, or to drive his car into collision with wagons or cariages also upon the street. His failure in this respect will render the company liable in damages to the person injured;[13] as where, from idle curiosity the driver, instead of watching his horses and looking ahead and otherwise properly attending to his duties, stares at a young lady in a doorway,[14] or looks at a fire,[15] or a pigeon,[16] or talks to his friend

11 Brown v. Christopher, &c., R. Co., 34 Hun, 471.

12 Lapointe v. Middlesex R. Co., 144 Mass. 18.

13 Chicago City Ry. Co. v. Robinson (Ill.), 18 N. E. Rep. 772; Hill v. Ninth Ave. R. Co., 109 N. Y. 239; 16 N. E. Rep. 61; Franklin v. Forty-second St. R. Co., 3 N. Y. Supl. 229; Heucke v. Milwaukee City Ry. Co., 69 Wis. 401; 34 N. W. Rep. 243, exacts a high degree of care of the driver. Railroad Co. v. Gladmon, 15 Wall. 401; Albert v. Bleecker St. R. Co., 2 Daly, 389; Cohen v. Dry Dock, &c., R. Co., 69 N. Y. 170; Pendleton St. R. Co. v. Shires, 18 Ohio St. 255; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 255; Liddy v. St. Louis, &c., R. Co., 40 Mo. 506. A pedestrain, who, having first looked before him, and neither seeing or hearing a car, started to cross a street and was struck and injured by a horse car coming rapidly around a short curve, will not be precluded from recovering damages for the injuries he sustained, even though his own negligence contributed to the accident, if, by the exercise of reasonable care, the driver of the car could have avoided the consequence of such negligence. North Baltimore Pass. Ry. Co. v. Arnreich, 78 Md. 589; 28 Atl. Rep. 809.

14 Baltimore, &c., R. Co. v. McConnell, 43 Md. 534, 553, where it was also said that what would be ordinary care on the part of the driver would be dependent on the locality through which he is driving. Thus, in a large, populous city, where all descriptions of vehicles are constantly passing, he must not only see that the track is clear, but must exercise constant watchfulness for persons who may be approaching the track. Brooks v. Lincoln St. Ry. Co., 22 Neb. 816; 36 N. W. Rep. 529, holding that the place for the driver is on the platform with the lines in his hands.

15 Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

16 Mangan v. Brooklyn R. Co., 38 N. Y. 455.

riding with him upon the platform,[17] or otherwise neglects his business to gratify his own curiosity or idleness.[18] A driver who is blind in one eye should not be indifferent to the added responsibility resting upon that organ, and if he turns his head away from the direction in which the car is moving, it is a circumstance unfavorable to him in determining whether he was exercising due care.[19] To rush a "grip-car" over a street crossing at a rapid speed, without signal or warning, while a train bound in the opposite direction is discharging passengers at the crossings, is an act which warrants a finding of negligence on the part of the company.[20] Where the driver of a street car, observing a woman driving in a buggy ahead, and being able to stop the car in time for the buggy to pass out of danger, nevertheless drove at

17 Mentz v. Second Avenue R. Co., 2 Robt. 356; 3 Abb. App. Dec. 274.

18 Collins v. South Boston R. Co., 142 Mass. 301; Fenton v. Second Ave. R. Co., 56 Hun, 99; 9 N. Y. Supl. 162; Winters v. Kansas City, &c., Ry. Co., 99 Mo. 509; 12 S. W. Rep. 652; Galveston City R. Co. v. Hewitt, 67 Tex. 473. Evidence that the cars on the company's lines are habitually crowded is admissible and important, because it charges the company with knowledge that the attention of the driver is thereby frequently distracted from the path of the car. Anderson v. Minneapolis St. Ry. Co., 42 Minn. 490; 44 N. W. Rep. 518. If there is no conductor, and the driver is inside collecting fares while the car is in motion, it is at the peril of the company. Saare v. Union Ry. Co., 20 Mo. App. 211; Hyland v. Yonkers R. Co., 1 N. Y. Supl. 363. *Cf.* Stone v. Dry Dock, &c., R. Co., 46 Hun, 184. In Wright v. Third Ave. Ry. Co., 5 N. Y. Supl. 707, it was held that inattention on the part of the driver should not take the case from the jury, and that the question of contributory negligence must not be overlooked. Pendrill v. Second Avenue R. Co., 2 Jones & S. 481; 43 How. Pr. 399; Oldfield v. New York, &c., R. Co., 14 N. Y. 310; Cook v. Metropolitan R. Co., 98 Mass. 361. But see Citizens' Street Ry. Co. v. Carey, 56 Ind. 396. If he is vigilant to see and avoid any obstruction on or dangerously near the track in front of him, he is guilty of no negligence in omitting also to keep a constant watch on each side of the car, to see that no one is injured by coming laterally in collision with it. Bulger v. Albany Ry., 42 N. Y. 459; Boland v. Missouri, &c., R. Co., 36 Mo. 484; Albert v. Bleecker St. R. Co., 2 Daly, 389; Lynam v. Union R. Co., 114 Mass. 83; Suydam v. Grand St. R. Co., 41 Barb. 375; 17 Abb. Pr. 304; Thompson on Negligence, 398, §§ 3, 4, where the cases are collected.

19 Silberstein v. Houston, &c., R. Co., 4 N. Y. Supl. 843.

20 Chicago City Ry. Co. v. Robinson, 127 Ill. 1; 18 N. E. Rep. 772.

an extraordinary speed, and crowding the buggy into a narrow space between a sandbank and the track, struck and injured it, the company was liable, though the woman might have been careless in not observing the approach of the car.[21] But where a woman knew a car was coming, and was near, but could not see it until she turned her horses to cross the track at a slow walk, she was held guilty of contributory negligence barring recovery.[22] When the driver's negligence has been the occasion of a collision, and an injured passenger brings his action against the person with whom the car collided, who was also at fault, the negligence of the driver of the street car in which the plaintiff rode cannot, as we have seen,[23] be imputed to the plaintiff to bar his recovery.[24]

§ 288. Walking upon a street railway track.—Inasmuch as he who walks upon the track of a steam railway is usually a trespasser, going at his peril, and entitled only to that small measure of care on the part of the railway company that the law requires to be exercised even toward mere trespassers or bare licensees, it has been held in Louisiana that it is a trespass to walk upon the track of a street railway laid in the thoroughfares of a city or town,[25] but this is denied in California[26] and Texas.[27] Under the

[21] Citizens' St. Ry. Co. v. Steen, 42 Ark. 321. Nor is a person driving on the track in advance of a car approaching at a rapid rate bound, as a matter of law, to believe that the rate of speed will be continued and thus end in a collision. Gumb v. Twenty-third St. Ry. Co., 9 N. Y. Supl. 376. It is not alone conclusive proof of negligence to drive upon and along the track ahead of a car in motion. It is a proper question for the jury. Brooks v. Lincoln St. Ry. Co. (Neb.), 36 N. W. Rep. 529; Buhrens v. Dry Dock, &c., Ry. Co., 53 Hun, 571; 6 N. Y. Supl. 224.

[22] Citizens' Pass. Ry. Co. v. Thomas, 132 Penn St. 504; 19 Atl. Rep. 286. See also, Schlater v. Wilbert, 41 La. Ann. 406; 6 So. Rep. 107; Wood v. Detroit Ry. Co., 52 Mich. 402; 50 Am. Rep. 259.

[23] § 110, *supra*.

[24] Bennett v. New Jersey R. & Trans. Co., 36 N. J. Law, 225; 13 Am. Rep. 435; Thompkins v. Clay St. Ry. Co. (Cal.), 19 Am. Law Rev. 163, 318.

[25] Johnson v. Canal St. Ry. Co., 27 La. Ann. 53; Childs v. New Orleans St. Ry. Co., 33 La. Ann. 154. See, also, Hearn v. St. Charles St. Ry. Co., 34 La. Ann. 160.

[26] Shea v. Potrero, 44 Cal. 414; *Cf.* Robinson v. Western Pacific R. Co., 48 Cal. 409.

[27] Gulf, &c., Ry. Co. v. Walker, 70 Tex. 126; 7 S. W. Rep. 831.

rule in Louisiana, one who is run down while walking upon a street car track, in the absence of wantonness upon the part of the driver of the car, has no remedy, his contributory negligence in walking upon the track being held sufficient to prevent a recovery.[28] But this is believed to be an untenable position. In no proper sense can the pedestrian who walks in the roadway, as he has a right to do, upon the street car track, be said to be a trespasser. The street car company has no such exclusive, proprietary right to any part of the street as entitles them to warn the public off, or gives them a license to abate any part of that ordinary care in going through the streets with their vehicles which is justly required of other persons who drive upon the highway. The steam railroad company owns the land upon which it runs its trains, or, if it does not, its easement is an exclusive right to use the land except at public crossings.

§ 288a. Crossing street at other places than regular crossings.— Persons have the right to cross a street on which a street railroad is operated at any place they may select, and are not confined to the street crossing.[29] Yet the railroad cars have the preference between the crossings, and although the cars must be managed with care so as not to injure persons in the street, pedestrians must use reasonable care to keep out of their way.[30]

§ 289. The track not a highway.— The street railway track, although in the highway, is not a king's highway nor a part of a highway. For a steam railroad the law very properly and justly insists upon a clear track,[31] not only as the right of the railway

[28] See also, generally the cases cited *supra*.

[29] Thompson v. Buffalo Ry. Co., 145 N. Y. 196; 39 N. E. Rep. 709; Mitchell v. Tacoma Ry. & Motor Co., 9 Wash. 120; 37 Pac. Rep. 341; Thatcher v. Central Traction Co., 166 Penn. St. 66, 71; 40 Atl. Rep. 1048; Baltimore Traction Co. v. Helms, 84 Md. 515; 36 Atl. Rep. 119.

[30] Thompson v. Buffalo Ry. Co., 145 N. Y. 196; 39 N. E. Rep. 709. One who deliberately walks out from behind a street car, from which he has alighted, and attempts to cross the adjoining track without using his powers of observation, and is injured by a car approaching from the opposite direction, which injury could have been avoided by the use of the most ordinary care, is not entitled to recover damages for such injury. Baltimore Traction Co. v. Helms, 84 Md. 515; 36 Atl. Rep. 119.

[31] Railroad Co. v. Norton, 24 Penn. St. 465; 64 Am. Dec. 672.

company, but also from the most obvious considerations of general convenience and policy. It were safer to drive the car of Juggernaut through Broadway than to abate anything from the strictness of this rule. The franchise of the street railway company, on the other hand, is a mere easement to use the highway in common with the public generally. There is nothing exclusive or proprietary in their ownership of this right or franchise, and they have no higher right to use the street than the humblest pedestrian.[32] Moreover, the reasons which render it prudent and proper to hold persons who walk upon railway tracks trespassers, are wholly wanting in the case of persons walking in the highway upon a street car track The measure, or *quantum* of care and prudence which will constitute "ordinary care," with respect to street railways, on the part of those who have to do with them, is much less than is required to be exercised by persons who are brought in any way in connection with steam railways.[33]

§ 290. The degree of care not the same as that required in case of steam railroads.— The danger of accident from collision with horse cars is very slight as compared with that from collision with trains of cars running at a high rate of speed upon a railroad. Horse cars never run very fast, and are easily and almost instantly stopped.[34] What, therefore, might be gross negligence as respects a steam railroad, might be perfectly prudent and perfectly proper to be done in dealing with street cars.[35] We must not, therefore, attempt to apply to horse railways the rules of law applicable to steam railroads. The cases are essentially different, and the reason for the rule ceasing, the rule itself must also cease. It is in accordance with this view that the courts hold that the rule that one upon approaching a railroad crossing upon the highway, must look carefully up and down the track before he attempts to cross, is not to be applied to one who

[32] Adolph v. Central, &c., R. Co., 65 N. Y. 554; Government St. R. Co. v. Hanlon, 53 Ala. 70.

[33] Thompson on Carriers, 444, § 6.

[34] Meesel v. Lynn, &c., R. Co., 8 Allen, 234.

[35] There is a difference between the degree of care required by one in crossing a street railroad and in crossing a railroad operated by steam. Bennett v. Brooklyn Heights R. Co., 1 App. Div. (N. Y.) 205; McClain v. Brooklyn City R. Co., 116 N. Y. 459; 22 N. E. Rep. 1062; Ober v. Crescent City R. Co., 44 La. Ann. 1059; 11 So. Rep. 818.

attempts to cross a horse car track upon the highway.[36] Due care, that is to say, ordinary care, under the circumstances, must be exercised both in walking upon a street railway track and also in attempting to cross it. A failure to have done this on the part of one who brings his action against the company for injuries received while being upon the track, will be held a legal offset to the negligence of the company's servants; but it is not necessary in such an action for the plaintiff to establish his carefulness to the same extent as in a similar action against a railway company. He need not show absolutely that he looked carefully up and down the track before venturing upon it. It need only appear that he was in the exercise of ordinary care.[37] And he will not be held a trespasser if he walks upon the track; he has his common law right to walk there if he chooses,[38] and

[36] Chicago City Ry. Co. v. Robinson, 127 Ill. 1; 18 N. E. Rep. 772; Baltimore Traction Co. v. Helms, 84 Md. 515; 36 Atl. Rep. 119; Cincinnati Street Ry. Co. v. Whitcomb, 31 U. S. App. 374, 383; 66 Fed. Rep. 915. This is especially true where the company has been accustomed to keep a track free while discharging passengers on another track who are compelled to cross the former. A passenger alighting may proceed without being on the alert for a violation of the rule. Burbridge v. Kansas City R. Co., 36 Mo. App. 669; Lyman v. Union, &c., R. Co., 114 Mass. 83; Mentz v. Second Avenue R. Co., 2 Robt. 356; 3 Abb. App. Dec. 274. But see, also, Kelly v. Hendrie, 26 Mich. 255; Buzby v. Philadelphia Traction Co., 126 Penn. St. 559; 17 Atl. Rep. 895; 24 W. N. C. 155; Cowan v. Third Ave. R. Co., 1 N. Y. Supl. 612; Cowan v. Third Ave. Ry. Co., 9 N. Y. Supl. 610; Miller v. St. Paul, &c., Ry. Co., 42 Minn. 454. The rule requiring one to look and listen before crossing a steam railway, in order to be in the exercise of due care, does not apply with equal force to one crossing the track of a street railway in a city street where the company and the public stand on an equal footing in the use of the highway, and it was held that it was not negligence, *per se*, in the plaintiff's intestate, under the circumstances, in going upon the defendant's track without first looking for an approaching car, and the judge's refusal to so charge was sustained, he having fairly submitted the question of contributory negligence as a matter for the jury to determine upon the facts in evidence. Consolidated Traction Co. v. Scott, 58 N. J. Law, 682; 34 Atl. Rep. 1094.

[37] West Chicago Street Ry. Co. v. McNulty, 166 Ill. 203; 46 N. E. Rep. 784; Hall v. Ogden City Street Ry. Co., 13 Utah, 243; 44 Pac. Rep. 1046; McClain v. Brooklyn City R. Co., 116 N. Y. 459, 465; 22 N. E. Rep. 1062.

[38] § 251, *supra*. See, also, Government St. R. Co. v. Haulon, 53 Ala. 70, 81; McClain v. Brooklyn City R. Co., 116 N. Y. 459; 22 N. E. Rep. 1062. But the fact that

wherever the servants of the street railway company fail to exercise the ordinary care of any other person who drives a vehicle upon the highway not to run over him, the company is liable.[39] But, as a street car must continue on the rails of its track, persons otherwise traveling on the street are required to use care to keep out of its way.[40]

§ 290a. Where cars operated by electricity or the cable.— In some of the cases it has been held that where the motive power of street cars is electricity or the cable, the rule applicable to railroad crossings applies, and that a person crossing the tracks must look and listen.[41] But other courts hold that the

one has a right to be on a highway does not relieve him from the duty of exercising care to avoid danger. Southwestern Telegraph & Telephone Co. v. Beatty, 63 Ark. 65; 37 S. W. Rep. 570.

[39] See the preceding section and the cases there cited, and Thompson on Negligence, 396, 397. But when a person solely by his own negligence was thrown under the front platform, and the driver backed the car without unhitching the horses, whereby the plaintiff was trampled upon, the driver's error of judgment gave no ground of action. Rhing v. Broadway, &c., Ry. Co., 53 Hun, 321; 6 N. Y. Supl. 641.

[40] McClain v. Brooklyn City R. Co., 116 N. Y. 459, 464; 22 N. E. Rep. 1062. See Baltimore Traction Co. v. Helms, 84 Md. 515; 36 Atl. Rep. 119 for a full discussion of the subject of street cars and passengers in the public streets.

[41] "We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street car track upon which the motive power is electricity or the cable. In this State it is well sttled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting a crossing. Electric street car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. If the view is unobstructed, and the pedestrian takes this precaution, there is not much opportunity for him to be injured. It will not do to say that he has discharged the responsibility in case of an accident by looking, when some feet away, for he may miscalculate the distance and speed of the car. To avoid danger, he must look just before he enters upon the track." McGhee v. Consolidated Street Ry. Co., 102 Mich. 107, 115; 60 N. W. Rep. 293. "In walking or riding along a line of railway where cars or trains are passing or likely to pass at short intervals, one while in a position to be endangered by such vehicles must pay attention to his surroundings,

fact that the power used is of this character is not sufficient to require the exercise of these precautions.[42]

and employ his natural faculties, and exert due diligence to avoid such danger; and he must listen and look to ascertain whether danger is threatened by his situation, and a failure so to do constitutes negligence *per se*, or negligence in law, which is not a question for the jury; and there is no distinction in the application of this doctrine between an electric or cable line operated upon the streets of a city, and that of an ordinary steam railroad operated upon the right of way of the corporation." Everett v. Los Angeles Consolidated Electric Ry. Co., 115 Cal. 105; 43 Pac. Rep. 207; 46 Pac. Rep. 889. One who knowingly crosses an electric street railroad track in such close proximity to a moving car as to be struck before he can cross, cannot, because of his contributory negligence, recover for injuries so received. Watson v. Mound City Street Ry. Co., 133 Mo. 246; 34 S. W. Rep. 573. It is a recognized rule that before attempting to cross the track of an electric car a person should look to ascertain whether prudently the crossing should be attempted. The rule contemplates that this should be done at a time and place where the reason upon which it is founded can be made effective. When the law requires steps of diligence and caution, it will not be satisfied by the substitution therefor of vain and useless acts. Snider v. New Orleans & Carrollton R. Co., 48 La. Ann. 1; 18 So. Rep. 695. A person about to cross a street along which cars are propelled by electricity, having full appreciation that to do so he must act hastily or be run down, is guilty of negligence *per se*, if he rushes upon the track without listening or looking for the whereabouts of a car which he expects and knows is rapidly approaching the place of crossing. Hickey v. St. Paul City Street Ry. Co., 60 Minn. 119; 61 N. W. Rep. 893.

[42] Robbins v. Springfield St. Ry. Co., 165 Mass. 30, 36, 37; 42 N. E. Rep. 334. An electric street railway company, in the operation of its car in the public highways, has no right superior to that of any other traveler. The right to use the highway is one common to all travelers, and is to be so exercised by each that the just rights of others are not unreasonably interfered with. Laufer v. Bridgeport Traction Co., 68 Conn. 475; 37 Atl. Rep. 379. A driver of a vehicle, before attempting to cross an electric street railway track at a street intersection, is not bound at his peril to know that a collision will not occur, and need only make such observation and acquire such information as would convince a reasonably prudent man, in a like situation, that the passage could be made in safety. Saunders v. City & Suburban R. Co., 41 S. W. Rep. 1032. "We apprehend that electric cars have, in a qualified way at least, the right of way as against persons on foot or traveling with carriages and teams in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways should carefully

§ 291. Alighting from or boarding moving street cars.— It is well settled that it is not contributory negligence *per se* for one to alight from or to board a moving street car;[43] and here, again, we find the severity of the rule, as applicable to steam railways, essentially relaxed.[44] "Ordinarily," said the Court of Appeals of New York, "it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly,[45] or when the person is infirm and clumsy, or is

observe the movements of the street cars and leave them an unobstructed passage as well as they reasonably can. But great care must also be observed by the conductors and drivers, or motor-men, upon the cars to see that no injury be caused by themselves to persons or teams. Street railroads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid injury. If a horse driven by a traveler appears to be restive or refractory at the sight of a moving car the movement of the car should be managed in such a way as to relieve, if possible, the traveler in his dilemma. For these reasons, as well as for the general safety of passengers within and persons outside of the cars, the rate of speed should be reasonable according to circumstances." Flewelling v. Lewiston & Auburn Horse R. Co., 89 Me. 585, 593-594; 36 Atl. Rep. 1056.

[43] Schacherl v. St. Paul City Ry. Co., 42 Minn. 42; 43 N. W. Rep. 837; Valentine v. Broadway, &c., R. Co., 4 N. Y. Supl. 481; 14 Daly, 540; West End, &c., R. Co. v. Mozely, 79 Ga. 463; 4 S. E. Rep. 324; Stager v. Ridge Ave., &c., Ry. Co., 119 Penn. St. 70; 12 Atl. Rep. 821; Ashton v. Detroit City Ry. Co., 78 Mich. 587; 44 N. W. Rep. 141; McDonough v. Metropolitan R. Co., 137 Mass. 210; Briggs v. Union Street Ry. Co., 148 Mass. 72; 19 N. E. Rep. 19; Eppendorf v. Brooklyn City, &c., R. Co., 69 N. Y. 195; 25 Am. Rep. 171; Mettlestadt v. Ninth Avenue R. Co., 4 Robt. 377; Rathbone v. Union R. Co., 13 R. I. 709; People's Passenger R. Co. v. Green, 56 Md. 84. See, also, Diethick v. Balto., &c., R. Co., 58 Md. 347. *Contra*, Hagan v. Philadelphia, &c., Ry. Co., 15 Phila. (Penn.) 278.

[44] See two very full and learned Indiana cases upon this point. Terre Haute, &c., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168; Stoner v. Pennsylvania Co., 98 Ind. 384; 49 Am. Rep. 764, and §§ 146, 147, *supra*. But see White v. West End Ry. Co., 165 Mass. 522; 43 N. E. Rep. 298.

[45] The Supreme Court of Texas, however, has held a charge that it is negligence to alight from a rapidly moving railway train, while it is not negligence to

encumbered with children, packages,[46] or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so; and a court might, upon undisputed evidence, hold, as a matter of law, that there was negligence in doing so. But in most cases it must be a question for a jury.[47] Here there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. He had the right to expect that the speed of the car would continue arrested until he was safely on the car. It was the act of the driver in letting go the brake without notice, and thus suddenly giving the car a jerk while plaintiff was getting upon it, that caused the accident."[48]

§ 292. **Where motive power is electricity or the cable.**— The rule that it is not negligence *per se* to get on or off a street car while it is in motion, applies to cases where the motive power is electricity or the cable.[49]

alight from one moving slowly, error and ground upon which appellant may have a new trial. Texas, &c., R. Co. v. Murphy, 46 Tex. 356.

[46] Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600; 5 So. Rep. 353, where the passenger had a keg of lead in his hand. Reddington v. Phila. Traction Co., 132 Penn. St. 154; 19 Atl. Rep. 28.

[47] Morrison v. Broadway, &c., R. Co., 130 N. Y. 166; 29 N. E. Rep. 105; Johanus v. National Accident Society, 16 App. Div. (N. Y.) 117; New Jersey Traction Co. v. Gardner (N. J.), 38 Atl. Rep. 669; Omaha Street Ry. Co. v. Martin, 48 Neb. 65; 66 N. W. Rep. 1007; Omaha Street Ry. Co. v. Craig, 58 N. W. Rep. 209.

[48] Eppendorf v. Brooklyn City, &c., R. Co., 69 N. Y. 195. See, also, Conley v. Forty-second St., &c., Ry. Co., 2 N. Y. Supl. 229; Morison v. Broadway, &c., R. Co., 8 N. Y. Supl. 436; Schepers v. Union Depot R. Co., 126 Mo. 675, 676; 29 S. W. Rep. 712; Ober v. Crescent City R. Co., 44 La. Ann. 1059; 11 So. Rep. 818. A woman, in alighting from a street car, slipped and fell. There was evidence of negligence on her part, but a compulsory nonsuit was held to be erroneous. Nelsio v. Second, &c., Passenger Co., 113 Penn. St. 300.

[49] Cicero & Proviso Street Ry. Co. v. Meixner, 160 Ill. 320, 325, 326; 43 N. E. Rep. 823; Sahlgaard v. St. Paul Street Ry. Co., 48 Minn. 275; 51 N. W. Rep. 111; Denver Tramway Co. v. Reid, 22 Colo. 349, 362; 45 Pac. Rep. 378. "Electricity has now in a great measure superseded horse power. The same style of cars, and often the same cars are used, the same streets are traversed, and a like number of stops, and in like places, are made to receive and deliver passengers. Electricity as a motive power, while stronger and more powerful, and with possibilities of a greater speed, is at

§ 293. Riding upon the platforms of street cars.— It is an equally well established rule that the mere fact of riding on the platform of a street car is not conclusive evidence of negligence.[50] "The seats inside are not the only places," said the Supreme Judicial Court of Massachusetts, "where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full and then to stand on the platforms till they are full, and continue to stop and receive them after there is no place to stand

the same time more nearly under the control of the person in charge than horse power. The strict rule in force regarding the negligence of a person alighting or boarding an ordinary train of steam cars had for it many good and sufficient reasons which are not applicable to the electric car as in general use. In the latter case, stops are frequent and opportunity for great speed is not presented; steps for passengers are near the ground, and the chances of a mis-step or fall are not so great as in steam cars as constructed; streets on such lines are generally paved, and in that respect passengers may as safely depart or board such cars in one place or another, where in the case of steam cars platforms are generally provided. While in the electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach that of horse cars that it must be held that the same rule of law which in cases cited and a long line of other case holds that it is not negligence *per se* to board or depart from such cars while in motion, is also applicable to electric cars." Cicero & Proviso Street Ry. Co. v. Meixner, 160 Ill. 320, 327, 328; 43 N. E. Rep. 823. It is not *per se* negligence for a person with something in each hand to board or attempt to board an electric car whilst it is in the act of stopping to receive passengers and before it has come to a full stop. Such boarding or attempt may or may not be negligence, according to circumstances. White v. Atlanta Consolidated Street Ry. Co., 92 Ga. 494; 17 S. E. Rep. 672.

[50] Fleck v. Union Ry. Co., 134 Mass. 481; Nolan v. Brooklyn City, &c., R. Co., 87 N. Y. 63; 41 Am. Rep. 345; Thirteenth St., &c., R. Co. v. Boudrou, 92 Penn. St. 475; 37 Am. Rep. 707, and the note; Germantown Passenger R. Co. v. Walling, 97 Penn. St. 55; 37 Am. Rep. 711; 2 Am. & Eng. Ry. Cas. 20, and the note; Meesel v. Lynn, &c., R. Co., 8 Allen, 234; Maguire v. Middlesex R. Co., 115 Mass. 239; Burns v. Bellefontaine, &c., R. Co., 50 Mo. 139; Spooner v. Brooklyn City, &c., R. Co., 54 N. Y. 230; 13 Am. Rep. 570; Pray v. Omaha Street Ry. Co., 44 Neb. 167; Adams v. Washington, &c., Ry. Co., 9 App. D. C. 26; Bailey v. Tacoma Traction Co., 16 Wash. 48. "Street Railways," 24 Alb. L. J. 365; "Rights of street car platform passengers," by Eugene McQuillen, 20 Cent. L. J. 104.

except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger. There is, therefore, no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care " [he was injured while standing on the platform]. " It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence."[51] It is not negligent to take a car upon which there is no place to ride except the platform, and, having taken such a car, it is not negligent to remain upon it, and to ride upon the platform; or, to express the same rule in another way, it is not negligent to ride upon the platform from necessity, when the alternative is to ride there or get off the car.[52] Where it is customary in a busy season to allow passengers on street cars to ride on the side steps of an open car, there being no seats vacant, in the absence of any warning or objection from the conductor, a passenger injured while so riding is not guilty of contributory negligence, though he was a cripple.[53]

§ 294. How far it is the duty of the passenger to ride inside the car when there is room.— Neither is it negligent *per se* to ride upon the platform even when there is room inside the car;[54]

[51] Meesel v. Lynn, &c., R. Co., 8 Allen, 234; Geitz v. Milwaukee City Ry. Co., 72 Wis. 307; 39 N. W. Rep. 866; City Ry. Co. v. Lee, 50 N. J. Law, 435; 14 Atl. Rep. 883.

[52] Ginna v. Second Ave. R. Co., 67 N. Y. 596, which holds that it is not negligence *per se* for one so riding upon the platform to omit to take hold of the iron bar or rail to prevent being thrown upon the platform. Germantown Passenger R. Co. v. Walling, 97 Penn. St. 55; Thirteenth St., &c., R. Co. v. Boudrou, 92 Penn. St. 475; 37 Am. Rep. 707; Clark v. Eighth Aveuue R. Co., 36 N. Y. 135; 32 Barb. 657; Augusta, &c., R. Co. v. Renz, 55 Ga. 126; Hadencamp v. Second Ave. R. Co., 1 Sweeney (N. Y. Super. Ct.) 490; Sheridan v. Brooklyn City, &c., R. Co., 36 N. Y. 39; Werle v. Long Island R. Co., 98 N. Y. 650.

[53] Topeka City Ry. Co. v. Higgs, 38 Kan. 375; 15 Pac. Rep. 667.

[54] Connolly v. Knickerbocker Ice Co., 114 N. Y. 104; 21 N. E. Rep. 101; Burns v. Bellefontaine, &c., R. Co., 50 Mo. 139; Maguire v. Middlesex R. Co., 115 Mass. 239. But see, *contra*, Andrews v. Capitol, &c., R. Co., 2 Mackey, 137; 47 Am. Rep. 266; Solomon v. Central Park, &c., R. Co., 1 Sweeney (N. Y. Super. Ct.) 298, where it is held that where a passenger rides in a place of hazard or danger, such as the front

nor is it necessarily negligence, being upon the platform, not to take hold of the railing to prevent being thrown off;[55] nor to stand down upon the steps of the platform, if one holds on to the railing;[56] nor to pass on one of the side steps of an open car, from the rear platform to the front seat, there being no other means of passing from one end of the car to the other.[57] But to stand in a dangerous position upon the platform, after an opportunity is offered the passenger of exchanging it for a safer one, is contributory negligence.[58] The law does not regard one platform of a street car with any more favor than the other, and it is no more an act of negligence to ride upon the front than upon the rear platform.[59] But it is held that a rule which prohibits passengers from riding upon the front platform is a reasonable rule, and where a passenger, having been informed of the rule, violates it without some extenuating circumstances, he has no remedy in case of injury by reason of the mere negligence of the company's servants;[60] as, for an example, when one sits upon the

platform, his negligence is *prima facie* proved, and the *onus* is on him to rebut the presumption.

[55] Ginna v. Second Avenue R. Co., 67 N. Y. 596.

[56] Fleck v. Union R. Co., 134 Mass. 481; Huelsenkamp v. Citizens' R. Co., 34 Mo. 45; 37 Mo. 567.

[57] Craighead v. Brooklyn City R. Co., 5 N. Y. Supl. 431.

[58] Ward v. Central Park, &c., R. Co., 33 N. Y. Super. Ct. 392; 11 Abb. Pr. (N. S.) 411; 42 How. Pr. 289. A man, while standing on the front step of a horse car bowing to his wife inside, was thrown from the car by its sudden starting, and the court was ungallant enough to declare it contributory negligence. Ashbrook v. Frederick Ave. Ry. Co., 18 Mo. App. 290. "There was literally no excuse for the deceased taking the driver's seat on the front platform and exposing himself to the risks of such a position. The car was empty and it was the clear duty of the passenger to take his seat on the inside. He was not obliged to go on the front platform for want of room inside, nor was he there by invitation of the driver. The danger was increased by his occupying the driver's stool, which was high and with no arms or other protection, and narrow at the base. The case does not come within any of the decisions in which it was held not to be negligence for a passenger to ride on the platform. In those cases the cars were crowded, and the occupancy of the platform was invited or permitted." Mann v. Philadelphia Traction Co., 175 Penn. St. 122, 123-124; 34 Atl. Rep. 572.

[59] Meesel v. Lynn, &c., R. Co., 8 Allen, 234; Maguire v. Middlesex R. Co., 115 Mass. 239; Nolan v. Brooklyn City, &c., R. Co., 87 N. Y. 63; 41 Am. Rep. 345; People's Passenger R. Co. v. Green, 56 Md. 84; Germantown Passenger R. Co. v. Walling, 97 Penn. St. 55; Burns

steps of the front platform in spite of the rule of the company and the warning of the driver,[61] or upon the window sill, with one foot upon the iron rail of the dash-board upon the front platform.[62]

§ **295. Risks assumed by passenger riding in exposed position.**— When a passenger rides upon the platform, step or foot-board of a car he assumes the increased risk that may result therefrom in the ordinary course of things when the car is properly driven or managed,[63] as, for example, injury from passing vehicles, or by being thrown off by the swaying or jolting of the car.[64] But it has been held that a passenger riding on the foot-board of an electric car is not bound to anticipate the danger of being hit by a trolley pole; but that he has the right to assume that the railway company has performed its duty in so constructing its road that its passengers even on the foot-boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road.[65]

v. Bellefontaine, &c., R. Co., 50 Mo. 139; West Phila. Pass. Ry. Co. v. Gallagher, 108 Penn. St. 524; Hourney v. Brooklyn City R. Co., 7 N. Y. Supl. 602.

60 Wills v. Lynn, &c., R. Co., 129 Mass. 351; Balto. City Passenger R. Co., 30 Md. 224. In a recent case in Maryland, it was held to be the duty of a passenger frequently using the line to be aware of such reasonable regulations promulgated by placards in every car, and he failed to recover though he testified he had never seen them. Baltimore, &c., Turnpike Road v. Cason (Md.), 20 Atl. Rep. 113.

61 Wills v. Lynn, &c., R. Co., 129 Mass. 351; Solomon v. Central Park, &c., R. Co., 1 Sweeney (N. Y. Super. Ct.) 298; Clark v. Eighth Ave. R. Co., 36 N. Y. 135.

62 Heckrott v. Buffalo St. R. Co., Super. Ct. of Buffalo (1883), 13 Am. Law Record, 295.

63 Horbison v. Metropolitan Traction Co., 9 App. D. C. 60.

64 City Ry. Co. v. Lee, 30 N. J. Law, 435, 439.

65 City Ry. Co. v. Lee, 50 N. J. Law, 435; 14 Atl. Rep. 883; Elliott v. Newport Street Ry. Co., 18 R. I. 707, 711-712; 28 Atl. Rep. 338; 31 Atl. Rep. 694. "The use of electricity as a motive power by passenger railway companies has created new conditions from which new duties arise. The greater speed at which the cars are moved increases the danger to passengers and persons in the streets, and of these dangers all persons must take notice. When there is an invitation or permission to passengers to ride on the rear platforms, it is the duty of the company to observe a higher degree of care in the running of the cars at points where there is danger that they may be thrown off, and there should be a correspond-

§ 296. Passenger's hand or arm outside of the car window.— Where a passenger in a street car puts his arm, or elbow, outside of the car window, voluntarily, and without any qualifying or extenuating circumstances impelling him to it, it is held, in Pennsylvania, to be the duty of the court to declare the act negligence, as matter of law.[66] But in an earlier case the same court held, where one, in riding upon the defendant's street car with his arm extending out of an open window, was struck by a passing load of hay and his arm broken, that if the injury was caused by the contributory negligence of the passenger, or by the sole negligence of the driver of the wagon, there should be no recovery against the company, and the jury below, having been allowed to find that the passenger was without fault, the case turned upon the negligence, or freedom from negligence, of the street car driver.[67] In Minnesota, where a passenger on a street car sat down and placed his hand on the window sill, with his fingers outside, and his hand was injured by coming in contact with some planks piled within an inch of the car by the city authorities, to be used in constructing a sewer underneath the track, it was held that the question of the passenger's contributory negligence was for the jury.[68] And in Louisiana it is held not negligent, as matter of law, for a passenger to allow his arm to project from the window of a street car "a few inches," in a case in which it appears that the passenger's arm so exposed was struck by a passing car, belonging to the same company, as the cars met each other upon a curve — it being decided, also,

ing increase of care and vigilance upon the part of a passenger who voluntarily assumes such a position of danger." Reber v. Pittsburgh & Birmingham Traction Co., 179 Penn. St. 339, 342-343; 36 Atl. Rep. 245.

[66] People's Passenger Ry. Co. v. Lauderbach, Sup. Ct. Penn., 19 Am. Law Rev. 163.

[67] Federal St. R. Co. v. Gibson, 96 Penn. St. 83.

[68] Dahlberg v. Minnesota St. R. Co., 32 Minn. 404; 19 Am. Law Rev. 332; Francis v. New York Steam Co., 114 N. Y. 380; 21 N. E. Rep. 988. See, also, Sanderson v. Frazier, 8 Colo. 79; 54 Am. Rep. 544, which was the case of a passenger who had his arm partly outside a stage-coach window when the coach overturned and broke the limb. He was held not negligent. When a passenger on a street car, who has had opportunity, in one or more previous trips over the line, to observe the fact that there are many trees, posts, and other objects close beside the track, leaves a place of perfect safety in the car, and, going to the platform, extends his head beyond the side of the car to look at a fire, he is guilty of

that it is negligent for a street railway company to have two tracks laid so near together that such an accident can happen.[69]

§ 297. Free passengers and trespassers upon street cars.— When a newsboy is allowed free access to the cars for the purpose of selling his papers to the passengers, he is held to enjoy that license with its accompanying perils. He is not a passenger, and if injured by the mere carelessness or neglect of the company's servants, he has no remedy against the company.[70] So, also, when a passenger has left the car and is going about his business, the relation of carrier and passenger is thereby terminated; and toward such a person the duty of the company is not that of extraordinary diligence, as during the continuance of that relation, but only such care as the law requires two persons, each lawfully in the highway, to exercise toward each other.[71] Drivers and conductors of street cars have no authority, plainly, to carry passengers free, but when they suffer or invite young children to ride upon the cars, without collecting fare from them, and these children are injured upon the car by the negligent or wilful acts of the company's servants, it is generally held that the company is liable, and, in the absence of contributory neglect, an action may be maintained.[72]

such contributory negligence as to bar any recovery for injury or death resulting from his head striking a tree. Sias v. Rochester R. Co., 18 App. Div. (N. Y.) 506.

[69] Summers v. Crescent City R. Co., 34 La. Ann. 139; 44 Am. Rep. 419; Germantown Passenger R. Co. v. Brophy, 105 Penn. St. 38.

[70] Fleming v. Brooklyn City, &c., R. Co., 1 Abb. N. C. 433. See, also, Duff v. Allegheny R. Co., 91 Penn. St. 458; 36 Am. Rep. 675. In Philadelphia Traction Co. v. Orbann, 119 Penn. St. 37; 12 Atl. Rep. 816, a newsboy who was on the car by permission was pushed by the conductor, and fell under the following car. As the act was not wanton or malicious, an instruction as to exemplary damages was held erroneous.

[71] Platt v. Forty-second St. R. Co., 2 Hun, 124. See, also, Merrill v. Eastern R. Co. (Holmes, J.), 139 Mass. 238; 31 Alb. L. J. 503.

[72] Brennan v. Fair Haven, &c., R. Co., 45 Conn. 284, in which the court said (p. 298):—"Plaintiff was rightfully on the car — was there by the consent of the defendants' servants. They had a right to collect the fare, and as between themselves and their employers it was their duty to do so. Their neglect of this duty did not make him a trespasser, and did not relieve them of the obligation to use reasonable care not to injure him." 29 Am. Rep. 678; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; Metropolitan St. R. Co. v. Moore, 83 Ga. 453; 10 S. E. Rep. 730; Biddle v. Hestonville, &c., Ry. Co., 112 Penn. St. 551; Caldwell v. Pittsburgh, &c., R.

§ 298. The New England Sunday rule applied to street railways.— A street car driver or conductor, in Massachusetts, who performs his ordinary duties on Sunday, can maintain no action for an injury sustained by reason of a collision with a car of another company while so employed.[73] Neither can one in that State who rides in a street car on Sunday, for the purpose of making a social visit, recover damages from the street car company for an injury received in consequence of their neglect.[74] These decisions would not, however, be followed elsewhere.[75]

Co., 74 Penn. St. 421; Wilton v. Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11; 125 Mass. 130; Day v. Brooklyn City, &c., R. Co., 12 Hun, 435; Philadelphia, &c., R. Co. v. Hassard, 75 Penn. St. 367; East Saginaw, &c., City R. Co. v. Baker, 27 Mich. 503. See, also, §§ 165, 204, *supra*. *Cf.* McDonough v. Metropolitan Ry. Co., 137 Mass. 210. But where the servants of the company are ignorant of the boy's presence upon the car, and he falls or jumps off the platform the company is not liable. Bishop v. Union R. Co., 14 R. I. 314; 51 Am. Rep. 386.

[73] Day v. Highland St. R. Co., 135 Mass. 113; 46 Am. Rep. 447.

[74] Stanton v. Metropolitan R. Co., 14 Allen, 485.

[75] §§ 175 261, *supra*.

CHAPTER XII.

MASTER AND SERVANT; THE SERVANT'S RIGHTS AND OBLIGATIONS.

§ 299. Servant's own contributory negligence a bar.
300. Where servant's negligence not proximate cause of injuries.— Illegal acts.
301. Where injury caused by negligence.
302. Master's individual neglect a ground of liability.
303. This doctrine stated.
304. When the master's negligence combines with that of a co-servant in producing the injury.
305. Herein of proximate cause.
306. *Respondeat superior.*
307. The early cases.
308. The exception to the rule of *respondeat superior.*
309. Later English cases following Priestley v. Fowler.
310. The same subject continued.
311. The rule in the United States.— Murray v. South Carolina R. Co.
312. The reasoning of the South Carolina case.
313. Farwell v. Boston & Worcester R. Co.
314. The rule stated.
315. The reasoning of the Massachusetts case.
316. The reason of the rule criticised.
317. The same subject continued.
318. The modification of this rule in Kentucky.
§ 319. The leading case in Kentucky.
320. The opinion in the Collins case.
321. The rule in Illinois.
322. The rule in Tennessee.
323. Who are fellow-servants.
324. The rule stated.
325. Rule of vice-principal.
326. Chicago, Milwaukee & St. Paul R. Co. v. Ross.
327. Who is a vice-principal?
328. Applications of this doctrine.
329. Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other defendants?
330. What is common employment.
331. The same subject continued.
332. Illustrations—Railroad employees.
333. When conductor is a fellow-servant.
334. Rule as to train dispatcher.
335. Statutory modifications of the rule in the case of railway employees.
336. Further illustrations.—Miscellaneous employees.
337. Servants not in common employment.— Illustrations.
338. Servants of different masters.

§ 339. The rule stated.
340. This rule approved.
341. As between different railway corporations having running connections.
§ 342. As to volunteers.
343. The same subject continued.
344. Partnerships and receivers as employers.

§ 299. Servant's own contributory negligence a bar.— The rule of law that a plaintiff, in order to maintain his action for damages for an injury occasioned by the negligence of another, must himself be free from contributory negligence is, when the action involves only the individual neglect of the servant and his employer, in no way affected by the consideration that the relation of master and servant subsists between the parties. If the servant is to recover damages, in such a case, from his master, he, like any other plaintiff, comes into court under the legal obligation of showing, or having it sufficiently appear, that his own negligence has contributed in no legal sense to the injury. His own contributory fault will defeat him in an action against his employer just as it would in an action against any one else.[1]

[1] Pennsylvania R. Co. v. O'Shaughnessy, 122 Ind. 588; 23 N. E. Rep. 675; Elliot v. Chicago, &c., Ry. Co., 5 Dak. 523; 41 N. W. Rep. 758; Ellis v. Houston, 4 N. Y. Supl. 732. In Murphy v. N. Y., &c., R. Co., 11 Daly (N. Y.) 122, and Redmond v. Rome, &c., R. Co., 10 N. Y. Supl. 330, railroad employees were injured while walking upon or across the track without taking due heed of approaching trains. The question of contributory negligence in such cases was submitted to the jury in Interstate, &c., Ry. Co. v. Fox, 41 Kan. 715; 21 Pac. Rep. 797, and Sobieski v. St. Paul, &c., R. Co., 41 Minn. 169; 42 N. W. Rep. 863. Gibbons v. Chicago, &c., Ry. Co., 66 Iowa, 231; Chambers v. Western North Carolina R. Co., 91 N. C. 471; Roul v. East Tenn., &c., Ry. Co. (Ga.), 11 S. E. Rep. 558, and Dandie v. Southern Pac. R. Co. (La.), 7 So. Rep. 792, were cases where employees failed to recover for injuries received in boarding or alighting from moving engines and cars. But it was held to be a question for the jury in Pullutro v. Delaware, &c., R. Co., 7 N. Y. Supl. 510, and New York, &c., R. Co. v. Coulbourn, 69 Md. 360; 16 Atl. Rep. 208. If an employee unnecessarily rides on the pilot of the engine or on the platform at the end of the tender while being carried to his work, even with the knowledge of the conductor or trainmen, and, by reason of being there, is injured by a collision, he has no right of action against the company. Lehigh Valley R. Co. v. Greiner, 113 Penn. St. 600; Downey v. Chesapeake, &c., Ry. Co., 28 W. Va. 732; St. Louis, &c., Ry. Co. v. Marker, 41 Ark. 542. On the other hand, it is held not to be contributory negligence for a switchman to ride on the front foot-board of the switch-engine to which he is attached while *en route* to the work he has to do.

§ 300. Where servant's negligence not proximate cause of injuries.— Illegal acts.— But where the negligence of the servant does not contribute to his injury, then such negligence will not

Lockhart v. Little Rock, &c., R. Co., 40 Fed. Rep. 631. See, also, Conners v. Burlington, &c., Ry. Co., 71 Iowa, 490; 32 N. W. Rep. 465; Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639; 21 Pac. Rep. 574; Pennsylvania R. Co. v. Zink, 126 Penn. St. 288; 17 Atl. Rep. 614; Crabell v. Wapello Coal Co., 68 Iowa, 751. A laborer on a railroad section froze his feet when, by keeping in motion or going to a fire provided, he might have avoided it. Held, that he had no right of action against the railroad company employing him. Farmer v. Central Iowa Ry. Co., 67 Iowa, 136; Stoll v. Hoopes (Penn.), 14 Atl. Rep. 658. Newman v. Chicago, &c., Ry. Co., 80 Iowa, 672; 45 N. W. Rep. 1054; Powers v. New York, &c., R. Co., 98 N. Y. 274; Lane v. Central Iowa Ry. Co., 69 Iowa, 443; Chicago, &c., Ry. Co. v. Snyder, 117 Ill. 376; The John B. Lyon, 33 Fed. Rep. 184; Chesapeake, &c., Ry. Co. v. Lee, 84 Va. 642; 5 S. E. Rep. 579. It is not contributory negligence for a servant to neglect to take measures to protect himself from a possible defect in his employer's machinery or tackle which he is not aware of and has no reason to expect. Rooney v. Allan, 10 C. of S. Cas. 1224 (Sc.); Brown v. Wood (Penn.), 16 Atl. Rep. 42; Houston, &c., Ry. Co. v. Conrad, 62 Tex. 627; Larson v. St. Paul, &c., R. Co., 43 Minn. 488; 45 N. W. Rep. 1096; East Tenn., &c., R. Co. v. Rush, 15 Lea (Tenn.) 145; Taylor v. Carew Manuf'g Co., 143 Mass. 470; 10 N. E. Rep. 308; Goodlett v. Louisville, &c., R. Co., 122 U. S. 391; Campbell v. Lunsford, 83 Ala. 512; 3 So. Rep. 522; Wert v. Keim (Penn.), 13 Atl. Rep. 548; Piedmont Electric Illuminating Co. v. Patteson's Adm'x, 84 Va. 747; 6 S. E. Rep. 4. Where the master furnishes his servant with defective machinery, and an accident occurs which so suddenly and unexpectedly places the servant in a position of imminent peril as to allow him no sufficient time for reflection, and the servant in endeavoring to save the machinery commits an error of judgment, without which he would not have sustained injury, he is not chargeable with contributory negligence. Schall v. Cole, 107 Penn. St. 1. See, also, on this point, § 40, *supra*. Kelly v. Baltimore, &c., R. Co. (Penn.), 11 Atl. Rep. 659; Rogen v. Enoch Morgan's Sons' Co., 1 N. Y. Supl. 273; Hartwig v. Bay State S. & L. Co., 118 N. Y. 664; 23 N. E. Rep. 24; St. Louis, &c., Ry. Co. v. Morgart, 45 Ark. 318; Bauer v. St. Louis, &c., Ry. Co., 46 Ark. 388; Burns v. Chicago, &c., Ry. Co., 69 Iowa, 450. Where an employee, in discharging the duty required of him, has the choice of two ways of performing it,— one entirely safe, the other obviously and greatly dangerous,— adopts the dangerous way, and is injured, he is guilty of negligence which will bar a recovery by him in an action against the employer, based on the latter's negligence; and he cannot relieve himself of the consequences of such contributory negligence by showing that it was customary to perform the duty in

preclude his recovery.[2] Nor does the fact that he is engaged in an illegal act necessarily bar his action against the master. Thus, an engineer killed at an open switch, was allowed to recover of the railroad company, though he was running his train at a rate of speed forbidden by a city ordinance.[3] And the fact that the servant was injured while engaged in unlawful labor on Sunday does not preclude him from recovering damages.[4]

§ 301. Where injury caused by recklessness.— The recklessness of a vice-principal for whose act the master is responsible may amount to wilfulness and thus leave no place for the doctrine of contributory negligence in the case. Where the conductor of a gravel train, knowing that another servant was in a position of danger upon one of the cars, switched them with such an impetus against others as to indicate an indifference to consequences, the United States Circuit Court sustained a verdict awarding heavy damages against the company regardless of the

the dangerous way. George v. Mobile & Ohio R. Co., 109 Ala. 245; 19 So. Rep. 784. See, also, Jones v. Alabama Mineral R. Co., 107 Ala. 400; 18 So. Rep. 30; A., T. & S. F. R. Co. v. Tindall, 51 Kan. 719; 48 Pac. Rep. 12.

[2] Southern Ry. Co. v. Boston, 99 Ga. 798; 27 S. E. Rep. 163.

[3] Lake Shore, &c., R. Co. v. Parker, 131 Ill. 557; 23 N. E. Rep. 237. Nor, on the other hand, will the master's violation of law support the action if the servant's negligence was the proximate cause of the injury. Ryall v. Central Pac. R. Co., 76 Cal. 474; 18 So. Rep. 430. See, also, § 45 *et seq.*, *supra*.

[4] Houston, &c., Ry. Co. v. Rider, 62 Tex. 267; Louisville, &c., Ry. Co. v. Rusk, 116 Ind. 566; Louisville, &c., R. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; Johnson v. Missouri Pac. Ry. Co., 18 Neb. 690; Ryall v. Central Pac. R. Co., 76 Cal. 474. Before the enactment of Mass. Stat. 1884, chap. 37, a locomotive engineer injured on Sunday in the performance of his ordinary duties could not recover of the corporation. Nor did he show himself to have been engaged in a labor of necessity or charity by showing merely that there was live stock on the train, for which there were no conveniences for feeding and watering at the point of the departure of the train. Read v. Boston & Albany R. Co., 140 Mass. 199; Eureka Co. v. Bass, 81 Ala. 200; Hubgh v. New Orleans, &c., R. Co., 6 La. Ann. 495; 54 Am. Dec. 565; Brown v. Maxwell, 6 Hill (N. Y.) 592; 41 Am. Dec. 771; Abend v. Terre Haute, &c., R. Co., 111 Ill. 202; 19 Cent. L. J. 350; McKinne v. California, &c., R. Co., Sup. Ct. Cal., 1884, 5 Pac. Rep. 505; Galveston, &c., R. Co. v. Drew, 59 Tex. 10; 46 Am. Rep. 261; Wright v. Rawson, 52 Iowa, 329; 35 Am. Rep. 275; Cowles v. Richmond, &c., R. Co., 84 N. C. 309, and the cases generally hereinafter cited.

plaintiff's negligence in being in a situation exposing him to injury.[5] And so it has been held that a railroad company is liable for the killing of an employee on its track by an engine, although he was guilty of contributory negligence, when its employees in charge of the engine knew of his danger in time to have avoided the injury by the use of ordinary care, and failed to do so.[6]

§ 302. Master's individual neglect a ground of liability.— Every man is liable for his own torts and breaches of contract, and a master to his servant neither less nor more than to other persons. If a servant is injured through the direct negligence of his master, as where the master is present giving orders or superintending the work, the master is answerable in damages to the same extent as he would be if the relation of master and servant did not subsist. And the master when taking a hand and engaging in common labor with the servant does not thereby lose his position as an employer, or become a fellow-servant in such a legal sense that the servant impliedly undertakes to assume the risk of injury from his negligence when so jointly injured.[7]

§ 303. This doctrine stated.— "The doctrine that a servant on entering the service of an employer takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants, may be supposed to enter into the calculation

[5] Shumacher v. St. Louis, &c., R. R. Co., 39 Fed. Rep. 174. This case goes to the verge of the law in defining wilfulness, and leaves little, if any, room between gross negligence and a wilful act. It seems to raise gross negligence to the second power and denominates its wilfulness. It is also there held that if an injury is charged in a complaint to have been negligently done, a plaintiff may prove any degree of negligence, although it may be such a degree as to make a case of constructive or legal wilfulness. See, also, § 64 *et seq.*, *supra*.

[6] Kansas & Arkansas Valley R. Co. v. Fitzhugh, 61 Ark. 341; 33 S. W. Rep. 960.

[7] Ryan v. Fowler, 24 N. Y. 410; Leonard v. Collins, 70 N. Y. 93; Anderson v. New Jersey Co., 7 Robt. 611; Keegan v. Kavanagh, 62 Mo. 230; Ashworth v. Stanwix, 3 El. & El. 701; 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 134; 4 L. T. (N. S.) 85; Roberts v. Smith, 2 Hurl. & N. 213.

of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him, in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position, and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow-laborer."[8]

§ 304. When the master's negligence combines with that of a co-servant in producing the injury.—Whenever the negligence of the master, united to the negligence of a fellow-servant, contributes to the injury, the servant injured thereby may recover from the common employer. The servant will not be held to have taken any chances of negligence on the part of his master, and it is believed that no case has gone so far as to hold that where such combined negligence contributes to the injury the servant may not recover. It would be both impolitic and unjust to allow an employer, under these circumstances, to evade the penalty of his misconduct in neglecting to provide for the

[8] Crompton, J., in Ashworth v. Stanwix, 3 El. & El. 701; 7 Jur. (N. S.) 467. See, also, Flike v. Boston, &c., R. Co., 53 N. Y. 550; 13 Am. Rep. 545; Shearman & Redfield on Negligence (5th ed.), § 89; Ormond v. Holland, El., Bl. & El. 102; Baker v. Allegheny R. Co., 95 Penn. St. 211; 40 Am. Rep. 634; Gilman v. Eastern R. Co., 10 Allen, 233; 13 Allen, 433; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. Rep. 598; Holden v. Fitchburg R. Co., 129 Mass. 268, 273; Harkins v. Standard Sugar Refinery, 122 Mass. 400, 405. The rule of liability of a railroad company for negligence is not the same in the case of an employee as in the case of a passenger. In the case of an employee no presumption of negligence on the part of the company arises from the accident alone, as it does in the case of a passenger, but the plaintiff must at least show that he was using due care. East Tennessee, &c., R. Co. v. Maloy, 77 Ga. 237; Huff v. Austin, 46 Ohio, 386; 21 N. E. Rep. 864. A complaint alleging, in general terms, that defendant corporation negligently ran its snow-plough over plaintiff's intestate, defendant's servant, it may be shown that the accident was directly caused by the negligence of the corporation or a superior officer, and not alone by the negligence of a fellow-servant. Olson v. St. Paul, &c., Ry. Co., 34 Minn. 477.

security of his servant. Contributory negligence in order to defeat a right of action in such a case must be solely the negligence of the party injured, or the negligence of a co-employee unmixed with any negligence or default upon the part of the common employer.[9]

§ 305. Herein of proximate cause.— In the foregoing section it is not intended to assert that the doctrine of proximate cause is to be wholly disregarded in actions against a master, where his negligence has combined with that of a fellow-servant, although there are expressions in some of the cases that seem to carry the rule to that extent.[10] The doctrine of proximate cause is too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence. Accordingly, if the master's negligence is a remote cause or mere condition of the accident, he is not responsible in damages. Thus, where

[9] Paulmier v. Erie Ry. Co., 34 N. J. Law, 151, which holds the master liable in such a case on the ground that he is one of two joint wrong-doers. Franklin v. Winona, &c., R. Co., 37 Minn. 409; 34 N. W. Rep. 898; Jones v. Florence Mining Co., 66 Wis. 268; 57 Am. Rep. 269; Thall v. Carnie, 5 N. Y. Supl. 244; Hunn v. Michigan Cent. R. Co., 78 Mich. 513; 44 N. W. Rep. 502; Kern v. De Castro, &c., Refining Co., 5 N. Y. Supl. 548; Faren v. Sellers, 39 La. Ann. 1011; 3 So. Rep. 303; Sherman v. Menomonee River Lumber Co., 72 Wis. 122; 39 N. W. Rep. 365; Pullutro v. Delaware, &c., R. Co., 7 N. Y. Supl. 510; Stringham v. Stewart, 100 N. Y. 516; Houston, &c., Ry. Co. v. Lowe (Tex.), 11 S. W. Rep. 1065; Gulf, &c., Ry. Co. v. Pettis, 69 Tex. 689; 7 S. W. Rep. 93. See also, Kevern v. Providence Mining Co., 70 Cal. 392; Wood on Master and Servant, 812; Clark v. Soule, 137 Mass. 380; Crutchfield v. Richmond, &c., R. Co., 76 N. C. 320; Cayzer v. Taylor, 10 Gray, 274; Booth v. Boston, &c., R. Co., 73 N. Y. 38; 29 Am. Rep. 97; Hayes v. Western R. Co., 3 Cush. 270; Stetler v. Chicago, &c., R. Co., 46 Wis. 497; 29 Am. Rep. 102, note; Durgin v. Munson, 9 Allen, 396; Cone v. Delaware, &c., R. Co., 81 N. Y. 206; 37 Am. Rep. 491; Wright v. Southern Pacific Co., 14 Utah, 383; 46 Pac. Rep. 374. Where a workman is injured under circumstances which make it doubtful whether the injury was owing to his own negligence or to the fault of the master in furnishing defective tools, the burden of proving the master in fault is on the workman. East Tenn., &c., R. Co. v. Stewart, 13 Lea (Tenn.), 432.

[10] "The rule which excuses the master under such circumstances [defective machinery] presupposes that he has performed the obligations which the law imposes upon him, and that the injury occurs *solely through the negligence of the co-employee.*" Stringham v. Stewart, 100 N. Y. 516, 526.

a train became uncoupled through a defective appliance, and a brakeman, while engaged in repairing the mishap in the portion of the train remaining stationary, was, by the negligence of the engineer, backed upon by the engine and forward part of the train and killed, it was held that the proximate cause of the accident was not the defective appliance.[11] But where the train broke apart by reason of a defective brake, and the forward part being afterwards stopped, was run into by the detached rear cars, the defect in the brake was deemed the proximate cause of the accident, although a sudden increase of the speed of the locomotive might have contributed to cause the train to break in two.[12] It is held by the Supreme Court of Appeals of West Virginia, that if the proprietors of a coal mine have been negligent in permitting fire-damp to accumulate in their mine, which will not produce any injury until ignited, and it be ignited by a servant, who goes into the dangerous part of the open mine with a lighted lamp instead of a safety lamp, contrary to the orders of the proporietor of the mine, and by such lighted lamp the fire-damp is ignited and exploded, injuring a fellow-servant, such explosion and injury are caused directly and immediately by the act of the fellow-servant, and not by the negligence of the master.[13]

§ 306. **Respondeat superior.**— A well-known principle of law, which makes every man liable for his own wrong-doing or breaches of contract whenever they have caused actual or legal damage, holds him liable also for those of his duly authorized agent so long as that agent acts within the scope of his authority. This is the doctrine of *respondeat superior*. The agent is the *alter ego*, doing the bidding and guided by the mind of the principal for whose misfeasances, inattentions and negligences,

11 Course v. New York, &c., R. Co., 2 N. Y. Supl. 312; Pease v. Chicago, &c., Ry. Co., 61 Wis. 163.

12 Ransier v. Minneapolis, &c., Ry. Co., 32 Minn. 331. See, also, Gulf, &c., Ry. Co. v. Pettis, 69 Tex. 689; 7 S. W. Rep. 93.

13 Berus v. Coal Co., 27 W. Va. 285. I am constrained to doubt the soundness of this decision. The master's negligence in failing to provide a safe place for his servants to work in was operating at the time of the explosion — it was concurrent in time and action with the negligence of the fellow-servant. See Kern v. De Castro, &c., Refining Co., 5 N. Y. Supl. 548, which holds that if the master's negligence and that of a fellow-servant are both proximate causes contributing to the accident, the master is liable.

in the line of his duty, the principal is held liable. The reason of the rule is nowhere clearly stated, and speculative and philosophical writers have found much fault with it. But, whether based upon a sound reason or not, it is found in the Roman law, has been crystallized into a maxim,[14] and from the days of Charles II has been the unchallenged rule of the common law of England.[15]

§ 307. **The early cases.**— The first recorded reference to it is in the case of Michael v. Allestree.[16] It appears in this old case that a servant was sent by his master to Lincoln's Inn Fields, a place where people are always going about, with two ungovernable horses attached to a coach ; that the servant then drove them to make them tractable and fit them for the coach, and that the horses, because of their ferocity, ran upon the plaintiff and hurt and grievously wounded him. Upon which facts shown, the master, as well as the servant, was held liable in case. Another early case announcing the doctrine is Turberville v. Stampe.[17] Following these earlier authorities is a great array of adjudications both in this country and in England enforcing and establishing the rule. It is beyond dispute,[18] and

[14] "*Qui facit per alium facit per se.*"

[15] Austin's Lectures on Jurisprudence (3d London ed.), 513; Doctor and student, Dial. 2, chap. 42; Holmes' Common Law, Lect. I.

[16] Levintz, 172; *sub nom.*, Mitchell v. Allestry, 1 Vent. 295; *sub nom.*, Mitchell v. Alestree, 3 Keb. 650.

[17] 1 Lord Raym. 264 (by Lord Holt).

[18] Limpus v. London Omnibus Co., 1 Hurl & C. 526; Burns v. Poulson, L. R. 8 C. P. 563; 29 L. T. (N. S.) 329; Patten v. Rea, 2 C. B. (N. S.) 606; Booth v. Mister, 7 Car. & P. 66; Sadler v. Henlock, 4 El. & Bl. 570; 24 L. J. (Q. B.) 138; 1 Jur. (N. S.) 677; Quarman v. Burnett, 6 M. & W. 499; Ware v. Barataria, &c., Canal Co., 15 La. 169; 35 Am. Dec. 189, and the note in which Mr. Freeman has considered at much length the question of a master's liabilty in these classes of cases; Corrigan v. Union Sugar Refinery, 98 Mass. 577; Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311; Sherley v. Billings, 8 Bush, 147; 8 Am. Rep. 451; Joslin v. Grand Rapids Ice Co., 50 Mich. 516; 45 Am. Rep. 54; Allison v. Western, &c., R. Co., 64 N. C. 382; Snyder v. Hannibal, &c., R. Co., 60 Mo. 413; Tuel v. Watson, 47 Vt. 634; Mitchell v. Robinson, 80 Ind. 281; 41 Am. Rep. 812; Blake v. Ferris, 5 N. Y. 48; 55 Am. Dec. 304; Thomas v. Winchester, 6 N. Y. 397; 57 Am. Dec. 455; Lannon v. Albany Gas Light Co., 46 Barb. 264; 44 N. Y. 459; Courtney v. Baker, 60 N. Y. 1; 5 Jones & S. 249; Thorpe v. New York, &c., R. Co., 76 N. Y. 406;

"a rule," says Judge Thompson, "so plain and easy of application that it could not be made clearer by illustration."[19]

§ 308. The exception to the rule of respondeat superior.— In 1837 the great case of Priestley v. Fowler[20] was decided, being the first recorded exception in the English law to the ancient rule of *respondeat superior*. It was decided by Lord Abinger without any reference to the earlier doctrine, but it constitutes a clear exception, from which has flowed in a copious flood all the modern law as to fellow-servants and a common employment. It is not extravagant to say that this decision in its influence upon subsequent jurisprudence is second to no adjudication to be found in the reports. No other reported case has changed the current of decision more radically than this. All subsequent common law report books contain refinements upon the doctrine, here for the first time announced,[21] that the superior may not under given conditions be held to respond for the tortious or negligent acts of his agent. The case was as follows :—A butcher sent one of his men to deliver meat on a wagon which had been loaded by another employee, but loaded too heavily. The wagon broke down and the man's thigh was broken. His lordship decides that the butcher was not liable for the injury. The ground of the decision is not plain. It does not appear whether the wagon broke down because it was not in proper condition for the journey, or because it had been carelessly overloaded, and the opinion does not say whether the butcher is not liable because the law does not imply a contract of warranty as to the safe condition of the wagon on the part of the employer, or because the law does not imply a contract to indemnify against the negligence of his servant. No authorities are cited in support of the position taken, but several instances are loosely suggested, as if by way of analogy, with the

Vogel v. Mayor, &c., of New York, 92 N. Y. 17; Shea v. Reems, 36 La. Ann. 969; Cooley on Torts, 533; Wood on Master and Servant, § 279; Smith on Master and Servant, 130; Hill on Torts, 407; Shearman & Redfield on Negligence (5th ed.), § 59; Wharton on Negligence, § 187.

19 Thompson on Negligence, 885.

20 3 M. & W. 1.

21 The dictum of Gordon, J., in Waddell v. Simonson, 112 Penn. St. 576,— "that the employer cannot be made responsible for damages resulting to a servant from the negligence of a fellow-servant is a principle as old as the common law," must be taken *cum grano salis*.

skill which advocates possess in suggesting analogies, several of which are quite as applicable to other relations as to the relation of master and servant.

§ 309. **Later English cases following Priestley v. Fowler.**— The question arose again in England, in 1850, in the suit of Hutchinson v. The York, New Castle and Berwick Railway Company.[22] This case, although Priestley v. Fowler is the earlier authority, has been regarded the leading English case, properly speaking, upon the subject. Here it is explicitly laid down that there is no implied contract of indemnity between employer and employed, but an implied contract on the part of the servant to run the ordinary risks of the service. In the judgment, Alderson, B., says :—" The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case we are of opinion that the master is not, in general, responsible when he has selected persons of competent care and skill." He continues, giving the reason for this rule, as follows:— " They have both engaged in a common service, the duties of which impose a certain risk on each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master " — which comes only something short of assigning as a reason for the rule that when he is hurt he knows exactly who hurt him.

§ 310. **The same subject continued.**— " He knew," continued the learned baron, " when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow-servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk." This is an implied contract; " a risk," he says, " which Hutchinson must be taken to have agreed to run when he entered into the defendant's service." In a single sentence, in conclusion, his lordship defines both the principle and the terms of the implied contract, as follows:— " The principle is, that a servant, when he engages to serve a master, undertakes, as

[22] 5 Exch. 343; 14 Jur. 837; 6 Eng. Rail. Cas. 588; 19 L. J. (Exch.) 296.

between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is common master of both." This statement of the rule has been accepted in the English courts as the law in point, and a long line of authorities, from 1850 to the passage of the "Employers' Liability Act," in 1880, are found in the reports, affirming and reiterating the doctrine.[23]

§ 311. The rule in the United States.— Murray v. South Carolina Railroad Company.— The first case in this country involving the right of employees in this respect as against their employers, was Murray v. South Carolina R. Co.,[24] decided in 1841. Priestley v. Fowler had been decided three years before, but Judge Evans, of the South Carolina court, seems not to have had Lord Abinger's opinion before him. In his opinion, however, in this case, Judge Evans came to the same conclusion as that reached in Priestley v. Fowler, by an essentially similar process of reasoning. The facts were these:— A fireman upon a locomotive owned and operated by the defendant corporation, was injured while engaged in the discharge of his duty by reason of the engine on which he was employed being thrown from the track, in consequence of the negligent and careless conduct of

[23] Wigmore v. Jay, 5 Exch. 354; 19 L. J. (Exch.) 300; Seymour v. Maddox, 16 Q. B. 326; 20 L. J. (Q. B.) 327; Skipp v. Eastern Counties Ry. Co., 9 Exch. 223; 23 L. J. (Exch.) 23; Couch v. Steel, 3 El. & Bl. 402; 18 Jur. 575; 23 L. J. (Q. B.) 121. (In this case the doctrine is applied to the relation of shipowner and seaman.) Brydon v. Stewart, 2 Macq. 30; 1 Pat. Sc. App. 447; *sub nom.*, Marshall v. Stewart, 33 Eng. Law & Eq. 1; Bartonshill Coal Co. v. Reid, 3 MacQueen, 266; 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 796; Bartonshill Coal Co. v. McGuire, 3 Macq. 300; 4 Jur. (N. S.) 772; 1 Pat. Sc. App. 785; Wilson v. Merry, L. R. 1 Sc. & Div. App. Cas. 326. "It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precaution on the part of the employer. If a man chooses to accept the employment, he must bide the consequences, so far as any claim to compensation against the employer is concerned." Woodley v. Metropolitan, &c., R. Co., 2 Exch. Div. 384, 389; Tarrant v. Webb, 18 C. B. 797; 25 L. J. (N. S.) C. P. 263; Conway v. Belfast, &c., Ry. Co., 11 Ir. C. L. 353; Griffiths v. London Docks, &c., Co., 50 L. T. (N. S.) 755; 12 Q. B. Div. 493; affirmed, L. R. 13 Q. B. Div. 259.

[24] 1 McMillan's Law, 385; 36 Am. Dec. 268.

the engineer who had charge of the engine, and who refused to lessen the speed or stop the engine after his attention had been called to the obstacle on the track which occasioned the accident. These facts presented fairly the question, whether the railroad company was liable to one servant for an injury arising from the negligence of another servant, and the court held that in such a case the servant could not recover.

§ 312. **The reasoning of the South Carolina case.**— In the case referred to in the preceding section, Judge Evans argued:— "Is it incident to this contract" (that between plaintiff and defendant, as master and servant) "that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract, and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other. Nor is the company liable to one for the misconduct of another, and, as a general rule, I would say that, where there was no fault in the owner, he would be liable only for wages to his servants, and so far has this doctrine been carried that in the case of seamen, even wages are forfeited if the vessel be lost and no freight earned."[25] This doctrine was subsequently adopted in Massachusetts, in the case of —

§ 313. **Farwell v. Boston & Worcester R. Co.**,[26] in which the opinion of the court was rendered by Chief Justice Shaw. In this case, which also presents the precise question fairly, the earlier cases of Priestley v. Fowler,[27] and Murray v. South Caro-

[25] Murray v. South Carolina R. Co., 1 McMillan's Law, 385, 388; 36 Am. Dec. 268.

[26] 4 Metc. 49; 38 Am. Dec. 339.

[27] 3 M. & W. 1.

lina R. Co.,[28] are followed. The rule as laid down in those cases is expounded and enforced with much ingenuity and ability, and with such cogency of logic that the Farwell case has since been regarded one of the most profound and masterly to be found in any of our reports. It has been cited with admiration and approval, it may safely be said, in all the courts of this country, as well as in England, but it must not be overlooked that the rule was first laid down in the South Carolina case. With these two leading American adjudications as cases of first impression, handed down at nearly the same time, declaring the law as just previously held in England, this doctrine became, in process of time, firmly established as the American rule.

§ 314. The rule stated.— It is the common-law rule in every State and Territory of the Union and in the federal courts, that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness or misconduct of other servants in his employ, engaged in the same common or general service or employment, denominated fellow-servants or co-employees, unless the employer himself has been at fault. The rule is so undisputed that it is sufficient to cite one leading or recent decision in point in each jurisdiction.[29]

[28] 1 McMillan's Law, 385.

[29] Keilley v. Belcher, 3 Sawyer, 500; Chicago, &c., R. Co. v. Ross, 8 Fed. Rep. 544; affirmed, 112 U. S. 377; Quinn v. New Jersey Lighterage Co., 23 Fed. Rep. 363; 32 Alb. Law Jour. 86; Alabama, &c., R. Co. v. Waller, 48 Ala. 459; McLean v. Blue Point, &c., Co., 51 Cal. 255; Summerhays v. Kansas, &c., R. Co., 2 Colo. 484; Colorado, &c., R. Co. v. Ogden, 3 Colo. 499; Burke v. Norwich, 34 Conn. 475; Georgia, &c., R. Co. v. Rhodes, 56 Ga. 645; Shields v. Yonge, 13 Ga. 349; 60 Am. Dec. 698. "He, the master, is not liable for the negligence of a fellow-servant while engaged in the same employment, unless *he has been negligent* in the selection of that servant, or retained him after knowledge of his incompetency." Crusselle v. Pugh, 67 Ga. 430, 435; 44 Am. Rep. 724; Stafford v. Chicago, &c., R. Co. (Ill.), 6 Chic. Law Jour. 329, 330; Chicago, &c., R. Co. v. Rusch, 84 Ill. 570; Sullivan v. Toledo, &c., R. Co., 58 Ind. 26; Robertson v. Terre Haute, &c., R. Co., 78 Ind. 77; 41 Am. Rep. 552; Peterson v. Whitebreast Coal, &c., Co., 50 Iowa, 673; 32 Am. Rep. 143; Union Trust Co. v. Thomason, 25 Kan. 1; Louisville, &c., R. Co. v. Caven's Adm'r, 9 Bush, 559; Camp v. Church Wardens, 7 La. Ann. 321; McGee v. Boston Cordage Co., 139 Mass. 145; 1 East. Rep. 126; Carle v. Bangor, &c., R. Co., 43 Me. 269; Blake v. Maine, &c., R. Co., 70 Me. 60; 35 Am. Rep. 279; Hanrathy v. Northern, &c., R. Co.,

§ 315. The reasoning of the Massachusetts case.— It is clear that this exception to the rule of *respondeat superior* in favor of employers had its origin in the common law in the case of

46 Md. 280; Smith v. Lowell Manfg. Co., 124 Mass. 114; Johnson v. Boston Towboat Co., 135 Mass. 209; 46 Am. Rep. 458; Chicago, &c., R. Co. v. Bayfield, 37 Mich. 205. When the employer has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them. Smith v. Flint, &c., Ry. Co., 46 Mich. 258, 264; 41 Am. Rep. 161; Joslin v. Grand Rapids Ice Co., 50 Mich. 516; 45 Am. Rep. 54; Foster v. Minnesota, &c., R. Co., 14 Minn. 360; Brown v. Winona, &c., R. Co., 27 Minn. 162; 38 Am. Rep. 285; Tierney v. Minnesota, &c., R. Co., 33 Minn. 311; 32 Alb. Law Jour. 133; Memphis, &c., R. Co. v. Thomas, 51 Miss. 639; Howd v. Mississippi, &c., R. Co., 50 Miss. 178; Gibson v. Pacific, &c., R. Co., 46 Mo. 163; Gormly v. Vulcan Iron Works, 61 Mo. 492; McAndrews v. Burns, 39 N. J. Law, 118; Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; Brick v. Rochester, &c., R. Co., 98 N. Y. 211; 32 Albany Law Jour. 52; Sherman v. Syracuse, &c., R. Co., 17 N. Y. 153; Laning v. N. Y., &c., R. Co., 49 N. Y. 512; Murphy v. Boston & Albany R. Co., 88 N. Y. 146; 42 Am. Rep. 240; Hardy v. Carolina, &c., R. Co., 76 N. C. 5; Murray v. South Carolina R. Co., 1 McMul. 385; 36 Am. Dec. 268, which is expressly declared, in Boatwright v. Northeastern R. Co., 25 S. C. 128, to be still the law in South Carolina; Whaalan v. Mad River R. Co., 8 Ohio St. 249; Key Stone Bridge Co. v. Newberry, 96 Penn. St. 246; 42 Am. Rep. 543. When no negligence on the part of defendant is proved, and it appears that the injury was directly caused by a fellow-workman's negligent disobedience of orders, it is the court's duty to give a specific instruction to find for defendant. Allegheny Heating Co. v. Rohan, 118 Penn. St.; 11 Atl. Rep. 789; Fox v. Sandford, 4 Sneed, 36; Nashville, &c., R. Co., v. Wheless, 10 Lea, 741; 43 Am. Rep. 317; Price v. Houston, &c., R. Co., 46 Tex. 535; Hard v. Vermont, &c., R. Co., 32 Vt. 472; Brabbits v. Chicago, &c., R. Co., 38 Wis. 289; Luebke v. Chicago, &c., R. Co., 59 Wis. 127; 48 Am. Rep. 483. A complaint in an action by a servant against his master to recover damages for injuries sustained, which makes a general averment, charging facts sufficient for a recovery, and specific statements showing that the injuries were caused by the negligence of a fellow-servant, states no cause of action. Indianapolis, &c., Ry. Co. v. Johnson, 102 Ind. 352. The non-liability of masters for injuries to servants through the negligence of fellow-servants is discussed, and extracts from statutes and decisions on the subject are collected in 23 Weekly Law Bul. 84. See, also, Cooley on Torts, 541; 1 Redfield on Railways, § 131 *et seq.*, and McKinney on Fellow Servants, *in loco.* A servant is not liable for the acts of a fellow-servant of the common master, but simply takes the risk of them. McCormick v. Nassau Electric R. Co., 18 App. Div. (N. Y.) 333.

Priestley v. Fowler,[30] in England, and in Murray v. South Carolina R. Co.,[31] in the United States. We shall look in vain in the reports of either country for any earlier adjudications than these in point. A consideration of the later cases will show that the doctrine has been mainly developed under the influence upon the jurisprudence of each country of the great railway corporations. A very large proportion of the cases in which the question of an employer's liability to his employees in this regard has arisen have been railway cases, and the commercial importance and power of these corporations have extended the rule in their interest much beyond what might, under other circumstances, have been expected. But, while the origin of the rule is not far to seek, and its development from 1837 to the present time can be intelligently appreciated, with the principal underlying causes of its extension and growth, in the opinion of the author no entirely satisfactory reason for the exception has ever been found. The reasons of the rule were well stated by Chief Justice Shaw, of Massachusetts, in Farwell v. Boston & Worcester R. Co.[32] His opinion contains, in substance, all the arguments which in forty succeeding years have been discovered by the courts in favor of the rule as therein adopted, and they amount, it is submitted, in reality to this:— that from considerations of public policy and general convenience, the law will refuse, in the absence of an express contract, to imply a contract on the part of the employer of liability for the negligence of his employee as to a fellow employee, but will, from the same considerations, in the absence of an express contract, imply a contract on the part of the employee to run the risk as to his co-employees of all the ordinary and extraordinary dangers of the common employment.

§ 316. The reason of the rule criticised.— If this be an essentially fair statement of what is proposed as the *ratio decidendi*, it is safe to charge that it is not entirely satisfactory. It may be briefly urged, in objection to the present state of the law upon this point — (*a*) that, inasmuch as it is essentially a question of agency, it is a violent rule that allows the judges to say, as matter of law, beforehand, in every case where a servant injures a fellow-servant, that he is not *quoad hoc* the master's

[30] 3 M. & W. 1.
[31] 1 McMillan's Law, 385.
[32] 4 Metc. 49.

agent, when it is not denied that he is his master's agent for some purposes. Shall the courts presume to say, when the question of agency is properly a question of fact, that when injury results, there is no agency, while when advantage results the agency is not to be disputed? If the servant is the master's agent there is an end of controversy; and were not the Scotch judges right, in Wilson v. Merry,[33] in holding that in such a case the question of the agency must go to the jury? (*b*) It may further be asserted that, upon this subject, as to the question of public policy, judges, as a rule, are not more capable of deciding than other equally informed and experienced men, and that in assuming that the rule of the non-liability of employers is the better policy, questions of fact are involved which the policy of the law has usually referred to juries. Moreover, this question of public policy and general convenience was decided for us in the very infancy of the great corporate interests of the country, when railways were an experiment, and powerful private corporations had not been born. What was sound public policy before the middle of the century, even if it be conceded that the judges of half a century ago divined it aright, when Priestley v. Fowler and Murray v. South Carolina R. Co. were decided, may, in view of the extraordinary change in position as regards employer and employee, reasonably be challenged in 1892. It is quite possible that what was good public policy then, is not policy in any sense now.[34]

§ 317. The same subject continued.— (*c*) Is it in point of fact true that the employee takes the risk of the employment, by entering into it with his eyes open? Verily, he does in a legal point of view in the present attitude of the law toward him. If he is injured, as the law is, he gets no damages, and it is a legal

[33] L. R. 1 Sc. App. 326; 19 L. T. (N. S.) 30.

[34] See the discriminating opinion of Lord, J., in Anderson v. Bennett, 16 Or. 515, in which he notes the vast change in industrial interests since Farwell v. Boston & Worcester R. Co. was decided, and criticises the severity of the broad rule of exemption as declared in Massachusetts, affirming that its application has often worked manifest injustice and hardship. Public policy may or may not be a term to conjure with, but it is interesting to observe that in Ohio the liability of railroad companies for injuries caused by the carelessness of those who are superior in authority and control over them is placed chiefly upon considerations of "public policy." Railway Co. v. Spangler, 44 Ohio St. 471, 478.

presumption that every man knows the law. But this is not enough to sustain the position. It proceeds upon the presumption, not of law, but of fact, that the employee actually thinks of the possibility of injury, and deliberately decides to take the risk. This is an assumption contrary to all human experience, and the position seems wholly untenable. In reality the servant does not voluntarily and intelligently decide to assume any such risk as the law casts upon him. (*d*) But, it is said, as a controlling argument, that there is the implied contract on the part of the servant, implied through considerations of public convenience. To which it may be replied that the policy is questioned. It is insisted, also, that, aside from this supposed consideration of public policy, there is no consideration whatsoever for such a contract, the price of labor not being pretended to be in any proportion to the risk — *e. g.*, a railway brakeman receives smaller wages than a conductor, while his exposure to danger is many times more; and a fireman is paid less for risking his life every other night than a station agent is paid for running no risk at all. Moreover, this implied contract, fastened upon the employee, is one which, on the other hand, he did not make for himself, but which, on the other hand, if he consulted his interests, he would wholly refuse to make if the matter were brought to his notice. By what right does a court assume to frame this contract for him? To which the only answer is, by virtue of considerations of public policy and under the operation of the rule of *stare decisis*. Because Lord Abinger in England, in 1837, and Judge Evans in South Carolina, in 1841, in cases of novel impression, believed that public policy required the adoption of this rule at that day — when at least it is barely possible that these two judges were mistaken — all the courts of the two countries follow these precedents, and the law is as it is.[35]

§ 318. The modification of this rule in Kentucky.— Under a statute in Kentucky, giving punitive damages in case of death resulting from wilful neglect, it is held that when the wilful neglect of the defendant is established, the contributory negli-

35 See an intelligent discussion of this subject in "Employers' Liability for Personal Injuries to their Employees," a pamphlet written for the Commonwealth of Massachusetts, in accordance with a resolution of the legislature. By Charles G. Fall, Esq., of Boston, 1883.

gence of the plaintiff is no bar to his recovery.[36] The statute is as follows:— "If the life of any person is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."[37] "Wilful neglect," within the meaning of this statute, is such conduct as implies malice, or a reckless disregard of human safety, *i. e.*, such negligence as is *quasi*-criminal;[38] but if the killing be intentional, it does not come within the statute. "The redress of injuries consisting in the destruction of life resulting from negligence, is the exclusive subject to which all the provisions of the statute relate;"[39] neither will the statute apply where the injuries do not result in death;[40] nor in cases where the *wilful* neglect of the defendant is not clearly made out.[41]

§ 319. The leading case in Kentucky.— The leading case in Kentucky, considering an employer's liability in this regard, is Louisville, &c., R. Co. v. Collins,[42] in which the opinion was written by Chief Justice Robertson. This case settled the law as to the liability of an employer to his employee for injuries occasioned by the negligence of a fellow-servant, and the doctrine of that decision has sometimes been understood to be some-

[36] Louisville, &c., R. Co. v. Goodell, 17 B. Mon. 586; Louisville, &c., R. Co. v. Sickings, 5 Bush, 1; Louisville, &c., R. Co. v. Filburn, 6 Bush, 574; Louisville, &c., R. Co. v. Mohony, 7 Bush, 235; Digby v. Kenton Iron Works Co., 8 Bush, 166; Jacobs v. Louisville, &c., R. Co., 10 Bush, 263; Claxton v. Lexington, &c., R. Co., 13 Bush, 636; Jones' Adm'r v. Louisville, &c., R. Co., 82 Ky. 610.

[37] 2 Stanton's Rev. Stat. Ky. 510, § 3; Gen. Stats. 1873, chap. 57, § 3.

[38] Board of Internal Improvements v. Scearce, 2 Duv. 576; Louisville, &c., Canal Co. v. Murphy, 9 Bush, 522; Louisville, &c., R. Co. v. Case, 9 Bush, 728; Jacobs v. Louisville, &c., R. Co., 10 Bush, 263; Claxton v. Lexington, &c., R. Co., 13 Bush, 642; Lexington v. Lewis' Adm'x, 10 Bush, 677; Hansford's Adm'x v. Payne, 11 Bush, 380; Chiles v. Drake, 2 Metc. 146.

[39] Spring's Adm'r v. Glenn, 12 Bush, 172; Morgan v. Thompson, 82 Ky. 383.

[40] Louisville, &c., R. Co. v. Collins, 2 Duv. 114; Louisville, &c., R. Co. v. Robinson, 4 Bush, 507.

[41] Sullivan v. Louisville Bridge Co., 9 Bush, 81.

[42] 2 Duv. 114.

thing near the Georgia and Illinois rule of "comparative negligence." It is, however, not exactly that, as a careful reading of the leading case will show.[43] It was a simple case presenting the question fairly. A railway engineer ordered a young and inexperienced laborer to go under an engine, which was standing on the track with steam up, for the purpose of making repairs, and the engineer neglected to check the hind wheels, and the engine started, cutting off both the legs of the laborer. The court held that, while the laborer may have been negligent, yet, as the negligence of the engineer was wilful, the company must pay damages.

§ 320. The opinion in the Collins case.— The court said:— "The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium facit per se.* It is, therefore, responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graded by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees, associated with the engineer in conducting the cars, the negligence must be gross,[44] but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers constituting a distinct class, all standing on the same platform of equality and power and engaged in a merely incidental but independent service, no one of them, as between himself and his co-equals, is the corporation's agent, and, therefore, it is not, on the principle of agency or otherwise, responsible for damages to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it."[45] This is the Kentucky doctrine. It is, perhaps

[43] *Vide* § 98, *supra*, for an extended discussion of that case.

[44] *i. e.* wilful. See § 98, *supra*.

[45] Louisville, &c., R. Co. v. Collins, 2 Duv. 114. Where a brakeman is injured by the wilful negligence of the engineer of the same train, the railroad company is liable, the brakeman and engineer not being co-equals. Louisville, &c., R. Co. v. Brook's Adm'x, 83 Ky. 129. So, also, where he is injured by the gross neglect of a fireman acting according to the custom of the road, as engineer while switching. A railroad company is liable for injuries to a brakeman, through the gross neg-

it should be admitted, something more than the general rule, but it is plainly not the same thing as the rule of "comparative negligence."[46]

§ 321. The rule in Illinois.— In Illinois, under the influence of the rule of comparative negligence, the general rule, as to an employer's liability to his employee for the negligence of a co-employee, is so modified that a comparison is instituted between the negligence of plaintiff and defendant, and if it appear that the negligence of the former is slight while that of the latter is gross, the plaintiff may recover. So thoroughly is this pernicious principle engrafted upon the jurisprudence of that State that it is asserted even here.[47]

§ 322. The rule in Tennessee.— A somewhat similar qualification of the rule has been asserted in Tennessee. There, a plaintiff may not recover if, by the exercise of ordinary care, he could have avoided the mischief, but if only by extraordinary care could it have been avoided, he may recover; and it is also held that a plaintiff's negligence, which is not sufficient altogether to defeat a recovery, may be looked to in mitigation of damages.[48] "Where a party," said McKinney, J., in the lead-

lect of a fireman, acting according to the custom of the road as engineer, while switching the train, the brakeman not being his co-equal while so employed. Louisville, &c., R. Co. v. Moore, 83 Ky. 675. But the statute does not vary the common law rule of liability so as to allow recovery for the death of a servant when caused by the negligence of a fellow-servant, in the same grade of employment. Casey's Adm'r v. Louisville, &c., R. Co., 84 Ky. 79; See Lingenfelter v. Louisville, &c., R. Co. (Ky.), 4 S. W. Rep. 185, where the engine bell was ringing, and head light burning, but the engineer was not on the look-out, and it was held sufficient to charge the company with wilful negligence in running over a watchman who must have been aware of his danger.

[46] See, particularly, Louisville, &c., R. Co. v. Robinson, 4 Bush, 507; Digby v. Kenton Iron Works Co., 8 Bush, 166.

[47] Chicago, &c., R. Co. v. Gregory, 58 Ill. 272; Chicago, &c., R. Co. v. Sullivan, 63 Ill. 293; Fairbank v. Haentzsche, 73 Ill. 236; St. Louis, &c., R. Co. v. Britz, 72 Ill. 256; Toledo, &c., R. Co. v. O'Connor, 77 Ill. 391; Foster v. Chicago, &c., R. Co., 84 Ill. 165. And see §§ 72 to 79, *supra*. But see § 85a.

[48] Whirley v. Whiteman, 1 Head, 610; Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347. For a railroad servant, who had boarded the pay train to receive the amount due him, and had com-

ing case, " brings an injury upon himself, or contributes to it, the mere want of a *superior* degree of care or diligence cannot be set up as a bar to the plaintiff's claim for redress, and, although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of *ordinary* care, have avoided the consequence of the defendant's negligence, he will be entitled to recover."[49]

§ 323. Who are fellow-servants.[50]— A servant, in law, is any person, male or female, minor or of full age, paid or unpaid, who works for another with his knowledge and consent. Two or more such persons working for the same master are co-employees, or fellow-servants. The earliest case in which the question, as bearing upon the matter of negligence, arose, is Priestley v. Fowler,[51] decided in the English Court of Exchequer, in 1837. In this case, two men, working for a butcher and riding in his van, were held fellow-servants. Here there was a similar occupation, and they had full knowledge, or opportunity for knowledge, of each other's care and character and judgment. In the next case, Murray v. South Carolina R. Co.,[52] decided in the Court of Appeals of South Carolina, in 1841, an engineer and fireman, employed together upon the same locomotive, were held fellow-servants. In Farwell v. Boston and Worcester R. Co.,[53] decided in 1842, a locomotive engineer and a switchman were declared to be within the rule. In Brown v. Maxwell,[54] a New York case, decided in 1844, a workman and his foreman, whose orders the workman was required to obey, were held co-employees. In 1850, in Albro v. Agawam Canal Co.,[55] the rule as originally declared in Massachusetts,

pleted his business, to attempt to alight from the train which was then moving is not such contributory negligence *per se* as will prevent recovery for injuries sustained, and it is for the jury to determine whether such acts should prevent recovery, or only mitigate damages. Louisville, &c., R. Co. v. Stacker, 2 Pickle, 343; 6 S. W. Rep. 737.

49 Whirley v. Whiteman, 1 Head, 610. And see §§ 71, 93, 98, *et seq.*, *supra.*

50 See 30 Cent. L. J. 504, note; 39 Am. & Eng. R. Cas. 332, note; McKinney on Fellow-Servants, *in loco;* Bailey on Conflict of Judicial Decisions, 211; Garrahy v. Kansas City, &c., R. Co., 28 Fed. Rep. 262, and the note.

51 3 M. & W. 1.

52 1 McMillan's Law, 385; 36 Am. Dec. 268.

53 4 Metc. 49; 38 Am. Dec. 339.

54 6 Hill, 592; 41 Am. Dec. 771.

55 6 Cush. 75.

in Farwell v. Boston and Worcester R. Co.,[56] was extended, and an operative and his superintendent were held fellow-servants. 1856, the New York Court of Appeals took a similar ground in Sherman v. Rochester and Syracuse R. Co.[57] In Wiggett v. Fox,[58] an English case decided in the same year, there is a still more radical extension of the doctrine, which in that case was held to apply to an employee of a sub-contractor, whose negligence caused injury to defendant's servant, and who was hired to do work by the piece. The wages of the employee were paid by the defendant, but he worked under the direction of the sub-contractor. In the later cases, the rule has been sufficiently extended to include almost every possible employee.

§ 324. The rule stated.—In the present state of the law the essence of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments, or grades of it, are co-employees, who are held in law to assume the risk of one another's negligence.[59] Lord Cranworth, in the famous case of

[56] 4 Metc. 49; 38 Am. Dec. 339.

[57] 17 N. Y. 153.

[58] 11 Exch. 832; 2 Jur. (N. S.) 955; 25 L. J. (Exch.) 188. See, also, Riley v. O'Brien, 6 N. Y. Supl. 129; 53 Hun, 147.

[59] Lewis v. Seifert, 116 Penn. St. 628; 11 Atl. Rep. 514; Lindvall v. Woods, 41 Minn. 212; Chicago, &c., R. Co. v. O'Bryan, 15 Ill. App. 134; Doughty v. Penobscot Log Driving Co., 76 Me. 143; Scott v. Sweeney, 34 Hun (N. Y.) 292. "It is only when the master or superior places the entire charge of the business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, that the master is held liable for the negligence of such agent or subordinate. The latter must have a general power of control over the business, not a mere authority to superintend a certain class of work, or a certain gang of men, in order to make the master liable." Kinney v. Corbin, 132 Penn. St. 341; Kenny v. Cunard Steamship Co., 55 N. Y. Super. Ct. 558; Loughlin v. State, 105 N. Y. 159; 11 N. E. Rep. 371; Anderson v. Winston, 31 Fed. Rep. 528; McBride v. Union Pac. Ry. Co. (Wyo.), 21 Pac. Rep. 687; Wigmore v. Joy, 5 Exch. 354; 14 Jur. 838; 19 L. J. (Exch.) 300; Feltham v. England, 2 L. R. (Q. B.) 33; 4 Fost. & Fin. 460; 7 Best & S. 676; Wonder v. Baltimore, &c., R. Co.,

Bartonshill Coal Co. v. Reid,[60] defined the relation as follows:— "To constitute fellow-laborers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the

32 Md. 411; 3 Am. Rep. 143; Thayer v. St. Louis, &c., R. Co., 22 Ind. 26; Foster v. Minnesota, &c., R. Co., 14 Minn. 360; Collier v. Steinhart, 51 Cal. 116; Zeigler v. Day, 123 Mass. 152; Lawler v. Androscoggin, &c., R. Co., 62 Me. 463; 16 Am. Rep. 493; Peterson v. Whitebreast C. & M. Co., 50 Iowa, 673; 32 Am. Rep. 143; McLean v. Blue Point M. Co., 51 Cal. 255. "The rule is the same although the one injured may be inferior in grade, and is subject to the control and direction of the superior, whose act caused the injury, provided they are both co-operating to effect the same common object." Lehigh Valley Coal Co. v. Jones, 86 Penn. St. 432, 439; McGowan v. St. Louis, &c., R. Co., 61 Mo. 528; O'Connor v. Roberts, 120 Mass. 227; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Blake v. Maine, &c., R. Co., 70 Me. 60; 35 Am. Rep. 297. "Superiority in grade or rank does not change the relation." Wood on Master & Servant, 847 *et seq.;* Thompson on Negligence, 1026. See, however, Dutzi v. Geisel, 23 Mo. App. 676. A railroad hand ordered to quit work before the usual hour and take a train to carry him to a point where he was to be paid, while boarding the train was injured by the negligence of another workman. It was held that he was in the service of the company at the time so that the negligence of his fellow-workmen exonerated the company. O'Brien v. Boston, &c., R. Co., 138 Mass. 387; 52 Am. Rep. 279. In Broderick v. Detroit Union R. Co., 56 Mich. 261; 56 Am. Rep. 382, the relation of master and servant operated in the workman's favor. He was ordered to assist in opening a ventilator while staying on the premises during the dinner hour, and was injured by a defect without fault on his part. He had judgment against the employer. A brakeman off duty on Sunday and returning home on a conductor's pass is not a co-employee of those running the train, by whose negligence he is killed. State v. Maryland R. Co., 63 Md. 433. The relationship of the plaintiff and a third person as fellow-servants is for the jury to determine, under proper instructions. Theleman v. Moeller, 73 Iowa, 108; 34 N. W. Rep. 765; Baltimore, &c., R. Co. v. McKenzie, 81 Va. 71. But where it so clearly appears from the evidence that the injury to the plaintiff was caused by the negligence of a fellow-servant that a finding based thereon that they were not fellow-servants could not be sustained by the courts, it is proper to direct a verdict for the defendants. Miller v. Ohio, &c., Ry. Co., 24 Ill. App. 326.

[60] 3 Macq. H. L. Cas. 266; 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 796, decided in 1858. "Reid and McGuire were both victims of the same accident which, though melancholy, has settled the law," naively observed the Scotch reporter.

servant sustaining the injury shall both be engaged in precisely the same, or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineer and switchman, the man who lets the miners down into, and who afterward brings them up from the mine, and the miners themselves — all these are fellow-servants and *collaborateurs* within the meaning of the doctrine in question." This is, in general, a fair statement of the prevailing rule as held in England and this country. It must be admitted that the terms " fellow-servant " and " common employment," under late decisions both in England and the United States, are of very comprehensive import.[61]

[61] Brodeur v. Valley Falls Co. (R. I.), 16 R. I. 448; 17 Atl. Rep. 54; Holden v. Fitchburg R. Co., 129 Mass. 268; 37 Am. Rep. 343; Summersell v. Fish, 117 Mass. 312; Hofnagle v. New York, &c., R. Co., 55 N. Y. 608; Weger v. Penn. R. Co., 55 Penn. St. 460; Marshall v. Schricker, 63 Mo. 208; Columbus, &c., R. Co. v. Arnold, 31 Ind. 174, holding that a master machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman. Railway Co. v. Lewis, 33 Ohio St. 196; Cooper v. Milwaukee, &c., R. Co., 23 Wis. 668; St. Louis, &c., R. Co. v. Britz, 72 Ill. 256; Kansas, &c., R. Co. v. Salmon, 11 Kan. 83; Gilshannon v. Stony Brook, &c., R. Co., 10 Cush. 298; Sever v. Boston, &c., R. Co., 14 Gray, 466; Manville v. Cleveland, &c., R. Co., 11 Ohio St. 417; McAndrews v. Burns, 30 N. J. Law, 117; Valtez v. Ohio, &c., R. Co., 85 Ill. 500; Hodgkins v. Eastern R. Co., 119 Mass. 419; Baulec v. New York, &c., R. Co., 59 N. Y. 356; 5 Lans. 436; 62 Barb. 623; Sammon v. New York, &c., R. Co., 62 N. Y. 351; Ohio, &c., R. Co. v. Hammersley, 28 Ind. 371; Tunney v. Midland Ry. Co., 1 L. R. (C. P.) 291; Murphy v. Smith, 19 C. B. (N. S.) 361; 12 L. T. (N. S.) 605; Allen v. New Gas Co., 1 Exch. Div. 254; 45 L. J. 668; 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Weekly Rep. 335. " Since the case of Wilson v. Merry, in the House of Lords (L. R. H. L. Sc. 326), it is not open to dispute, that in general the master is not liable to a servant for the negligence of a fellow-servant, although he be the manager of the concern." Cockburn, C. J., in Howells v. Steel Co., L. R. 10 Q. B. 62; Conway v. Belfast Ry. Co., Ir. R. 9 C. L. 498; Wilson v. Merry, L. R. 1 H. L. Cas. Sc. App. 326; Peschel v. Chicago, &c., R. Co., 62 Wis. 338; 21 N. W. Rep. 269; 20 Cent. L. J. 203; Mobile, &c., R. Co. v. Smith, 59 Ala. 245, where it is said that it is not the relative grades of different employees, or the subordination of one to the other which determines when they are fellow-servants, but it is the nature of the duty intrusted to

§ 325. Rule of vice-principal.— In the federal Supreme Court and in several of the State courts, it is held that where the negligent servant is, in his grade of employment, superior to the injured servant, or where one servant is placed by the employer in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his *alter ego*, or vice-principal, when such inferior servant, without fault, and while in discharge of his duty, is injured by the negligence of the superior servant, the master is liable in damages for the injury.[62]

them. Wilson v. Madison, &c., R. Co., 81 Ind. 226; Colorado, &c., R. Co. v. Martin, 7 Col. 592; 19 Am. Law Rev. 163; Johnson v. Boston Towboat Co., 135 Mass. 209; 46 Am. Rep. 458; McGee v. Boston Cordage Co., 139 Mass. 445; 1 East. Rep. 126.

[62] Railroad Co. v. Fort, 17 Wall. 553; affirming 2 Dill. 259; Mann v. Oriental Print Works, 11 R. I. 152; Mason v. Edison Machine Works, 28 Fed. Rep. 228. One may be a fellow-servant concerning a certain employment, although he has other duties in exercising which he is the *alter ego* of the master. Brick v. Rochester, &c., R. Co., 98 N. Y. 211; Borgman v. Omaha, &c., Ry. Co., 41 Fed. Rep. 667; Criswell v. Pittsburgh, &c., Ry. Co., 30 W. Va. 798; 6 S. E. Rep. 31; Taylor v. Evansville, &c., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; Stephens v. Hannibal, &c., R. Co., 80 Mo. 221; Missouri Pac. R. Co. v. Williams, 75 Tex. 4; 12 S. W. Rep. 835. See, also, Anderson v. Bennett, 16 Or. 515; Slater v. Chapman, 67 Mich. 523; 35 N. W. Rep. 106; Peterson v. Chicago, &c., R. Co., 64 Mich. 621; 34 N. W. Rep. 260; Hussey v. Coger, 39 Hun (N. Y.) 639; Reddon v. Union Pac. R. Co. (Utah), 15 Pac. Rep. 262; Little Miami, &c., R. Co. v. Stevens, 20 Ohio, 415; Dixon v. Rankin, 1 Am. R. Cas. 567, and note; Cleveland, &c., R. Co. v. Keary, 3 Ohio St. 201; Whaalan v. Mad River, &c., R. Co., 8 Ohio St. 249; Berea Stone Co. v. Kraft, 31 Ohio St. 287; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 14; Cooper v. Iowa Central R. Co., 44 Iowa, 134; Patterson v. Pittsburgh, &c., R. Co., 75 Penn. St. 389; Brothers v. Carter, 57 Mo. 373; 14 Am. Rep. 424; Whalen v. Centenary Church, 62 Mo. 226; Cook v. Hannibal, &c., R. Co., 63 Mo. 397; Louisville, &c., R. Co., v. Bowles, 9 Heisk. 866; Nashville, &c., R. Co. v. Jones, 9 Heisk. 27; Chicago, &c., R. Co. v. Bayfield, 37 Mich. 205; Lalor v. Chicago, &c., R. Co., 52 Ill. 401; Mullan v. Phila. Steamship Co., 78 Penn. St. 25; 21 Am. Rep. 2; Kansas, &c., R. Co. v. Little, 19 Kan. 267; Walker v. Bowling, 22 Ala. 294; Moon's Adm'r v. Richmond, &c., R. Co., 78 Va. 745; 49 Am. Rep. 401; Chicago, &c., R. Co. v. Ross, 112 U. S. 377; 8 Fed. Rep. 544. "Where the employer leaves everything in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the master's negligence, for which the latter is lia-

§ 326. Chicago, Milwaukee & St. Paul R. Co. v. Ross.[63]— This case came up from the Circuit Court of the United States for the District of Minnesota. It involved the liability of a railway corporation for an injury to one of its servants resulting from the negligence of another, and as the deliberate judgment of the Supreme Court of the United States upon this frequently recurring and most important question, it has attracted much attention and provoked much criticism and comment. It is a little remarkable that the question had never before been squarely presented to the Supreme Court. In the multitude of decisions upon this point, we find no Supreme Court case upon the question as here presented, and as it has frequently presented itself in the State courts of last resort. In this state of the matter it was fortunate that a case arose which required that august tribunal to pass upon this precise question, and the opinion is worthy of very careful consideration. The case was a

ble." Wharton on Negligence, § 229; Thompson on Negligence, 1028, § 34; Shearman & Redfield on Negligence (5th ed.), § 102; Brabbits v. Chicago, &c., R. Co., 38 Wis. 289; Cumberland, &c., R. Co. v. State, 44 Md. 283; Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Toledo, &c., R. Co. v. Ingraham, 77 Ill. 309; Dobbin v. Richmond, &c., R. Co., 81 N. C. 446; 31 Am. Rep. 512; Baun v. Chicago, &c., R. Co., 53 Iowa, 595; Booth v. Boston, &c., R. Co., 73 N. Y. 38; 29 Am. Rep. 97; Railway v. Sullivan, 5 Tex. Law Rev. 183 (Texas, 1885); Davis v. Central Vermont R. Co., 55 Vt. 84; 45 Am. Rep. 590; Ryan v. Bagaley, 50 Mich. 179; 45 Am. Rep. 35; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298; Wilson v. Willimantic, &c., Co., 50 Conn. 433; 47 Am. Rep. 653; Flike v. Boston, &c., R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Pantzar v. Tilly Foster Mining Co., 99 N. Y. 368; McCasker v. Long Island, &c., R. Co., 84 N. Y. 77; Gunter v. Graniteville Manfg. Co., 18 S. C. 262; 44 Am. Rep. 573; Cowles v. Richmond, &c., R. Co., 84 N. C. 309; 37 Am. Rep. 620; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Mitchell v. Robinson, 80 Ind. 281; 41 Am. Rep. 812; Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. Rep. 369; Atlanta Cottton Factory v. Speer, 69 Ga. 137; 47 Am. Rep. 750. But, see Crispin v. Babbitt, 81 N. Y. 516; 37 Am. Rep. 521, 527, where, in a dissenting opinion, Earl, J., said: — "If one selects a suitable agent to do a lawful and proper act, and is guilty of no negligence in making the selection, or in directing and instructing his agent, and the agent does a negligent or wrongful act, causing injury to another, there is no principle of natural law or abstract justice by which the master can be held responsible for the injury." The master is liable for an injury caused by a fellow-servant in doing an act under the direction of the vice-principal. Wood v. Odell Mfg. Co. (N. C.), 31 S. E. Rep. 495.

[63] 112 U. S. 377.

simple one involving nothing but the bare question whether a railway company is liable to a locomotive engineer for the neglect of a train-conductor. The facts were these:— The conductor of a freight train, which left Minneapolis at about midnight, neglected to notify the engineer of an order which he had received from the train-dispatcher to stop the train at South Minneapolis until a gravel train coming toward the city and not running on schedule time passed. The engineer, not having received the order, through the negligence of the conductor, and without fault on his part, ran his train into the gravel train, and, being injured, sued the company. He had judgment in the court below, and upon a writ of error prosecuted to the Supreme Court of the United States the judgment was there affirmed.[64] It appeared in evidence that the conductors of each train were guilty of gross negligence, and that this negligence caused the collision. The court argued that the conductor, by virtue of his general control and charge of the train, and of his power and authority to direct the other persons employed with him to move the train, represented the company; that ordinary prudence on his part would have prevented the accident, and that, therefore, the company must be held liable in damages for his failure to exercise it. The precise point decided in this case is that a conductor of a regular railway train is not a fellow-servant of the other persons employed to run that train, but is the vice-principal, representing the company, for whose negligent acts, when they result in injury to the other employees upon the train, the company is liable, and in arriving at this conclusion the court enters into a very full and discriminating discussion of the general rule.

§ 327. Who is a vice-principal.— The questions whether an employee is, as to his fellow-servants in a common employment, the representative of the master is often one of considerable difficulty; and there is great conflict in the decisions upon the point. The mere fact that one servant has had more experience and is authorized to give directions to the other in respect to their common work does not make him a vice-principal.[65] And

[64] Mr Justice Field delivering the opinion, Bradley, Matthews, Gray and Blatchford, JJ., dissenting.

[65] Rozelle v. Rose, 3 App. Div. (N. Y.) 132, 138; Loughlin v. State of New York, 105 N. Y. 159; 11 N. E. Rep. 371; Crown v. Orr, 140

the fact that one employee is vested with authority to hire and discharge a co-employee is not conclusive evidence that as to such employee he is a vice-principal; nor does it follow that one employee is not a vice-principal as to his co-employee because not vested with authority to hire and discharge them.[66] And though the courts have frequently attempted to do so, it appears to be impossible to formulate any general rule which will afford a satisfactory test in all cases.[67] The question is generally one

N. Y. 450; 35 N. E. Rep. 648; Faber v. Carlisle Mfg. Co., 126 Penn. St. 387; 17 Atl. Rep. 621.

[66] Union Pacific R. Co. v. Doyle, 50 Neb. 555; 70 N. W. Rep. 43.

[67] In a late case in Minnesota the court say: — "The authorities upon the question when and under what circumstances an employee becomes, as to his fellow-servants in a common employment, the representative of the master, are involved in a bewildering mass of inconsistency and injustice. In the case of Lindvall v. Woods, 41 Minn. 212 (42 N. W. Rep. 1020), this court had the question under consideration, and as a result of a review of its previous decisions, and upon principle, reached the conclusion: — 'That it is not the rank of the employee, or his authority over other employees, but the nature of the duty or service which he performs, that is decisive; that whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent, and to the extent of a discharge of those duties by the middle-man, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere co-servant. It follows that the same person may occupy a dual capacity of vice-principal as to some men and as fellow-servant as to others.' We adhere to this conclusion. It is correct in principle, and furnishes a just and rational test for determining whether the act or default of an employee in a given case is that of a fellow-servant or a vice-principal. The decisive test is not the conventional title, grade, or rank given to the employee, but the character of what he is authorized to do and does do. In the application of this rule or test to the facts of particular cases, wherein an inequitable conclusion may have been reached, not, however, from the principle of the rule, but by taking too limited a view of the personal or absolute duties of the master in such cases." Carlson v. Northwestern Telephone Exchange Co., 63 Minn. 428, 432, 433; 65 N. W. Rep. 914. But the Supreme Court of Nebraska has said that the most satisfactory evidence that one is, as to his co-employees, a vice-principal, is that his co-employees are under his supervision, his control, and subject to his order and directions. Union Pacific R. Co. v. Doyle, 50 Neb. 555; 70 N. W. Rep. 43. And in North Carolina it is held that the test of the

of mixed law and fact, and is to be determined by the particular question whether one in charge of other servants is to be regarded as a fellow-servant or a middleman is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged. Turner v. Goldsboro Lumber Co., 119 N. C. 387, 396, 397; 26 S. E. Rep. 23. See, also, Mason v. Railroad Co., 111 N. C. 482; 16 S. E. Rep. 698; 114 N. C. 718; 19 S. E. Rep. 362; Shadd v. Railroad Co., 116 N. C. 968; 21 S. E. Rep. 554; Patton v. Railroad Co., 96 N. C. 455; 1 S. E. Rep. 863; Logan v. Railroad Co., 116 N. C. 940, 951; 21 S. E. Rep. 959. "The designation as foreman of the business or a branch of it does not *ex vi termini*, import, as does the place of conductor or manager of an independent train and its crew, the existence of such authority as will of necessity inspire the fear of suffering such a penalty for disobedience. But, owing to the fact that the foreman of some establishments are clothed with different powers and sustain different relations toward their subordinates from those existing between superior and subordinate in other places, the circumstances in each case must be developed in order to determine whether the under servant has acted in fear of losing his place on account of a disregard of the command of him who is above him in authority. Where a servant never comes in direct contact with, or receives orders or instructions from one higher in position or power than the foreman, he is justified in looking upon the foreman as the very embodiment of the authority of a corporation." Turner v. Goldsboro Lumber Co., 119 N. C. 387; 26 S. E. Rep. 23. An employee given by a corporation control of a particular class of workmen in any branch of its business is in such respect the direct representative of the company, and the company is responsible for the consequences of commands given by him. The Illinois Steel Co. v. Schymanowski, 162 Ill. 447; 44 N. E. Rep. 876. See, also, Stoddard v. St. Louis, &c., R. Co., 65 Mo. 514; Chapman v. Erie Ry. Co., 55 N. Y. 579; Kansas, &c., R. Co. v. Little, 19 Kan. 267; Walker v. Bowling, 22 Ala. 294; Laning v. New York, &c., R. Co., 49 N. Y. 521; 18 S. C. 362; 44 Am. Rep. 573; Shearman & Redfield on Negligence (5th ed.), § 320; Lindvall v. Woods, 41 Minn. 212; 42 N. W. Rep. 1020; Loughlin v. State, 105 N. Y. 159; 11 N. E. Rep. 371; Flike v. Railroad Co., 53 N. Y. 549; Crispin v. Babbitt, 81 N. Y. 521; McKinney on Fellow-Servants, § 23. A train-dispatcher, especially if he has authority to employ and discharge men, or make new time schedules, is a vice-principal. McKune v. Cal. Southern R. Co., 66 Cal. 302; Lewis v. Seifert, 116 Penn. St. 628; 11 Atl. Rep. 514; Smith v. Wabash, &c., Ry. Co., 92 Mo. 350; 4 S. W. Rep. 129; Darrigan v. N. Y., &c., R. Co., 52 Conn. 285; 52 Am. Rep. 590; Hunn v. Railroad Co., 78 Mich. 513. The master mechanic of a railroad company is a vice-principal as to a fireman upon one of its locomotives. Kruger v. Louisville, &c., Ry. Co., 111 Ind. 51; 11 N. E. Rep. 957. An employer is not liable to

circumstances in evidence in the case in which it is presented.[68]

§ **328. Applications of this doctrine.**— It is held in Ohio that where one servant is a subordinate and subject to the orders and control of another servant, and such inferior servant is injured while in discharge of his duty, without fault, through the negligence of his superior, the master is liable. In such a case the superior servant is held to be the vice-principal.[69] And in Rhode Island the same rule is applied as between an engineer of a manufacturing establishment and his fireman. When, therefore, the engineer ordered the fireman into an extra hazardous position, to perform a duty outside of that which he was engaged to perform, in consequence of which he was injured, the company was held liable.[70] In several jurisdictions it is held that an employer is liable for the negligence of a superintendent which causes injury to a mere employee; that

an employee for the negligence of a vice-principal in doing the duty of a co-employee of the person injured. Quinn v. New Jersey Lighterage Co., 23 Fed. Rep. 363; Johnson v. Ashland Water Co., 77 Wis. 51; 45 N. W. Rep. 807. Plaintiff, a carpenter, working on a railroad trestle, intending to descend to a lower bent, asked the foreman of his gang, who was above him on the trestle, if a certain hanging rope was made fast. On answer that it was, plaintiff swung himself off, and, the rope being loose, he was thrown to the ground and injured. It appeared that plaintiff's descent was without orders of the foreman, and might have been made another way; that he did not tell the foreman of his intention to descend; and that no duty rested on the foreman to see to the means of descent. Held, that the foreman's negligence was merely personal, and not as a vice-principal, and that plaintiff could not recover from the railroad company. Louisville, &c., Ry. Co. v. Lahr, 2 Pickle, 335; 6 S. W. Rep. 663. See, also, Brick v. Rochester, &c., R. Co., 98 N. Y. 211; Garrahy v. Kansas City, &c., R. Co., 25 Fed. Rep. 258; Hussey v. Coger, 39 Hun (N. Y.) 639; Lincoln Coal Mining Co. v. McNally, 15 Ill. App. 181; 7 Am. & Eng. Cyclop. Law, tit. "Fellow-Servants," where the authorities upon the question when and under what circumstances a servant becomes a representative of the master are exhaustively cited and classified.

[68] Union Pacific R. Co. v. Doyle, 50 Neb. 555; 70 N. E. Rep. 43.

[69] Berea Stone Co. v. Kraft, 31 Ohio St. 287; City of Toledo v. Cone, Sup. Ct. of Ohio (1885), 19 Am. Law Rev. 330. It is so held chiefly upon considerations of public policy. Railway Co. v. Spangler, 44 Ohio St. 471, 478.

[70] Mann v. Oriental Print Works, 11 R. I. 152.

the negligence of such a superior officer as this one, intrusted with the general management and control of a business, is the negligence of the employer, for which he is liable.[71] It has been so held of an architect and superintendent having general charge of building a church;[72] and of the foreman of a mine having entire supervision of a mine, including the employing and discharging of laborers;[73] and of a "section boss" upon a railroad;[74] and of the captain of a ship;[75] and of an ordinary superintendent, although engaged at the time of the injury at the same work with the servant injured.[76] And in

[71] Stephens v. Hannibal, &c., R. Co., 86 Mo. 221. In an action by a brakeman against the railroad company for injuries alleged to have been caused by the negligence of defendant's engineer in charge of the train, who was averred by the declaration to have been plaintiff's superior, a plea of not guilty raises an issue as to whether the injury was caused by the engineer's acting in the capacity of plaintiff's superior, but none as to whether he was plaintiff's negligent fellow-servant. East Tennessee, &c., R. Co. v. Collins, 85 Tenn. 227; 1 S. W. Rep. 883; Hussey v. Coger, 39 Hun (N. Y.) 639; Reddon v. Union Pac. R. Co. (Utah), 15 Pac. Rep. 262; Railroad Co. v. Fort, 17 Wall. 553; Cook v. Hannibal, &c., R. Co., 63 Mo. 397; Washburn v. Nashville, &c., R. Co., 3 Head, 638; Railway v. Sullivan, Sup. Ct. Texas (1885), 5 Tex. Law Rev. 183; Dobbin v. Richmond, &c., R. Co., 81 N. C. 446; Wilson v. Willimantic, &c., Co., 50 Conn. 433; 47 Am. Rep. 653; Gunter v. Graniteville Manfg. Co., 18 S. C. 262; 44 Am. Rep. 573; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298. See, also, Peschel v. Chicago, &c., R. Co., 62 Wis. 338; 21 N. W. Rep. 269; Mayhew v. Sullivan Mining Co., 76 Me. 100; 19 Am. Law Rev. 328.

[72] Whalen v. Centenary Church 62 Mo. 226.

[73] Reddon v. Union Pac. R. Co. (Utah), 15 Pac. Rep. 202. A foreman in charge of a stone quarry which is being operated by a company, who has general superintendence over the workmen, and makes rules for their guidance, and abrogates them at his pleasure; who divides the workmen into squads, and appoints foremen for the squads, and who is the highest officer in rank of the company at the quarry, is not a fellow-servant with one of the workmen in the quarry, but occupies to him the relation of vice-principal, and the company is liable for injuries inflicted through his negligence. In the case at bar, the injury was inflicted through the negligence of such foreman. Richmond Granite Co. v. Bailey, 92 Va. 554; 24 S. E. Rep. 232.

[74] Louisville, &c., R. Co. v. Bowles, 9 Heisk. 866; Patton v. Western North Carolina R. Co., 96 N. C. 455; 1 S. E. Rep. 863; Herriman v. Chicago, &c., R. Co., 27 Mo. App. 435.

[75] Ramsay v. Quinn, Irish Common Pleas, 4 Cent. Law Jour. 478. See, also, Wharton on Negligence, § 229.

[76] Crispin v. Babbitt, 81 N. Y. 516; 37 Am. Rep. 521; Gormly v.

Iowa, a foreman is a fellow-servant of the men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees.[77]

§ 329. Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other defendants? — The constructive or presumed presence of the corporation in the acts of its servants is a favorite doctrine with some judges and text-writers. Under the influence of this theory, in some jurisdictions there is attempted a distinction in this regard between a corporation and a natural person. Inasmuch as bodies corporate can, from their very nature, act only through an agent it is urged that, unless this executive agent is to be deemed for the purposes of this rule the corporation itself, there will result in favor of the corporation an immunity which is denied to men who carry on their business in person.[78] A corporation should unquestionably be held liable in damages for the negligence of its servant whenever that servant, under the operation of an impartial rule, stands to it in the relation of vice-principal. Whenever a body corporate comes in its relations to its employees fairly within the general rule of law which regulates the liability of a master for the neglect of his

Vulcan Iron Works, 61 Mo. 492; McCasker v. Long Island, &c., R. Co., 84 N. Y. 77. *Contra*, as to the liability of the master when his vice-principal is doing the duty of a co-employee of the servant who is injured. Quinn v. New Jersey Lighterage Co., 23 Fed. Rep. 363.

[77] Houser v. Chicago, &c., R. Co., 60 Iowa, 230; 46 Am. Rep. 65. Where plaintiff was employed as one of a gang to do heavy moving, under a boss who worked with and directed them, but received his instructions from the foreman of the shop, and had no power to discharge members of the gang, the boss was a fellow-servant and not a vice-principal. Richmond Locomotive & Machine Works v. Ford, 94 Va. 627; 27 S. E. Rep. 509. The act of a foreman in striking at a pile of ore beside which he has set a laborer at work, so as to loosen the support of the under part of it and cause the ore to fall upon such laborer, is the conduct of the master and not of a fellow-servant. The Illinois Steel Co. v. Schymanowski, 162 Ill. 447; 44 N. E. Rep. 876.

[78] 1 Redfield on Railways, 310, § 2, and the notes; Patterson v. Pittsburgh, &c., R. Co., 76 Penn. St. 389; Brickner v. New York, &c., R. Co., 49 N. Y. 672; Cumberland, &c., R. Co. v. Hogan, 45 Md. 229; Cumberland, &c., R. Co. v. Moran, 44 Md. 283.

servant then it should answer, like any other master in like case, for the servant's negligence. It is not easy to see why the rule should go farther, or why there is any reason, in fact or in law, for carrying out a rule especially applicable to corporations. Under the operation of the rule as it stands, the corporation is liable whenever it ought to be liable. Judge Redfield, in his treatise on the law of Railways, attempted to extend the doctrine, but it may well be questioned whether the rule, if generally adopted, would be salutary in its effect. The English courts refuse to recognize such a distinction,[79] and in this country it has been severely criticised. In the case of Evansville, &c., R. Co. v. Baum,[80] the Supreme Court of Indiana said:— "Nor will sound policy maintain the application of a rule of law to railways, or corporations, on this subject, which shall not be applied alike to others — as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned in any tribunal pretending to administer justice impartially." This is a reasonable and perfectly just position, and one which wlil not be challenged by any court of justice not dominated by labor organizations or small politicians.

§ 330. What is common employment.— It is generally held that all servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment. In the earlier cases, the term common employment is used to designate the employment of two or more workmen by one master — *e. g.*, the two employees of the butcher in Priestley v. Fowler.[81] As soon as the rule became recognized law, the courts were called upon to say what classes of cases the term included. Having established the rule, they were asked to apply it, and as case after case arose, it became necessary to determine whether it should have a wide or a narrow application. On the one hand it might be held to include only those employees who

[79] Allen v. New Gas Co., 1 Exch. Div. 251; Conway v. Belfast Ry. Co., Ir. R. 9 C. L. 498; Howells v. Landore Sieman's Steel Co., L. R. 10 Q. B. 62; 44 L. J. (Q. B.) 25; 32 L. T. (N. S) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433.

[80] 26 Ind. 74.

[81] 3 M. & W. 1.

worked side by side in a similar occupation, as masons building a wall, or carpenters a house, or weavers attending adjacent looms; and, on the other hand, it might be so extended as to include all employees of every grade who are hired by the same person, as, all the hands in a factory, or all the employees of a railway corporation; and between the two extremes would be found many various degrees, where the rule might be held to include or exclude occupations more or less dissimilar. The chief embarrassment seems to have been to settle whether it should be strictly confined to persons engaged in similar occupations, or should include any and every occupation however essentially unlike.

§ 331. **The same subject continued.**— Some courts have done one thing, and some another, and decisions abound excluding and including almost every mentionable occupation. It is said by a very competent authority, that twenty years ago no more than a dozen cases could be found in which the point is raised. Now, there are hundreds and hundreds of wholly irreconcilable decisions in point. No court, as far as my reading has gone, has attempted to define the term, to circumscribe it by metes and bounds, or attempted more than to say that the particular case before it was one where common employment ought or ought not to be a defense. Indeed, the term is one which, from the very nature of the subject, cannot be defined. It is entirely impossible to anticipate all the various kinds of employment in their varying degrees of similarity. In Massachusetts the rule has received its widest development. The Supreme Judicial Court of that State holds the most radical views upon this subject,[82] and the influence of that independent and exceptionally able tribunal has, in this particular, been strongly felt throughout the Union, so that, it must be admitted, the Massachusetts rule is the general rule in this country.

§ 332. **Illustrations.— Railroad employees.**—The question of fellow-servant frequently arises in the case of railroad employees,

[82] Shearman & Redfield on Negligence (5th ed.), §§ 227, 230; and the Massachusetts cases cited *supra*.

and it has been held that this relation exists between an engineer of a locomotive and the fireman working with him;[83] an engineer and a brakeman on the same train;[84] an engineer and a brakeman on different trains of the same company;[85] engineers on different trains;[86] an engineer and a switch-tender;[88] an engineer and

[83] Mulligan v. Montana Union Ry. Co., 19 Mont. 135; 47 Pac. Rep. 795; Kansas City, &c., Ry. Co. v. Becker, 63 Ark. 477; 39 S. W. Rep. 358; Murray v. South Carolina R. Co., 1 McMill. 385; 36 Am. Dec. 268; Gulf, &c., Ry. Co. v. Blohn, 73 Tex. 637; 11 S. W. Rep. 867. *Contra*, Nashville, &c., Ry. Co. v. Handman, 13 Lea (Tenn.) 423; Ragsdale v. Northern Pac. R. Co., 42 Fed. Rep. 383. St. Louis, &c., Ry. Co. v. Weaver, 35 Kan. 412, is authority for the rule that an engineer and section foreman are not fellow-servants.

[84] St. Louis, &c., R. Co. v. Britz, 72 Ill. 256; Summerhays v. Kansas, &c., R. Co., 2 Colo. 284; Sherman v. Rochester, &c., R. Co., 17 N. Y. 153; Nashville, &c., R. Co. v. Wheless, 10 Lea, 741; 43 Am. Rep. 317; Missouri Pac. Ry. Co. v. Texas, &c., Ry. Co., 31 Fed. Rep. 527; Wallis v. Morgan's, &c., R. Co., 38 La. Ann. 156; Fowler v. Chicago, &c., Ry. Co., 61 Wis. 159. *Contra*, Louisville, &c., R. Co. v. Brooks' Adm'x, 83 Ky. 129; East Tenn., &c., R. Co. v. Collins, 85 Tenn. 227. In Rodman v. Michigan Cent. R. Co., 55 Mich. 57; 54 Am. Rep. 348, the court was equally divided on the question whether a brakeman could recover for injuries received in consequence of the conductor's managing the locomotive in the engineer's absence. Louisville, &c., R. Co. v. Moore, 83 Ky. 675, holding that a fireman acting as engineer, according to the custom of the road, while switching, and a brakeman on the same train are not fellow-servants.

[85] Wright v. N. Y., &c., R. Co., 25 N. Y. 562; Louisville, &c., R. Co. v. Robinson, 4 Bush, 507; Pittsburgh, &c., R. Co. v. Devinney, 17 Ohio St. 197; Randall v. Baltimore, &c., R. Co., 109 U. S. 478. See, also, Armour v. Hahn, 111 U. S. 313; Hough v. Railroad Co., 100 U. S. 213. And a passenger-train engineer is not a fellow-servant with the train-men in charge of a freight train. Kentucky Cent. R. Co. v. Ackley, 87 Ky. 278; 8 S. W. Rep. 691. The engineer of a "wild" engine, who, by violation of orders, produces a collision, is a fellow-servant of a brakeman on the train collided with. Healy v. N. Y., N. H. & H. R. Co. (R. I.) 37 Atl. Rep. 676.

[86] Van Avery v. Union Pac. Ry. Co., 35 Fed. Rep. 40. But not an engineer and fireman on different trains. Howard v. Denver, &c., Ry. Co., 26 Fed. Rep. 837.

[88] Farwell v. Boston & Worcester R. Co., 4 Metc. 49; 38 Am. Dec. 339; Naylor v. New York, &c., R. Co., 33 Fed. Rep. 801. But Louisville, &c., R. Co. v. Sheets (Ky.), 13 S. W. Rep. 248, holds that an engineer and a yard switchman are not fellow-servants.

a telegraph operator;[89] an engineer and a track repairer;[90] an engineer and an inspector of the tracks;[91] an engineer and a servant employed to put danger signals on the track;[92] an engineer and a shoveler on a gravel train;[93] an engineer of a switch-engine and a car repairer;[94] an engineer and a station agent;[95] an engineer and a servant employed at a station whose duties in-

89 Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; Monaghan v. New York, &c., R. Co., 45 Hun, 113. *Contra*, Madden v. Chesapeake, &c., Ry. Co., 28 W. Va. 610; 57 Am. Rep. 695. Engineer and "train dispatcher" are not fellow-servants. Darrigan v. New York, &c., R. Co., 52 Conn. 285; 52 Am. Rep. 590. Train dispatchers are vice-principals. McKune v. Cal. Southern R. Co., 66 Cal. 302; Lewis v. Siefert, 116 Penn. St. 628; 11 Atl. Rep. 514; Smith v. Wabash, &c., R. Co., 92 Mo. 359; 4 S. W. Rep. 129. When it appears that a collision was caused by an operator's negligent misinterpretation of a dispatcher's order as to holding a delayed train, although the operator is a fellow-servant of the engineer of the train, who was killed by the accident, the question of the defendant railroad company's negligence ought still to be submitted to the jury, since they may find that due diligence required that the dispatcher should have sent orders directly to the conductor and engineer of the train, in which case the possibilities of mistake would have been decreased. Sutherland v. Troy, &c., R. Co., 46 Hun, 372.

90 Boldt v. New York, &c., R. Co., 18 N. Y. 432; Whaalen v. Mad River R. Co., 8 Ohio St. 249; Ohio, &c., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; Gormley v. Ohio, &c., R. Co., 72 Ind. 32; Van Wickle v. Manhattan Ry. Co., 23 Blatchf. 422; Clifford v. Old Colony R. Co., 141 Mass. 564; Connelly v. Minneapolis, &c., Ry. Co. (Minn.), 35 N. W. Rep. 582. See, also, Corbett v. St. Louis, &c., R. Co., 26 Mo. App. 621. *Contra*, as to an engineer and section-master, according to Calvo v. Charlotte, &c., R. Co., 23 S. C. 526; 55 Am. Rep. 28; and as to a passenger-train engineer and a section hand; Sullivan v. Missouri Pac. Ry. Co., 97 Mo. 113; 10 S. W. Rep. 852.

91 Waller v. Southeastern Ry. Co., 2 Hurl. & C. 102; Coon v. Syracuse, &c., R. Co., 5 N. Y. 492; Lovejoy v. Boston, &c., R. Co., 125 Mass. 79; 28 Am. Rep. 206.

92 East Tennessee, &c., R. Co. v. Rush, 15 Lea (Tenn.) 145.

93 Ohio, &c., R. Co. v. Tindall, 13 Ind. 366. See, also, St. Louis, &c., R. Co. v. Britz, 72 Ill. 256; Chicago, &c., R. Co. v. McDonald, 21 Ill. App. 409; St. Louis, &c., R. Co. v. Shackelford, 42 Ark. 417.

94 Chicago, &c., R. Co. v. Murphy, 53 Ill. 336; Valtez v. Ohio, &c., R. Co., 85 Ill. 500.

95 Evans v. Atlantic, &c., R. Co., 62 Mo. 49; Brown v. Minneapolis, &c., R. Co., 23 Am. L. Reg. 335. See, also, Brown v. Winona, &c., R. Co., 27 Minn. 162; 38 Am. Rep. 285, a case of a section-man and a road-master held under the same rule.

volved the coupling and uncoupling of cars;[96] an engineer and a workman employed in an engine yard;[97] an engineer and a tunnel repairer, while being transported from one point to another on that line of railroad;[98] an engineer and any employee of the railroad company, including, specifically, the general superintendent, the supervisor of the road, a section boss, and a common laborer;[99] an engineer and the laborers on a gravel or construction train;[1] an engineer and the servants of a contractor, engaged in furnishing wood to the railroad under the contract, being on the train,[2] a brakeman and another brakeman on the same train;[3] a brakeman and a fireman on the same train;[4] a brakeman and the employees operating another train;[5] a brakeman and a car inspector;[6] a brakeman and a switch-ten-

[96] Wilson v. Madison, &c., R. Co., 81 Ind. 226; and an engineer and a yardman, attempting to couple cars, that being out of his line of duty. Bradley v. Nashville, &c., Ry. Co., 14 Lea (Tenn.) 374.

[97] Texas, &c., Ry. Co. v. Harrington, 62 Tex. 597.

[98] Capper v. Louisville, &c., Ry. Co., 103 Ind. 305.

[99] Mobile, &c., R. Co. v. Smith, 59 Ala. 245. This should seem to be the culmination of the rule as far as it affects railway corporations. Krogg v. Atlanta, &c., R. Co., 77 Ga. 202, holds that an engineer is not a fellow-servant with the general manager of the road.

[1] Chicago, &c., R. Co. v. Keefe, 47 Ill. 108; Ryan v. Cumberland, &c., R. Co., 23 Penn. St. 384. But the foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the section-men are not fellow-servants. Omaha & Republican Valley R. Co. v. Krayenbuhl, 48 Neb. 553; 67 N. W. Rep. 447.

[2] Illinois, &c., R. Co. v. Cox, 21 Ill. 20; but not an engineer and a detective in the employ of the railway company, walking on the track. Pyne v. Chicago, &c., R. Co., 54 Iowa, 223; nor an engineer of a train with a teamster hauling ties, who, with other workmen, rides on the train to dinner. Hobson v. New Mexico, &c., R. Co. (Ariz.), 11 P. 545.

[3] Hayes v. Western R. Co., 3 Cush. 270.

[4] Galveston, &c., Ry. Co. v. Faber, 63 Tex. 344.

[5] McMaster v. Illinois Cent. Ry. Co., 4 So. Rep. 59.

[6] Mackin v. Boston, &c., R. Co., 135 Mass. 201; 46 Am. Rep. 456; Smith v. Flint, &c., R. Co., 46 Mich. 258; 41 Am. Rep. 161; Ballou v. Chicago, &c., R. Co., 54 Wis. 259; 41 Am. Rep. 31; Michigan, &c., R. Co. v. Smithson, 45 Mich. 212; Columbus, &c., R. Co. v. Webb, 8 Ohio Law Jour. 201 (Ohio, 1884); Railroad Co. v. Fitzpatrick, 8 Ohio Law Jour. 203 (Ohio, 1884); 19 Am. Law Rev. 163; St. Louis, &c., Ry. Co. v. Gaines, 46 Ark. 555. See, also, Byrnes v. New York, &c., R. Co., 113 N. Y. 251; 21 N. E. Rep. 50.

der;[7] a brakeman and the mechanics in a repair shop, including the inspector of machinery;[8] a brakeman and one whose duty it is to fill the sand-box on the engine;[9] a brakeman and a "section boss";[10] a fireman in addition to the relations *supra*, and the master-machinist of the railway company;[11] a fireman and the servants of an independent contractor at work for the company, and being upon the train;[12] a fireman and a track repairer;[13] a fireman and a trackwalker;[14] a fireman and a telegraph operator;[15] a carpenter or other employees of a railway company,

Contra, O'Neil v. St. Louis & Iron Mountain, &c., R. Co., 9 Fed. Rep. 337; Smith v. Chicago, &c., R. Co., 42 Fed. Rep. 520; Daniels v. Union Pac. Ry. Co. (Utah), 23 Pac. Rep. 762; Morton v. Detroit, &c., R. Co., 81 Mich. 423; 46 N. W. Rep. 111; 20 N. E. Rep. 287; Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58; 12 Pac. Rep. 352; Tierney v. Minneapolis, &c., Ry. Co., 33 Minn. 311; 53 Am. Rep. 35.

[7] Slattery's Adm'r v. Toledo, &c., R. Co., 23 Ind. 83.

[8] Wonder v. Baltimore, &c., R. Co., 32 Md. 418; 3 Am. Rep. 143; Besel v. New York, &c., R. Co., 70 N. Y. 171. *Cf.* Murphy v. Boston, &c., R. Co., 88 N. Y. 146; 42 Am. Rep. 240; Cooper v. Pittsburgh, &c., Ry. Co., 24 W. Va. 37. *Contra*, Condon v. Missouri, &c., R. Co., 78 Mo. 567; Blessing v. Missouri, &c., R. Co., 77 Mo. 410.

[9] Louisville, &c., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 361.

[10] Slattery v. Toledo, &c., R. Co., 23 Ind. 81. *Contra*, Nashville, &c., R. Co. v. Carroll, 6 Heisk. 347. See, also, Waller v. Southeastern Ry. Co., 2 Hurl. & C. 102; 7 Jur. (N. S.) 501; 32 L. J. (Exch.) 205; but not the train-men running a material train, and a section boss. Moon's Adm'r v. Richmond, &c., R. Co., 78 Va. 745; 49 Am. Rep. 401.

[11] Columbus, &c., R. Co. v. Arnold, 31 Ind. 174; but not a fireman and the company's bridge builder. Davis v. Central, &c., R. Co., 55 Vt. 84; 45 Am. Rep. 590; Gilleuwater v. Madison, &c., R. Co., 5 Ind. 339; 61 Am. Dec. 101, and note.

[12] Illinois, &c., R. Co. v. Cox, 21 Ill. 20. *Cf.* Davis v. Central, &c., R. Co., 55 Vt. 84; 45 Am. Rep. 590.

[13] Whaalan v. Mad River R. Co., 8 Ohio St. 249; Boldt v. New York, &c., R. Co., 18 N. Y. 432; Ohio, &c., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; King v. Boston, &c., R. Co., 9 Cush. 112; 129 Mass. 277 (*n.*); Corbett v. St. Louis, &c., R. Co., 26 Mo. App. 621. But see, *contra*, a very carefully considered case, Chicago, &c., R. Co. v. Moranda, 93 Ill. 302; 34 Am. Rep. 168, holding that to be in the same common employment, servants must actually co-operate at the time of the injury in the particular business in hand, or their usual duties should bring them into habitual consociation, so that proper caution for their common safety would be likely to result.

[14] Schultz v. Chicago, &c., R. Co., 67 Wis. 616; 58 Am. Rep. 881.

[15] Not the train dispatcher, but one who communicates instructions from him to the train-men. McKaig v. Northern Pac. R. Co., 42 Fed. Rep. 288.

and the men in charge of the train by which they are carried to their work;[16] an employee going on a train to his work and a signal-man;[17] a carpenter at work for a railway company and servants of the company in charge of a turn-table;[18] a road-master and a common laborer;[19] a section-hand running a hand-car and the employees on a train;[20] a car-repairer and a yard switchman;[21] a car-repairer and a yard-master;[22] a baggage-master on

[16] Seaver v. Boston, &c., R. Co., 14 Gray, 466; Gillshannon v. Stony Brook R. Co., 10 Cush. 228; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 736; C. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 12 Week. Rep. 144 (affirming 5 Best. & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Weekly Rep. 1031); Tunney v. Midland Ry. Co., L. R. 1 C. P. 291; 2 Jur. (N. S.) 691; Vick v. New York, &c., R. Co., 95 N. Y. 267; 47 Am. Rep. 36; Brick v. Rochester, &c., R. Co., 98 N. Y. 211. *Contra*, O'Donnell v. Allegheny, &c., R. Co., 59 Penn. St. 239; Gillenwater v. Madison, &c., R. Co., 5 Ind. 339; 61 Am. Dec. 101.

[17] Moran v. New York, &c., R. Co., 3 N. Y. 770.

[18] Morgan v. Vale of Neath Ry. Co., 5 Best & S. 736, as more fully cited in a preceding note. *Cf.* Killea v. Faxon, 125 Mass. 485; Colton v. Richards, 123 Mass. 484; Kelley v. Norcross, 121 Mass. 508.

[19] Lawlor v. Androscoggin, &c., R. Co., 62 Me. 463; 16 Am. Rep. 492; Brown v. Winona, &c., R. Co., 27 Minn. 162; 38 Am. Rep. 285; and *cf.* Foster v. Minnesota, &c., R. Co., 14 Minn. 360. But it is otherwise as to a road-master and a fireman; Davis v. Vermont, &c., R. Co., 55 Vt. 84; 45 Am. Rep. 590. See, also, Ryan v. Bagley, 50 Mich. 179; 45 Am. Rep. 35. Complainant was a section-man on a work train of defendant railroad. On the day of the injury, the road-master directed a section foreman to take charge of the train. He had no authority outside of his work as section foreman, except what was conferred upon him for the time being by the road-master. Held, that he was not such a vice-principal as to entitle plaintiff to recover for injuries received through his negligence. Morch v. Toledo, S. & M. Ry. Co. (Mich.), 71 N. W. Rep. 464.

[20] Easton v. Houston, &c., Ry. Co., 32 Fed. Rep. 893. In running cars on the track these employees were brought into direct relations with one another, which distinguishes the case from Howard v. Delaware & H. Canal Co., 40 Fed. Rep. 195, where it is laid down as a general rule that trackmen are not fellow-servants of those in charge of trains.

[21] Kirk v. Atlanta, &c., Ry. Co., 94 N. C. 625; 55 Am. Rep. 621. But not a car inspector and a yard-master. Macy v. St. Paul, &c., R. Co., 35 Minn. 200.

[22] Smith v. C., M. & St. P. Ry. Co., 91 Wis. 503; 65 N. W. Rep. 183. The foreman of repair shops was merely a fellow-servant of an employee therein while engaged, as a volunteer and outside of the line of his duty as foreman, in assisting such employee to turn the wheels of an engine which was to be repaired. Hartford v. Northern Pacific R. Co., 91 Wis. 374; 64 N. W. Rep. 1033.

a passenger train and a switch-tender;[23] an engine-wiper and train-men;[24] a night watcher employed by a railroad company to note and report upon the conduct of the foreman of a night crew whose duty it was to make up trains and such foreman;[25] a track-repairer and a switchman operating a derrick in removing a wreck;[26] members of different gangs of workmen on a railroad engaged in work of a different sort;[27] a foreman of a yard subject to the orders of a yard-master and one employed there in moving cars.[28] And so, it has been held that the motor-man and track-foreman of a street railway are fellow-servants.[29]

§ 333. **When conductor is a fellow-servant.**— In the leading case of Chicago, Milwaukee & St. Paul Railroad Co. v. Ross,[29a] it was held by the Supreme Court of the United States, that the conductor of a regular railway train is not a fellow-servant of the other persons employed to run that train, but is, as to them, a vice-principal. And this rule also prevails in some of the State courts,[30] though in other States the contrary is held.[31] But it is the settled law of the Federal Supreme Court that the relation of fellow-servant exists between a con-

23 Roberts v. Chicago, &c., Ry. Co., 33 Minn. 218.

24 Ewald v. Chicago, &c., Ry. Co., 70 Wis. 420; 36 N. W. Rep. 12.

25 Chicago, &c., R. Co. v. Geary, 110 Ill. 383.

26 Slattery v. New York, &c., R. Co., 4 N. Y. Supl. 910.

27 New York, &c., R. Co. v. Bell, 112 Penn. St. 400.

28 Fracker v. St. Paul, &c., Ry. Co., 32 Minn. 54.

29 Rittenhouse v. Wilmington Street Ry. Co., 120 N. C. 544; 26 S. E. Rep. 922.

29a 112 U. S. 377.

30 Spencer v. Brooks, 97 Ga. 681; 25 S. E. Rep. 480; Central R. Co. v. De Bray, 71 Ga. 406; Richmond, &c., R. Co. v. Williams, 86 Va. 165; 9 S. E. Rep. 990; Mason v. Richmond & D. R. Co., 114 N. C. 718; 19 S. E. Rep. 362; Purcell v. Southern Ry. Co., 119 N. C. 728; 26 S. E. Rep. 161.

31 Hayes v. Western R. Co., 3 Cush. 270; Pease v. Chicago, &c., Ry. Co., 61 Wis. 163; 20 N. E. Rep. 908; Johnston v. Pittsburgh, &c., Ry. Co., 114 Penn. St. 443; 7 Atl. Rep. 184; Slater v. Jewett, 85 N. Y. 61; Ragsdale v. Memphis, &c., R. Co., 59 Tenn. 426. See, also, Chicago, &c., Ry. Co. v. Snyder, 117 Ill. 376. "A conductor of a railroad train is frequently called upon, in the proper exercise of his functions, to use his judgment; but it would be absurd to say, when exercising that judgment, that he was necessarily transformed from the mere servant to the agent, or representative, of the master. That he was the fellow-servant of the intestate in doing his ordinary work has been long settled." Wooden v. Western New York & Pennsylvania R. Co., 147 N. Y. 508, 516; 42 N. E. Rep. 199.

ductor of one train and the persons operating another train on the same road.[32] And it has been held in other jurisdictions that this is the relation between a conductor and a brakeman on another train;[33] a conductor of a construction or gravel train and the laborers employed upon the same;[34] a conductor and the servants of a contractor working upon his train;[35] a conductor traveling on a train other than his own in going to his post of duty, and the other employees in charge of such train;[36] a conductor and a switchman;[37] a conductor and a station baggage-master;[38] a conductor and a laborer employed to remove snow and other obstructions;[39] a conductor and a railroad blacksmith on their way to remove a wreck.[40]

§ 334. Rule as to train dispatcher.— A train dispatcher in ordering the movements of railroad trains is not regarded as a fellow-servant of the employees upon the train, but as the *alter ego* of the company; for in this matter he is performing a duty resting upon the company, and his acts are deemed to be those of the company.[41]

[32] Oakes v. Mase, 165 U. S. 363.

[33] Pittsburgh, etc., R. Co. v. Deviney, 17 Ohio St. 197. And see Au v. New York, &c., R. Co., 29 Fed. Rep. 72.

[34] Gilshannon v. Stoney Brook R. Co., 10 Cush. 228; Cassiday v. Maine, &c., R. Co., 70 Me. 488; Abend v. Terre Haute, &c., R. Co., 111 Ill. 202; 20 Cent. L. J. 77; McGowan v. St. Louis, &c., R. Co., 61 Mo. 528; Ryan v. Cumberland, &c., R. Co., 23 Penn. St. 384; Chicago, &c., R. Co. v. Keefe, 47 Ill. 108; O'Connell v. Baltimore, &c., R. Co., 20 Md. 212; Cumberland Coal Co. v. Scally, 27 Md. 589; Cassidy v. Maine Central R. Co., 76 Me. 488; Rodman v. Mich., &c., R. Co., 55 Mich. 57; 31 Alb. Law Jour. 34. *Contra*, Chicago, &c., R. Co. v. Swanson, 16 Neb. 254, where the conductor was held as vice-principal, the laborers being under his direct control. Chicago, &c., R. Co. v. Bayfield, 37 Mich. 205; Moon's Adm'r v. Richmond, &c., R. Co., 78 Va. 745; 49 Am. Rep. 401; Lalor v. Chicago, &c., R. Co., 52 Ill. 401. And see Moon v. Richmond, &c., R. Co., 78 Va. 745; 49 Am. Rep. 401; Coleman v. Wilmington, &c., R. Co., 25 S. C. 446.

[35] Illinois, &c., R. Co. v. Cox, 21 Ill. 20.

[36] Manville v. Cleveland, &c., R. Co., 11 Ohio St. 417. See, also Vick v. New York, &c., R. Co., 95 N. Y. 267; 47 Am. Rep. 36.

[37] Wilson v. Madison, &c., R. Co., 81 Ind. 226.

[38] Colorado, &c., R. Co. v. Martin, 7 Colo. 592; 19 Am. Law Rev. 163.

[39] Fagundes v. Central Pac. R. Co., 79 Cal. 97; 26 Fed. Rep. 437.

[40] Abend v. Terre Haute, &c., R. Co., 111 Ill. 202.

[41] Hawkins v. N. Y., L. E. & W. R. Co., 142 N. Y. 416; 37 N. E. Rep. 466; Clyde v. Richmond & D.

§ 335. Statutory modifications of the rule in the case of railway employees.—The harshness of the common-law rule as to fellow-servants when applied to the employees of railroad companies has been modified in some of the States by statute. These statutes differ in their details, but their general purpose is to abolish the fellow-servant rule in those cases where the injury is caused by a servant of the company who exercises superintendence or control over the other.[42]

R. Co., 69 Fed. Rep. 673; McKune v. Cal. Southern R. Co., 66 Cal. 302; Lewis v. Seifert, 116 Penn. St. 628; 11 Atl. Rep. 514; Smith v. Wabash, &c., Ry. Co., 92 Mo. 359; 4 S. W. Rep. 129; Darrigan v. N. Y., &c., R. Co., 52 Conn. 285; 52 Am. Rep. 590; Hunn v. Railroad Co., 78 Mich. 513.

[42] For cases arising under such statutes see Kansas City, F. S. & M. Ry. Co. v. Becker, 63 Ark. 477; 39 S. W. Rep. 358; Georgia Railroad & Banking Co. v. Hicks, 95 Ga. 301; 22 S. E. Rep. 613; Louisville & N. R. Co. v. Graham's Adm'r, 98 Ky. 688; 34 S. W. Rep. 229; Pierce v. Van Dusen, 78 Fed. Rep. 693; Central Trust Co. v. East Tennessee, V. & Ga. Ry. Co., 69 Fed. Rep. 353; Mikleson v. Truesdale, 63 Minn. 137; 65 N. W. Rep. 260; Smith v. C., M. & St. P. Ry. Co., 91 Wis. 503; 65 N. W. Rep. 183; Texas Central R. Co. v. Frazier, 90 Tex. 33; 36 S. W. Rep. 432; Gulf, C. & S. F. Ry. Co. v. Warner, 89 Tex. 475; 35 S. W. Rep. 364; Culpepper v. International & G. N. Ry. Co., 90 Tex. 627; 40 S. W. Rep. 386; McCord v. Cammell, L. R. (1896) A. C. 57. The words in the Employers' Liability Act, Stats. 1887, chap. 270, § 1, cl. 3, "any person in the service of the employer who has charge or control of any * * * train upon a railroad," mean a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole and of the men engaged upon it. It is not necessary that such person should be actually upon the train itself; a laborer or brakeman in such a position that for the moment he physically controls and directs the movements of a train is not in charge or control of it, though, under some circumstances, he may have such charge or control; and it is possible that more than one person may have "charge or control" of a train at the same time. Caron v. Boston & Albany R. Co., 164 Mass. 423; 42 N. E. Rep. 112. The foreman of repair shops of a railway company is not a "superintendent" within the meaning of chap. 438, Laws of 1889 (§ 1816a, S. & B. Ann. Stats.), which provides that every railroad corporation shall be liable for the damages sustained by any employee, without contributory negligence on his part, "when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard officer, conductor or engineer, or of any other employee, who has charge or control of any stationary signal, target point, block or switch,"—the intent of the statute being to provide a remedy for the negligence of the officers and em-

§ 336. Further illustrations. — Miscellaneous employees. — A master and mate of a vessel are fellow-servants ;[43] a "gang boss," or foreman, and an ordinary laborer ;[44] the master of a lighter and one of the crew ;[45] the chief engineer on a steam vessel and one of the crew ;[46] an "underlooker" in a mine whose duty it was to examine the roof of the mine and prop it when dangerous and one of the miners ;[47] a scaffold-builder and a rigger employed on a steamship in port ;[48] a laborer loading cargo in the hold of a vessel and another laborer handling the tackle above;[49] a second mate, who superintends the reeling in of a hawser, and a seaman engaged in turning the reel ;[50] a mate and a sailor, the vessel being in charge of the captain ;[51] the carpenter, the porter, and the stewardess of a steamship, though belonging to different departments of the ship's company;[52] the foreman of a gang of laborers, engaged in building a shed under

ployees having to do with the movements of trains and cars. Hartford v. Northern Pacific R. Co., 91 Wis. 374; 64 N. W. Rep. 1033.

[43] Matthews v. Case, 61 Wis. 491; 50 Am. Rep. 151. See, also, Connolly v. Davidson, 15 Minn. 519; 2 Am. Rep. 154.

[44] Keystone Bridge Co. v. Newberry, 96 Penn. St. 246; 42 Am. Rep. 543; Clifford v. Old Colony R. Co., 141 Mass. 564; Olson v. St. Paul, &c., Ry. Co., 38 Minn. 117; 35 N. W. Rep. 866; Kinney v. Corbin, 132 Penn. St. 341. See, also, Mitchell v. Robinson, 80 Ind. 281; 41 Am. Rep. 812; Houser v. Chicago, &c., R. Co., 60 Iowa, 230; 46 Am. Rep. 65; Stephens v. Doe, 73 Cal. 26; 14 Pac. Rep. 378; Brazil & Chicago Coal Co. v. Cain, 98 Ind. 282. And *contra*, Railroad Co. v. Bowler, 9 Heisk. 866; McDermott v. Hannibal, &c., R. Co., 87 Mo. 285; Patton v. Western N. C. R. Co., 96 N. C. 455; Rowland v. Missouri Pac. Ry. Co., 20 Mo. App. 463; Clowers v. Wabash, &c., Ry. Co., 21 Mo. App. 213; Luebke v. Chicago, &c., R. Co., 59 Wis. 127; 48 Am. Rep. 483, not decided on the ground, however, that the foreman was a vice-principal. East Tennessee, &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319; Guthrie v. Louisville, &c., R. Co., 11 Lea, 372; 47 Am. Rep. 286; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298.

[45] Johnson v. Boston Towboat Co., 135 Mass. 209; 46 Am. Rep. 458.

[46] Searle v. Lindsay, 11 C. B. (N. S.) 429.

[47] Hall v. Johnson, 3 Hurl. & C. 589. *Cf.* Kelly v. Howell, 41 Ohio St. 246.

[48] Packett v. Atlas S. S. Co., 12 Daly (N. Y.) 441.

[49] Kenny v. Cunard S. S. Co., 52 N. Y. Super. Ct. 434. See, also, Hussey v. Coger, 112 N. Y. 114.

[50] The Egyptian Monarch, 36 Fed. Rep. 773.

[51] Benson v. Goodwin, 147 Mass. 237; 17 N. E. Rep. 517.

[52] Quebec S. S. Co. v. Merchant, 133 U. S. 375.

the direction of a superior, and one of the laborers, is the fellow-servant of the laborers;[53] a signal-man at a curve in the track and the grip-man of a motor car;[54] a servant employed to operate a machine and other operatives who repair it;[55] a laborer employed in constructing a sewer and one having the oversight and direction of the work;[56] an employee of the State, injured while digging clay, and the captain of a boat belonging to the State under whose direction he was acting;[57] one drilling holes in a girder of a building in process of construction and another clearing rubbish on a floor above;[58] the head carpenter and repairer in a saw-mill and a sawyer while both are moving lumber in the mill;[59] a servant blasting rocks and another hauling the rock;[60] the engineer of a coal mine, whose duty it is to lower and raise the cages, and a common laborer preparing the bottom of the shaft to receive them.[61]

§ 337. Servants not in common employment. — Illustrations. — But a "mining captain" and the miners are not fellow-servants.[62] Nor a common workman employed about a mine, but not himself a miner, and one of the miners.[63] Nor

[53] Willis v. Oregon Ry. & Nav. Co., 11 Or. 257.

[54] Murray v. St. Louis, &c., Ry. Co., 98 Mo. 573; 12 S. W. Rep. 252.

[55] Reading Iron Works v. Devine, 109 Penn. St. 246.

[56] Conley v. Portland, 78 Me. 217.

[57] Loughlin v. State, 105 N. Y. 159.

[58] Somer v. Harrison (Penn.), 8 Atl. Rep. 799.

[59] Sayward v. Carson, 1 Wash. 29; 23 Pac. Rep. 830. Carpenters employed by a master to inspect and repair, if necessary, a platform used by and employed in loading and unloading lumber, are not fellow-servants of the employee. Chesson v. Roper Lumber Co., 118 N. C. 59; 23 S. E. Rep. 925.

[60] Bogard v. Loulsville, &c., Ry. Co., 100 Ind. 491.

[61] Starne v. Schlothane, 21 Ill. App. 97.

[62] Ryan v. Bagaley, 50 Mich. 170; 45 Am. Rep. 35. Where the business of a mining corporation is under the control of a general manager, and is divided into three departments, of which the mining department is one, each with a superintendent under the general manager, and in the mining department were several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage or discharge the man under him, is a fellow-servant with them; and the corporation is liable to one of them for an injury caused by the foreman's negligence in managing the machiuery or in giving orders to the men. Alaska Mining Co. v. Whelan, 168 U. S. 86.

[63] James v. Emmet Mining Co., 55 Mich. 335.

a deck-hand and pilot.[64] Nor the foreman of a gang to whom a stevedore delegates the entire management of unloading a vessel and one of the gang.[65] Nor an employee of the E. company engaged in shoveling ashes from a pit and the engineer of a locomotive belonging to the T. company, though the E. company had exclusive control over the servants of the T. company employed on its locomotives while in the yard.[66] Nor a master mechanic and foreman of the shops of a railroad company and a watchman.[67] Nor one employed to superintend the construction of a cistern and a workman whom he employs.[68] Nor a servant to whom a master intrusts the duty of furnishing machinery for other servants and such other servants ;[69] so, also, of a servant ignorant of the use of a machine and an instructor furnished him by the master.[70]

§ 338. **Servants of different masters.**—It is generally held that those only are fellow-servants, within the intent of this rule, who are the servants of the same master. "A fellow-servant," said Dalrymple, J., in McAndrews v. Burns,[71] "I take to be any one who serves and is controlled by the same master." Whenever a definition of the term fellow-servant is attempted, it is made an essential element of the relation that it include only servants of the same master.[72] In the very nature of the case, under the rule of non-liability, the relation of fellow-servants to the same master must actually subsist, if the master is to escape responsibility for the negligence of his servant, or the rule to have any proper application. If, when the negligence of one servant injures another, it cannot be made clearly to appear that the servant injured and the servant whose fault occasioned the injury are the servants of the same master, then the rule

64 The Titan, 23 Fed. Rep. 413.

65 Brown v. Sennett, 68 Cal. 225.

66 Sullivan v. Tioga R. Co., 44 Hun, 304.

67 St. Louis, &c., Ry. Co. v. Harper, 44 Ark. 524.

68 Mulcairns v. Janesville, 67 Wis. 24.

69 Kelly v. Erie Telegraph, &c., Co., 34 Minn. 321.

70 Brennan v. Gordon, 13 Daly, 208.

71 39 N. J. Law, 119.

72 Smith v. New York, &c., R. Co., 19 N. Y. 132; Svenson v. Atlantic Steamship Co., 57 N. Y. 112; Cruselle v. Pugh, 67 Ga. 430; 44 Am. Rep. 724; Shearman & Redfield on Negligence (5th ed.), § 224; Abraham v. Reynolds, 5 Hurl. & N. 142; 6 Jur. (N. S.) 53; 8 Week. Rep. 181.

does not apply, and the injured person will be free to seek his remedy under some other rule of law. It is obvious that, in the majority of cases, this question cannot arise. It will usually happen that the fact of a common master will be beyond dispute; but in a class of cases a difficulty in this respect presents itself which we now proceed to consider.

§ 339. **The rule stated.**—It is generally held that the employees of an independent contractor are not fellow-servants of the employees of the proprietor for whom the contractor is engaged to work. If, therefore, the employee of such contractor is injured through the negligence of a servant of the proprietor, the maxim *respondeat superior* usually applies, and the proprietor is liable in damages for the injury.[73] It is accordingly held, that the servant of a lighterman, at work upon his master's barge unloading a ship, is not a fellow-servant with one of the crew ;[74] nor a grain-trimmer employed by a contractor to assist in trimming the grain with which a vessel is being loaded, and a sailor on the ship ;[75] nor a laborer employed by a contractor engaged in grading a railroad, and the engineer of a train furnished by the company to move the dirt;[76] nor one who contracts with a mining company to break down rock, &c., at a certain price per foot, and the superintendent of the mine ;[77]

[73] Smith v. New York, &c., R. Co., 19 N. Y. 127; Svenson v. Steamship Co., 57 N. Y. 108; Burke v. Norwich, &c., R. Co., 34 Conn. 474; Young v. N. Y., &c., R. Co., 30 Barb. 229; Woodley v. Metropolitan Ry. Co., 2 Exch. Div. 284 (dissenting opinions of Mellish and Baggallay, JJ.); Abraham v. Reynolds, 5 Hurl. & N. 142; 6 Jur. (N. S.) 53; 8 Week. Rep. 181; Swainson v. Northeastern Ry. Co., 3 Exch. Div. 341; Lake Superior Iron Co. v. Erickson, 39 Mich. 492; 33 Am. Rep. 423. And see, particularly, Devlin v. Smith, 89 N. Y. 470; 42 Am. Rep. 311; Coggin v. Central, &c., R. Co., 62 Ga. 685; 35 Am. Rep. 132. But the master is not liable for the negligence of the contractor (a stevedore in the cases cited) or his foreman, whereby a servant of the contractor is injured. The Wm. F. Babcock, 31 Fed. Rep. 418. Whether the relation be that of master and servant, so as to invoke the rule of *respondeat superior*, depends mainly on whether the employer retains direction and control of the work, or has given it to the contractor. Andrews v. Boedecker, 17 Ill. App. 213.

[74] Svenson v. Steamship Co., 57 N. Y. 108.

[75] Crawford v. The Wells City, 38 Fed. Rep. 47.

[76] Louisville, &c., R. Co. v. Conroy, 63 Miss. 562.

[77] Mayhew v. Sullivan Mining Co., 76 Me. 100.

nor an employee of a railroad company who is storing sleepers in a shed, and one who is repairing the roof under contract.[78] A railroad company which has entered into an agreement with a contractor to build a portion of the road, and whose rolling-stock, &c., used in the construction is controlled by the contractor, is not liable for the negligence of persons running the rolling-stock.[79] The servant of a stevedore who has a contract to load a vessel from a dock, the owner of the dock furnishing the hoisting apparatus with a person to manage the same, is not a fellow-servant with the latter, and may maintain an action against the dock-owner for injuries caused by the negligent management of the apparatus.[80] But, where a steamship company employed a stevedore to unload its vessels, and this stevedore employed his own men, and used his own machinery, when one of the crew was injured through the fault of one of his servants, it was held in Pennsylvania a proper question for the jury, whether this stevedore was a servant of the steamship company, or a contractor, and whether or not the injured servant was a fellow-servant.[81] So, also, it is held that the servants of a contractor, and those of a sub-contractor, are not co-servants within the meaning of this rule.[82]

[78] Gorman v. Morrison, 12 Ct. of Ses. Cas. 1073 (Sc.).

[79] Hitte v. Republican Valley R. Co., 19 Neb. 620. But see New Orleans, &c., R. Co. v. Norwood, 62 Miss. 287; 52 Am. Rep. 191, where defendant company employed a contractor to do work, and gave him a construction train and an engineer, placing them under his control, except that he was not to run above a certain speed and was to have the train on a side track fifteen minutes before the schedule time of regular trains. The company was bound to discharge the engineer on complaint of the contractor, but paid his wages, deducting the amount from the sum due the contractor. It was held that the engineer was a servant of the company.

[80] Sanford v. Standard Oil Co., 118 N. Y. 571; 24 N. E. Rep. 313; Coyle v. Pierrepont, 37 Hun, 379; reversing 33 Hun, 311. A., the owner of a mill, engaged B., a machinist, to make certain alterations in the wheel, it being understood that the mill should run when work was not going on. A.'s engineer negligently started the wheel while B.'s workman was at work, and the workman was injured. Held, that he and the engineer were fellow-servants, so that he could not recover against the owner. Ewan v. Lippincott, 47 N. J. Law, 192; 54 Am. Rep. 148.

[81] Haas v. Phila. Steamship Co., 88 Penn. St. 269; 32 Am. Rep. 462. But see Riley v. State Line Steamship Co., 29 La. Ann. 791; 29 Am. Rep. 349.

[82] Curley v. Harris, 11 Allen, 113; Murphy v. Caralli, 3 Hurl. & C. 462; 10 Jur. (N. S.) 1207; 34

§ 340. This rule approved.— The rule as here stated is unquestionably sound and just. Upon what principle of right can the servants of one man be held to be the fellow-servants of another man's servants? If the servant be held by his implied contract to assume all the risks of the negligence of his co-servant, is not this the end of his contract? How can he be held to assume the risk of the negligence of any other man's servants, with whom he may chance to be employed or associated? How can he exercise any influence upon such servants or what duty does he owe to their master to report delinquencies if he happen to discover them? Upon what principle can he be held to sustain any relation to them? Is he not a mere stranger? Is not the rule as laid down in some late Massachusetts and English cases the perfection of injustice? In these cases it is plainly declared that a servant is to be held to assume the risk, not only of the carelessness of all the other employees of his master, but of all the servants of all the various persons or corporations with whom he may be associated in any work assigned him, and a master is held free from liability, in almost every conceivable set of circumstances, for the negligence of his servant, though operating to injure persons with whom he is not the most remotely connected, upon the bare fact being shown that his servant and the injured person were, in some more or less intimate way, associated in labor. Under the operation of the rule as announced in these cases, a servant is absolutely remediless, and a master absolutely free from liability, for the most aggravated negligence of his employees. For practical purposes, the rule might as well be made absolute by statute, so

L. J. (Exch.) 14; 13 Week. Rep. 165. Builders contracted to build certain houses, the contract providing that the defendants, a firm of iron-founders selected by the architect, should do a certain specified part of the work at a fixed price, which the builders were to pay out of the contract price. The builders were also to provide scaffolding and other assistance. In the course of the work the plaintiff, one of the builders' workmen, was injured by the negligence of one of the defendants' workmen. It was held that the plaintiff and the servant who caused the injury were not engaged in a common employment under a common master and that the action could be maintained. Johnson v. Lindsay, 65 L. T. R. 97 (H. of L.), reversing 23 Q. B. Div. 508; Murray v. Currie, 6 L. R. (C. P.) 24; 40 L. J. (C. P.) 26; 23 L. T. (N. S.) 557; 19 Week. Rep. 104. *Cf.* Devlin v. Smith, 89 N. Y. 470; 42 Am. Rep. 311.

perfectly is the ancient rule of *respondeat superior* set aside as to master and servant in cases of this nature.[83]

§ 341. As between different railway corporations having running connections.— Where the servants of one railway company have been injured by reason of the negligence of the servants of another railway company, there existing between the two companies an arrangement by which one company runs its cars over the tracks of the other company, or one forms a junction with the other, by which the roads of the two companies constitute the whole, or some part of a trunk, or through line, or by which one uses the railway station of the other, we find the authorities for the most part consistent in holding that in such a case the employees of the two roads are not fellow-servants, and that either company is liable to the servants of the other for the negligence of its own servants.[84]

[83] Albro v. Agawam Canal Co., 6 Cush. 75; Johnson v. Boston, 118 Mass. 114; Connors v. Hennessy, 112 Mass. 96. A laborer in the employment of a firm who had contracted to lay the cement flooring of a building in course of erection was injured by a hammer let fall through a skylight in the roof, as alleged by the fault of a workman employed by one who had undertaken to do the plumber work of the same building. It was held that the latter contractor was not liable, as the servants were engaged in a common work. Maguire v. Russell, 12 Ct. of Ses. Cas. 1071 (Sc.); Harkins v. Sugar Refinery, 112 Mass. 400; Wiggett v. Fox, 11 Exch. 832; 2 Jur. (N. S.) 955; 25 L. J. Exch. 188.

[84] Smith v. New York, &c., R. Co., 19 N. Y. 127; Taylor v. Western Pacific R. Co., 45 Cal. 423; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637; 48 Am. Rep. 689; Carroll v. Minnesota, &c., R. Co., 13 Minn. 30; Sawyer v. Rutland, &c., R. Co., 27 Vt. 370; Gulf, &c., Ry. Co. v. Dorsey, 66 Tex. 148; Augusta, &c., R. Co. v. Killian, 79 Ga. 234; 4 S. E. Rep. 165; Phillips v. Chicago, &c., Ry. Co., 64 Wis. 475. Neither company is liable for injuries to its own servants sustained by the negligence of the employees of the other company. Georgia R., &c., Co. v. Fridell (Ga.), 79 Ga. 489; 7 S. E. Rep. 214; Zeigler v. Danbury, &c., R. Co., 52 Conn. 543; Sullivan v. Tioga R. Co., 112 N. Y. 643; 20 N. E. Rep. 569. See, also, Nary v. New York, &c., Ry. Co., 9 N. Y. Supl. 153; Missouri Pac. Ry. Co. v. Jones, 75 Tex. 151; 12 S. W. Rep. 972; Buchanan v. Chicago, &c., R. Co., 75 Iowa, 393; 39 N. W. Rep. 663. *Contra*, Mills v. Alexandria, &c., R. Co., 2 McArthur, 314, where it is said that the train is to be regarded as a unit in regard to its management and not as under two separate governments with divided responsibilities. Cruty v. Erie Ry. Co., 3 N. Y. Sup. Ct. (T. & C.) 244. Warburton v. Great Western Ry. Co.,

§ 342. As to volunteers.— There are a number of striking English cases upon this branch of the subject. In Degg v. Midland Ry. Co.[85] it is held that, when one voluntarily assists the servant of another, in an emergency, he cannot recover from the master for an injury caused by the negligence or misconduct of the servant, and the reason assigned is, that a stranger cannot by his officious conduct impose upon an employer a greater duty than that which he owes to his employees in general. This is the rule as to a *mere* volunteer, and it seems also to be the law in this country.[86] But wherever there is a temporary employment of a bystander, in an emergency, by a servant, who may

L. R. 2 Exch. 30; 36 L. J. (Exch.) 9; 15 L. T. (N. S.) 361; 15 Week. Rep. 108; 4 Hurl. & C. 695; Atkyn v. Wabash Ry. Co., 41 Fed. Rep. 193. Nor can a railway escape liability by an agreement of lease, placing its employees and trains under the control of the manager of another road. Wabash, &c., R. Co. v. Peyton, 106 Ill. 534; 46 Am. Rep. 705. But see Foley v. Chicago, &c., R. Co., 48 Mich. 622; 42 Am. Rep. 481; Singleton v. Southwestern R. Co., 70 Ga. 464; 48 Am. Rep. 574; Abbott v. Johnstown, &c., R. Co., 80 N. Y. 27; 36 Am. Rep. 572. A switchman employed by a board composed of representatives of three railroad corporations, and beyond the control of any one of said corporations, and a car inspector employed by one of such corporations, are not fellow-servants, though both are working in the same yard; and are engaged in the common enterprise of handling business for the same road, and the inspector was subject to the board's yard regulations. Kastl v. Wabash R. Co. (Mich.), 72 N. W. Rep. 28.

[85] 1 Hurl. & N. 773; 3 Jur. (N. S.) 395; 26 L. J. (Exch.) 171.

[86] Mayton v. Texas, &c., Ry. Co., 63 Tex. 77; 51 Am. Rep. 637. An employee in a mill sustained personal injuries while undertaking to make repairs to the machinery, which it was no part of his regular duty to make, and which he had started to do, knowing the danger, upon obtaining the mere consent of his own immediate superior. He failed to recover, the court holding that he was a mere volunteer. Mellor v. Merchants' Manuf'g Co., 150 Mass. 362; 23 N. E. Rep. 100. Bradley v. Nashville, &c., Ry. Co., 14 Lea (Tenn.) 374, is a similar case. Flower v. Penn., &c., R. Co., 69 Penn. St. 210; 8 Am. Rep. 251; New Orleans, &c., R. Co. v. Harrison, 48 Miss. 112; 12 Am. Rep. 356; Everhart v. Terre Haute, &c., R. Co., 78 Ind. 292; 41 Am. Rep. 567; Honor v. Albrighton, 93 Penn. St. 475; Osborne v. Knox, &c., R. Co., 68 Me. 49; 28 Am. Rep. 16. *Cf.* Pennsylvania Co. v. Gallagher, 40 Ohio St. 637; 48 Am. Rep. 689; Kelly v. Johnson, 128 Mass. 530; 35 Am. Rep. 398; Brown v. Byroads, 47 Ind. 435; Central R. Co. of Ga. v. Sears, 53 Ga. 630. See, also, McCullough v. Shoneman, 105 Penn. St. 169; Barstow v. Old Colony R. Co., 143 Mass. 535; 10 N. E. Rep. 255.

be held to have had the authority to contract for the assistance, the master will be liable if such an assistant is injured by the negligence of his servants.[87] The justness of the rule in general is beyond dispute. When the service is entirely voluntary, the volunteeer may reasonably be held to assume the risks of his undertaking, and the employer may properly be held not to owe him any duty. And, even though the service be not voluntary, as where an employee of a railway company, a conductor of a freight train at a way station, compelled a bystander—a mere lad—by a threat, to uncouple some cars, and the boy's leg was run over and cut off, the company was held not liable.[88]

§ 343. The same subject continued.— But, where one assists the servants of another, at their request, for the purpose of expediting his own business, or the business of the master, the rule is otherwise, and if he is injured by the servant's negligence, the master is liable. In such a case the relation of fellow-servants is held not to exist; and, in case of injury, the rule of *pespondeat superior* applies.[89] Accordingly we find in Wright v. London & Northwestern Ry. Co.,[90] that, where the plaintiff had shipped a heifer by defendant's railway, and, upon the arrival of the train at the station, was assisting in shunting the horse-box, in order to avoid delay in getting the heifer out, and while so assisting was run against and hurt, the defendant was held liable. There was evidence that there was an insufficient number of servants at hand to unload the heifer promptly, and that the station-master knew that the plaintiff was assisting in the shunting, and assented to it. The court held that in such a case as this the plaintiff was not a mere volunteer, but that he was on the defendants' premises with their consent, assisting their servants for the purpose of hastening the delivery of his own goods,

[87] Central Trust Co. v. Texas, &c., Ry. Co., 32 Fed. Rep. 448; Bradley v. New York, &c., R. Co., 62 N. Y. 99. *Cf.* Terre Haute, &c., R. Co. v. McMurray, 98 Ind. 358; 49 Am. Rep. 752; Louisville, &c., R. Co. v. McVay, 98 Ind. 391; 49 Am. Rep. 770.

[88] New Orleans, &c., R. Co. v. Harrison, 48 Miss. 112, on the ground that the conductor's act was out of the line of his duty.

[89] Holmes v. Northeastern Ry. Co., L. R. 4 Exch. 254; affirmed, L. R. 6 Exch. 123. This is a case, says Chief Justice Coleridge, of the greatest authority, in that seven judges in the Exchequer Chamber affirmed the decision, for the reasons given by the judges in the Court of Exchequer.

[90] 1 Q. B. Div. 252; L. R. 10 Q. B. 298.

and that hence they were liable to him for the negligence of their servants.[91] And in Texas an action is maintained against a railroad company for the negligence of its engineer, causing injuries to one who was employed by persons shipping lumber on the cars, while he was making a coupling at the request of the conductor, the company being short of men.[92]

§ 344. Partnerships and receivers as employers.— A servant who is employed by a partnership concern, and is injured by the negligence of a member of the firm, if the work is within the scope of the partnership business, may have his action against the firm.[93] So, also, the receiver of an insolvent corporation, being in control of the property, is answerable in his official capacity to employees, for injuries, whenever the corporation itself would otherwise be liable.[94] This is the settled rule.[95]

[91] Wright v. London, &c., Ry. Co., 1 Q. B. Div. 252; L. R. 10 Q. B. 298. See, also, Potter v. Faulkner, 1 Best & S. 800; 8 Jur. (N. S.) 259; 31 L. J. Q. B. 30; 10 Weekly Rep. 93; 5 L. T. (N. S.) 455, wherein a plaintiff recovered nothing, being held a mere volunteer; Cleveland v. Spier, 16 C. B. (N. S.) 398, wherein a passer-by, being appealed to, by workmen upon a gas pipe in a street, for information, and being injured by their negligence while giving the information, it was held that he was something more than a mere volunteer, and might recover from the master of the workmen; and Ormond v. Hayes, 60 Tex. 180, wherein a passenger upon a railway train, who, upon arriving at his destination, went forward to the baggage car to assist in getting out his baggage, and was negligently run over and killed while so doing, was allowed his action against the company.

[92] Eason v. Sabine, &c., Ry. Co., 65 Tex. 577; 57 Am. Rep. 606.

[93] Ashworth v. Stanwix, 3 El. & El. 701; 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 183; 4 L. T. (N. S.) 85; Connolly v. Davidson, 15 Minn. 519; 2 Am. Rep. 154. See, also, Zeigler v. Day, 123 Mass. 152.

[94] Meara's Adm'r v. Holbrook, 20 Ohio St. 137; 5 Am. Rep. 633. See, also, Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627. In this case such an action was brought against a receiver of the Erie railway, and the right to bring it was not questioned.

[95] Beach on Receivers, §§ 717, 718, 719, 720.

CHAPTER XIII.

MASTER AND SERVANT; THE MASTER'S OBLIGATIONS AND LIABILITIES.

§ 345 The obligation of the master.

346. Defective, dangerous or unfit machinery, appliances, tools, or premises.

347. Applications of this rule. — Dangerous premises.

348. The same subject continued.— Defective machinery.

349. The master's duty as to machinery a continuing duty.

350. This rule criticised.

351. Master must provide safe and good, but not the safest and best, appliances.

352. Master not a guarantor of the safety or sufficiency of his appliances.

353. Incompetent and unfit employees.

354. The duty as to servants also a continuing duty.

355. The master not held to warrant the faithfulness or competency of his servants.

356. The master may act through an agent and become responsible for his acts.

357. The rule as to minor servants.

358. Where the master orders the servant into danger or into a service which he did not contract to perform.

§ 359. The patent and latent dangers of the employment.

360. The servant's assumption of risk.— Illustrations.

361. Risks not assumed.— Illustrations.

362. The master's duty toward minor servants.

363. Overhead railway bridges and depot roofs.

364. Injuries to train-men in coupling cars.

365. The same subject continued.

366. Knowledge on the part of the employer.

367. The same subject continued.

368. The obligation of the servant.

369. He must possess a fair measure of skill for the service he undertakes, and must inform himself at the outset of the duties and dangers peculiar to his work.

370. His knowledge when a bar.

371. Continued service, after knowledge, a waiver of the defect or danger.

372. Where master promises to remove the danger.

373. Servant must obey rules established to promote his safety.

374. Liability of a servant to a fellow-servant.

§ 375. His liability to the master and to third persons.
376. Statutory modifications of the rule which exempts a master from liability to one servant for the negligent wrong-doing of a co-servant.
377. The Employers' Liability Act in England.
378. The effect of the act.
379. Legislation on this subject in the United States.
380. Should the employee be allowed to make a contract releasing his employer from the liability imposed by these statutes.
§ 381. The same subject continued. — Griffiths v. The Earl of Dudley.
382. The English doctrine not approved in America.
383. Contracts releasing the employer from his common law liability.
384. The Georgia cases.
385. The laws of other countries as to the liability of an employer for injuries to an employee caused by the carelessness of a fellow-employee. — Scotland.
386. The Scotch rule further stated.
387. The rule in Ireland.
388. The rule on the Continent of Europe.

§ 345. The obligation of the master. — "The only ground," said the Court of Appeals of New York, in Warner v. Erie Ry. Co.,[1] "of liability of a master to an employee, for injuries resulting from the carelessness of a co-employee, which the law recognizes, is that which arises from personal negligence, or from want of proper care and prudence in the management of his affairs, or the selection of his agent or machinery and appliances." This is a complete statement of the rule as now established. It appears accordingly that the master's liability in this regard is three-fold. (a.) For his own personal negligence; (b.) for defective or dangerous machinery, appliances, tools, or premises; (c.) for incompetent or unfit servants. We have considered the first of these in the preceding chapter,[2] and it is not necessary here to do more than suggest the rule. We may, therefore, proceed to consider the liability of the master to an employee for —

§ 346. Defective, dangerous, or unfit machinery, appliances, tools, or premises. — In general, a master is bound to exercise ordinary care in respect of the machinery, appliances, tools, materials and premises, which he furnishes to his servants, for the prosecution of the work required of them. If he fail in this regard, and injury result, he is liable. It is his duty not to require

[1] 39 N. Y. 468.

[2] § 302.

his servants to work for him on dangerous premises, or in dangerous buildings, or with dangerous tools, machinery, materials, or appliances. If the servant is injured while in the discharge of his duty, and without his own contributory fault, through the master's dereliction in this respect, the servant may have his action against him.[3] Personal negligence is the gist of the action, and it must, therefore, appear, to render the master liable, that he knew, or from the nature of the case ought to have known, of the unfitness of the means of labor furnished to the servant, and that the servant did not know, or could not reasonably be held to have known of the defect. Knowledge on the part of the employer, and ignorance on the part of the employee are of the essence of the action;[4] or, in other words, the master must be at fault and know of it, and the servant must be free from fault, and ignorant of his master's fault, if the action is to lie. The authorities all state the rule with these qualifications.[5]

[3] See upon this point, Justice Harlan's learned opinion in Hough v. Railway Co., 100 U. S. 213, and the cases cited in the Reporter's note.

[4] In an action for injuries resulting from the unsafe condition of the premises upon which the servant was employed the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger. Griffiths v. London, &c., Docks Co., 13 Q. B. D. 259; 53 L. J. (Q. B.) 504 [51 L. T. 533; 33 W. R. 35 (C. A.)]. If a servant charges injuries received to a defective coupling-pin, he must in his complaint aver that he had no knowledge or means of knowledge of the defect. Indiana, &c., Ry. Co. v. Dailey, 110 Ind. 75. A servant put to work on a machine which is in a defective and unsafe condition, without opportunity given him to examine the machine, has a right to rely on the machine being in a right and safe condition, and, unless he knew, or ought to have known, of the danger to which he was exposed, by working near the machine, he cannot be said to have recklessly exposed himself to such danger, or to have voluntarily assumed the risk of working there. Higgins v. Williams, 114 Cal. 176; 45 Pac. Rep. 1041.

[5] Wright v. New York, &c., R. Co., 25 N. Y. 562; Booth v. Boston, &c., R. Co., 67 N. Y. 593; 73 N. Y. 38; 29 Am. Rep. 97; Murphy v. Boston, &c., R. Co., 88 N. Y. 146; 42 Am. Rep. 240; Laning v. New York, &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Ryan v. Fowler, 24 N. Y. 410; Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Vosburgh v. Lake Shore, &c., R. Co., 94 N. Y. 374; 46 Am. Rep. 148; Cone v. Delaware, &c., R. Co., 81 N. Y. 206; 37 Am. Rep. 491; Flike v. Boston, &c., R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Corcoran v. Holbrook, 59 N. Y. 519; Hickey v. Taaffe, 32 Hun, 7; 1 East. Rep. 7;

§ 347. Applications of this rule.— Dangerous premises.— "The general duty of a master to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks

Hawley v. New York, &c., R. Co., 82 N. Y. 370; Daley v. Shaaf, 28 Hun, 314; Ellis v. New York, &c., R. Co., 95 N. Y. 546; Holden v. Fitchburg R. Co. (an instructive and learned opinion by Gray, C. J.), 129 Mass. 268, and many cases there cited; 2 Am. & Eng. Ry. Cases, 94; Ford v. Fitchburg R. Co., 110 Mass. 240; Snow v. Housatonic, &c., R. Co., 8 Allen, 441; Hackett v. Manfg. Co., 101 Mass. 101; Arkerson v. Dennison, 117 Mass. 407; Walsh v. Peet Valve Co., 110 Mass. 23; Wheeler v. Wason Manfg. Co., 135 Mass. 294; McGee v. Boston Cordage Co., 139 Mass. 145; 1 East. Rep. 126; Baker v. Allegheny R. Co., 95 Penn. St. 211; 40 Am. Rep. 634; Patterson v. Pittsburgh, &c., R. Co., 76 Penn. St. 389; 18 Am. Rep. 412; Johnson v. Bruner, 61 Penn. St. 58; O'Donnell v. Allegheny R. Co., 59 Penn. St. 389; Ardesco Oil Co. v. Gilson, 63 Penn. St. 146; Riley v. State Line Steamship Co., 29 La. Ann. 791; 29 Am. Rep. 349; Greenleaf v. Ill., &c., R. Co., 29 Iowa, 14; Muldowney v. Ill., &c., R. Co., 39 Iowa, 615; Tuttle v. Chicago, &c., R. Co., 48 Iowa, 236; Brann v. Chicago, &c., R. Co., 53 Iowa, 595; Baldwin v. Railroad Co., 50 Iowa, 680; Way v. Illinois, &c., R. Co., 40 Iowa, 341; Hallower v. Henley, 6 Cal. 209; McGlynn v. Brodie, 31 Cal. 376; Baxter v. Roberts, 44 Cal. 187; Sullivan v. Louisville Bridge Co., 9 Bush, 81; Quaid v. Cornwall, 13 Bush, 601; Hayden v. Manfg. Co., 29 Conn. 549. Where the servant is a minor, his experience and want of judgment will be taken into account in deciding whether he should have known of the defective machinery. St. Louis, &c., R. Co. v. Valirius, 56 Ind. 511; Columbus, &c., R. Co. v. Arnold, 31 Ind. 174; Thayer v. St. Louis, &c., R. Co., 22 Ind. 26; Indianapolis, &c., R. Co. v. Love, 10 Ind. 554; Shanny v. Androscoggin, &c., R. Co., 66 Me. 420; Buzzle v. Manfg. Co., 48 Me. 113; Wonder v. Baltimore, &c., R. Co., 32 Md. 411; 3 Am. Rep. 143; Cumberland R. Co. v. Hogan, 45 Md. 229; Hardy v. Carolina, &c., R. Co., 76 N. C. 5; Cowles v. Richmond, &c., R. Co., 84 N. C. 309; 37 Am. Rep. 620; Fifield v. Northern, &c., R. Co., 42 N. H. 225; Harrison v. Central, &c., R. Co., 31 N. J. Law, 293; Paulmier v. Erie Ry. Co., 34 N. J. Law, 151; Smith v. Oxford Iron Co., 42 N. J. Law, 467; 36 Am. Rep. 535; Manfg. Co. v. Morrissey, 40 Ohio St. 148; 48 Am. Rep. 669; Columbus, &c., R. Co. v. Webb, 12 Ohio St. 475; Mad River R. Co. v. Barber, 5 Ohio St. 541; Guthrie v. Louisville, &c., R. Co., 11 Lea, 372; 47 Am. Rep. 286; East Tennessee, &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319; Nashville, &c., R. Co. v. Jones, 9 Heisk. 27; Nashville, &c., R. Co. v. Elliott, 1 Caldw. 611; Atchison, &c., R. Co. v. Holt, 29 Kan. 149; Atchison, &c., R. Co. v. Moore, 29 Kan. 632; Noyes v. Smith, 29 Vt. 59; Hathaway v. Michigan, &c., R. Co., 51 Mich. 253; 47 Am. Rep. 560; Foley v. Chicago, &c., R. Co., 48 Mich. 622; 42 Am. Rep. 481; Botsford v. Michigan, &c., R. Co., 33 Mich. 256; Fort Wayne, &c., R. Co. v. Gildersleeve, 33 Mich.

requires him among other things to use reasonable diligence in seeing that the *place* where the service is to be performed is safe for that purpose."[6] A railroad company must use reasonable

134; Michigan, &c., R. Co. v. Smithson, 45 Mich. 212; Huizega v. Cutler, &c., Lumber Co., 51 Mich. 272; Houston, &c., R. Co. v. Dunham, 49 Tex. 181; Houston, &c., R. Co. v. Oram, 49 Tex. 341; International R. Co. v. Doyle, 49 Tex. 190; Hobbs v. Stauer, 62 Wis. 108; 19 Alb. Law Jour. 490; Wedgewood v. Chicago, &c., R. Co., 41 Wis. 478; 44 Wis. 44; Dorsey v. Phillips, &c., Co., 42 Wis. 583; Ballou v. Chicago, &c., R. Co., 54 Wis. 259; 41 Am. Rep. 31; Flannagan v. Railroad Co., 45 Wis. 98; 50 Am. Rep. 462; Chicago, &c., R. Co. v. Russell, 91 Ill. 298; Indianapolis, &c., R. Co. v. Troy, 91 Ill. 474; 33 Am. Rep. 57; Toledo, &c., R. Co. v. Asbury, 84 Ill. 429; Indianapolis, &c., R. Co. v. Flanigan, 77 Ill. 365; Columbus, &c., R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 578; Chicago, &c., R. Co. v. Jackson, 55 Ill. 492; Illinois, &c., R. Co. v. Welch, 52 Ill. 183; Chicago, &c., R. Co. v. Swett, 45 Ill. 197; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. Rep. 425; East, &c., R. Co. v. Hightower, 92 Ill. 139; Le Claire v. First Div., &c., R. Co., 20 Minn. 9; Greene v. Minneapolis, &c., R. Co., 31 Minn. 248; 47 Am. Rep. 785; Flynn v. Kansas, &c., R. Co., 98 Mo. 195; 47 Am. Rep. 99; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298; Stoddard v. St. Louis, &c., R. Co., 65 Mo. 514, holding that though the plaintiff knew that defendant's brake beam and fog were dangerous and the force of hands insufficient, yet it was for the jury, under proper instructions, to say whether they were so glaringly defective and insufficient that a man of common prudence would not have undertaken the work, or on the other hand would have supposed that with great caution he could do the work with safety. Dale v. St. Louis, &c., R. Co., 63 Mo. 455; Conroy v. Iron Works Co., 62 Mo. 35; Porter v. Hannibal, &c., R. Co., 60 Mo. 160; Lewis v. St. Louis, &c., R. Co., 59 Mo. 495; Devitt v. Pacific, &c., R. Co., 50 Mo. 302; Gibson v. Pacific, &c., R. Co., 46 Mo. 163; 2 Am. Rep. 497; Brickman v. South Carolina, &c., R. Co., 8 S. C. 173; Holland v. Chicago, &c., R. Co., 5 McCrary, 549; Dillon v. Union Pac. Ry. Co., 3 Dill. 319; Jones v. Yeager, 2 Dill. 64; Woodworth v. St. Paul, &c., R. Co., 5 McCrary, 574; Patterson v. Wallace, 1 Macq. 748; Clark v. Holmes, 6 Hurl. & N. 349; 7 Hurl. & N. 937; Marshall v. Stewart, 2 Macq. 30. See, also, 39 Am. & Eng. R. Cas. 332, note.

[6] Cook v. St. Paul, &c., Ry. Co., 34 Minn. 45; McPherson v. St. Louis, &c., Ry. Co., 97 Mo. 253; 10 S. W. Rep. 846; Atchison, &c., R. Co. v. Thul, 32 Kan. 255; Mulcairns v. Janesville, 67 Wis. 24; Murray v. Usher, 117 N. Y. 542; 23 N. E. Rep. 564; Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; Burlington, &c., R. Co. v. Crockett, 19 Neb. 138; Sioux City, &c., R. Co. v. Smith, 22 Neb. 775; 36 N. W. Rep. 285; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. Rep. 32; Tissue v. Baltimore, &c., R. Co., 112 Penn. St. 91; 56 Am. Rep. 310; Hewitt v. Flint, &c., R. Co., 67

care to keep its roadway in a safe condition for its employees,[7] and a want of ordinary diligence in guarding against injuries to brakemen while coupling cars, by reason of defects in the track or road-bed, makes the company liable.[8] So, also, where sheds or water-tanks are permitted to be placed in such proximity to the track that servants of the company are injured while in the proper performance of their duties, they may have their actions.[9]

Mich. 61; 34 N. W. Rep. 659; Davis v. Button, 78 Cal. 247; 18 Pac. Rep. 133; Diamond State Iron Co. v. Giles (Del.), 11 Atl. Rep. 189; Sangamon Coal Min. Co. v. Wigerhaus, 122 Ill. 279; 13 N. E. Rep. 648; Cullen v. Norton, 4 N. Y. Supl. 774; 52 Hun, 9; Haley v. Western Transit Co., 76 Wis. 344; 45 N. W. Rep. 16; Hogan v. Smith, 9 N. Y. Supl. 881; Pantzar v. Tilly Foster Mining Co., 99 N. Y. 368; Kaspari v. Marsh, 74 Wis. 562; 43 N. W. Rep. 368; Hyatt v. Hannibal, &c., R. Co., 10 Mo. App. 287; Ford v. Lyons, 41 Hun, 512; Anderson v. Northern Mill Co., 42 Minn. 424; 44 N. W. Rep. 315; Conner v. Pioneer Fire-Proof Const. Co., 29 Fed. Rep. 629; Wannamaker v. Burke, 111 Penn. St. 423. And a servant, familiar with the location of a trap-door, who falls through it when suddenly and negligently opened by a fellow-workman, has no right of action against his master. Anthony v. Leeret, 105 N. Y. 591. And the servant cannot recover when injured by the fall of a scaffold which he helped to construct of defective scantling, having suitable timber to choose from. Hogan v. Field, 44 Hun, 72. A.'s business of hauling for B. required him to drive under a revolving shaft, which, without his knowledge, was repaired between two of his trips in such a manner that there was not room to drive under it without injury. The change was not apparent, and A. was not warned thereof. B. was held liable for injuries sustained. Hawkins v. Johnson, 105 Ind. 29; 55 Am. Rep. 169; Stewart v. Philadelphia, &c., R. Co. (Del.), 17 Atl. Rep. 639; Sayward v. Carlson, 1 Wash. 129; 23 Pac. Rep. 830. And see generally on this subject, 39 Am. & Eng. R. Cas. 332, and the note.

[7] It must use reasonable care to keep its roadway in a safe condition. St. Louis, &c., Ry. Co. v. Weaver, 35 Kan. 412; McFee v. Vicksburg, &c., R. Co., 42 La. Ann. 790; 8 So. Rep. 720; Van Amburg v. Vicksburg, &c., R. Co., 37 La. Ann. 650; 55 Am. Rep. 517. *Cf.* Brick v. Rochester, &c., R. Co., 98 N. Y. 211; Baltimore, &c., R. Co. v. McKenzie, 81 Va. 71; Bowen v. Chicago, &c., Ry. Co., 95 Mo. 268; 8 S. W. Rep. 230.

[8] Gulf, &c., Ry. Co. v. Rediker, 67 Tex. 190; 2 S. W. Rep. 513; Huhn v. Missouri Pac. Ry. Co., 92 Mo. 440; 4 S. W. Rep. 937; Missouri Pac. Ry. Co. v. Jones, 75 Tex. 151; 12 S. W. Rep. 972; Flynn v. Wabash, &c., Ry. Co., 18 Ill. App. 235; Franklin v. Winona, &c., R. Co., 37 Minn. 409; 4 N. W. Rep. 898. But snow removed from the track may be left at the side of it. Brown v. Chicago, &c., Ry. Co., 64 Iowa, 652.

[9] To permit sheds, water-tanks, &c., to be placed so near the track

Reasonable care must be taken to protect car repairers or other servants working upon or under stationary cars against injuries from movements of the train without notice.[10] And, generally, the company should frame and promulgate such rules and schedules for the moving of its trains as will afford safety to the operatives engaged in moving them.[11] But so long as the master keeps the places where the workman is employed or likely to go in a safe condition he discharges his whole duty in that regard.[12]

§ 348. The same subject continued.— Defective machinery. —The ordinary care to be exercised by the master in respect of the machinery must be measured by the character and risk and exposures of the business; and the degree required is higher where life and limb is endangered, or a large amount of property is involved, than in other cases.[13] The burden of proving

as to be a source of danger to employees in the discharge of their duty is evidence of negligence. Kearns v. Chicago, &c., Ry. Co., 66 Iowa, 599; Riley v. West Virginia C., &c., R. Co., 27 W. Va. 145; Illinois, &c., R. Co. v. Whalen, 19 Ill. App. 116; Davis v. Columbia, &c., R. Co., 21 S. C. 93.

[10] Quick v. Indianapolis, &c., R. Co., 130 Ill. 334; 22 N. E. Rep. 709; Pierce v. Central Iowa Ry. Co., 73 Iowa, 140; 34 N. W. Rep. 783; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57; Murphy v. New York, &c., R. Co., 118 N. Y. 527; 23 N. E. Rep. 812; Ritt's Adm'x v. Louisville, &c., R. Co. (Ky.), 4 S. W. Rep. 796; Campbell v. New York, &c., R. Co., 35 Hun, 506; Moore v. Wabash, &c., R. Co., 85 Mo. 588; Chicago, &c., R. Co. v. Bingenheimer, 116 Ill. 226. *Cf.* with the foregoing cases Luebke v. Chicago, &c., Ry. Co., 63 Wis. 91; 53 Am. Rep. 266; Central R. & B. Co. v. Kitchens, 83 Ga. 83; 9 S. E. Rep. 827.

[11] Lewis v. Seifert, 116 Penn. St. 628; 11 Atl. Rep. 514; Erickson v. St. Paul, &c., R. Co., 41 Minn. 500; 43 N. W. Rep. 332; Richmond, &c., R. Co. v. Normant, 84 Va. 167; 4 S. E. Rep. 211. In Clifford v. Denver, &c., R. Co., 9 Colo. 333; 12 Pac. Rep. 219, the plaintiff, a laborer employed in the construction of a road, maintained an action on account of sickness caused by being compelled to sleep on the cold and wet ground, without sufficient blankets.

[12] Belford v. Canada Shipping Co., 35 Hun, 347, 348, where a carpenter employed to do work on the upper deck of a vessel in port, hid his tools below at night, and on going to get them again fell into a bunker hole. The shipowner was held not liable.

[13] Cayzer v. Taylor, 10 Gray, 274; Bean v. Oceanic Steam Nav. Co., 24 Fed. Rep. 124; Hull v. Hall, 78 Me. 114; Herbert v. Northern Pac. R. Co., 3 Dak. 38; Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220; 12 S. W. Rep. 828; Chicago, &c., R. Co. v. Stites, 20 Ill. App.

the master's negligence in this regard is upon the servant,[14] and the breaking of the machinery is not alone sufficient

648; Covey v. Hannibal, &c., R. Co., 86 Mo. 635; Rice v. King Philip Mills, 144 Mass. 229; 11 N. E. Rep. 101; Steen v. St. Paul, &c., R. Co., 37 Minn. 310; 34 N. W. Rep. 113. The master's duty to furnish suitable machinery, &c., is not universal. It may depend upon the nature of the employment, and the circumstances of the case. Robinson v. George F. Blake Manuf'g Co., 143 Mass. 528; 10 N. E. Rep. 314. See, also, Peschel v. Chicago, &c., Ry. Co., 62 Wis. 338; George H. Hammond & Co. v. Schweitzer, 112 Ind. 246; 13 N. E. Rep. 869; Hewitt v. Flint, &c., R. Co., 67 Mich. 61; 34 N. W. Rep. 650; The Truro, 31 Fed. Rep. 158; Atchison, &c., R. Co. v. McKee, 37 Kan. 592; 15 Pac. Rep. 484; Spicer v. South Boston Iron Co., 138 Mass. 426; Nordyke & Marmon Co. v. Van Sant, 99 Ind. 188; The Carolina, 30 Fed. Rep. 199; 32 Fed. Rep. 112; Judkins v. Maine Cent. R. Co., 81 Me. 351; 14 Atl. Rep. 735; Columbia, &c., R. Co. v. Hawthorn, 3 Wash. T. 353; 19 Pac. Rep. 25; Puget Sound Iron Co. v. Lawrence, 3 Wash. T. 226; 14 Pac. Rep. 869; Gulf, &c., R. Co. v. Silliphant, 70 Tex. 623; 8 S. W. Rep. 673; Burns v. Ocean S. S. Co., 84 Ga. 709; 11 S. E. Rep. 493; Bajus v. Syracuse, &c., R. Co., 103 N. Y. 312; 57 Am. Rep. 723; Boardman v. Brown, 44 Hun, 336; Goodman v. Richmond, &c., R. Co., 81 Va. 576; Richmond, &c., R. Co. v. Moore, 78 Va. 93; Nelson v. Dubois, 11 Daly (N. Y.) 127; Steiler v. Hart, 65 Mich. 644; 32 N. W. Rep. 875; Hobbs v. Stauer, 62 Wis. 108; Madden v. Minneapolis, &c., Ry. Co., 32 Minn. 303; Malone v. Morton, 84 Mo. 436; Bradbury v. Goodwin, 108 Ind. 286; Withcofsky v. Weir, 32 Fed. Rep. 301; Hartwig v. Bay State Shoe & Leather Co., 43 Hun, 425; Burke v. Witherbee, 98 N. Y. 562; Central Trust Co. v. Texas, &c., Ry. Co., 32 Fed. Rep. 448; Muirhead v. Hannibal, &c., Ry. Co., 19 Mo. App. 634; Pittsburgh & W. Ry. Co. v. McCombs, 18 Atl. Rep. 613; Joseph Garneau Cracker Co. v. Palmer, 28 Neb. 307; 44 N. W. Rep. 463; International, &c., R. Co. v. Bell, 75 Tex. 50; 12 S. W. Rep. 321; Johnson v. Spear, 76 Mich. 139; 42 N. W. Rep. 1092; Siela v. Hannibal, &c., R. Co., 82 Mo. 430; Carey v. Chicago, &c., Ry. Co., 67 Wis. 608; Griffin v. Boston, &c., R. Co., 148 Mass. 143; 19 N. E. Rep. 166. Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent as tending to establish that it was not safe at the time of the accident. Atchison, &c., R. Co. v. McKee, 37 Kan. 592; 15 Pac. Rep. 484; Memphis, &c., Ry. Co. v. Askew, 90 Ala. 5; 7 So. Rep. 823; Goins v. Chicago, &c., Ry. Co., 37 Mo. App. 221. In order to charge an employer with neglect to furnish safe appliances, the danger must be shown to be such as to suggest itself to a man of ordinary prudence. Nelson v. Allen Paper Car-Wheel Co., 29 Fed. Rep. 840.

[14] St. Louis, &c., Ry. Co. v. Harper, 44 Ark. 524; Lindall v. Bode, 72 Cal. 245; 13 Pac. Rep. 660. The question of negligence is usually for the jury. Marshall v. Widdicomb Furniture Co., 67 Mich. 167; 34 N. W. Rep. 541; Ford v. Lake Shore, &c., R. Co., 2 N. Y.

proof of negligence.[15] But where negligence on the master's part is established, is is no defense that the negligence of a fellow-servant contributed to the injury.[16] The servant must exercise ordinary care to avoid injury, and if the tool furnished by the master is so obviously defective that no prudent person would have used it, the master is not liable for an injury resulting from its use.[17]

§ 349. The master's duty as to machinery a continuing duty. —Not only must the master furnish safe and suitable means and facilities to his servants for performing the work he requires of them, but the law imposes upon him the additional duty of taking care that this machinery, and these tools and instrumentalities of labor are kept in a safe and proper condition. Having provided safe and suitable machinery, the master's duty is not done. He cannot remain passive. He must continue to take ordinary care, and see to it that the machinery is properly inspected, and kept in repair, and in no way allowed to grow dangerous or unfit by use.[19] The duty of maintaining machin-

Supl. 1; Robinson v. George F. Blake Manuf'g Co., 143 Mass. 528; 10 N. E. Rep. 314; Cunard Steamship Co. v. Carey, 119 U. S. 245; Lilly v. New York, &c., R. Co., 107 N. Y. 566; 14 N. E. Rep. 503; Barbo v. Bassett, 35 Minn. 485. Where the sufficiency of the machinery, plaintiff's knowledge of the danger, or the performance of defendant's duty to notify plaintiff of it, are controverted questions, the case is for the jury. McDade v. Washington, &c., R. Co., 5 Mackey (D. C.) 144.

[15] Dobbins v. Brown, 119 N. Y. 188; 23 N. E. Rep. 537; Atchison, &c., R. Co. v. Ledbetter, 34 Kan. 326. An allegation that the machine causing the injury was unsafe and defective is not sustained by proof that the machine repeatedly required to be put in order while being used. Coffey v. Chapel, 2 N. Y. Supl. 648.

[16] Sherman v. Menomonee River Lumber Co., 72 Wis. 122; 39 N. W. Rep. 365; Stringham v. Stewart, 108 N. Y. 516; Pullutra v. Delaware, &c., R. Co., 7 N. Y. Supl. 510. See, also, § 104, *supra*.

[17] Moline Plow Co. v. Anderson, 19 Ill. App. 417. A servant may rely upon his master furnishing safe machinery, and, in the absence of notice, is under no primary obligation to investigate and test it. Chicago, &c., Ry. Co. v. Hines, 132 Ill. 161; 23 N. E. Rep. 1021; Heath v. Whitebreast Coal & Mining Co., 65 Iowa, 737.

[19] Gulf, &c., Ry. Co. v. Pettis, 69 Tex. 689; 7 S. W. Rep. 93; Gulf, &c., R. Co. v. Silliphant, 70 Tex. 623; 8 S. W. Rep. 673; Buckley v. Port Henry Iron Ore Co., 2 N. Y. Supl. 133; The Neptune, 30 Fed. Rep. 925; Rice v. King Philip Mills, 144 Mass. 229; Eichler v. St. Paul Furniture Co., 40 Minn. 263; 41 N. W. Rep. 975; Knapp v. Sioux City, &c., Ry. Co., 71 Iowa,

ery in repair, for the protection and safety of employees, is the same in kind as the duty of furnishing a safe and proper machine in the first instance, and an employer is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep the machinery in safe condition.[20] This rule has been somewhat modified in recent decisions affecting the liability of railway companies for injuries to their employees from the defective condition of cars received by them from other roads in the usual course of business, for transportation. If these cars come into their possession in apparent good order, it has been held that the receiving company is under no obligation as to its employees to inspect them, and is not liable for injuries to them occasioned by defects in such cars.[21]

41; 32 N. W. Rep. 18; Warden v. Old Colony R. Co., 137 Mass. 204. A declaration founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. Current v. Missouri Pac. Ry. Co., 86 Mo. 62. While the servant is not required to search for defects, unless bound to do so by contract; Missouri Pac. Ry. Co. v. Crenshaw, 71 Tex. 340; 9 S. W. Rep. 262; yet, if a defect becomes apparent, it is his duty to observe and report the fact to his employer. Kinney v. Corbin, 132 Penn. St. 341, 344; Fuller v. Jewett, 80 N. Y. 46; 36 Am. Rep. 575; Laning v. N. Y., &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Warner v. Erie Ry. Co., 39 N. Y. 468; Brick v. Rochester, &c., R. Co., 98 N. Y. 211; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. Rep. 598; Shanny v. Androscoggin Mills, 66 Me. 420; Brann v. Chicago, &c., R. Co., 53 Iowa, 595; Solomon R. Co. v. Jones, 30 Kan. 601; Atchison, &c., R. Co. v. Holt, 29 Kan. 149; Condon v. Mo. Pac. R. Co., 78 Mo. 567; Kain v. Smith, 25 Hun, 149; Toledo, &c., R. Co. v. Moore, 77 Ill. 217; Hough v. Railway Co., 100 U. S. 213; Holden v. Fitchburg R. Co., 129 Mass. 268; Gilman v. Eastern R. Co., 13 Allen, 440; Pierce on Railroads, § 370.

[20] "In fact, we cannot see how, on principle, there can be any difference whatever between the duty of furnishing safe machinery in the first instance and the duty of maintaining it in a safe condition thereafter, conditioned always that the employer's duty in both instances goes only to the extent of using proper care and foresight, and not to the extent of an absolute insurer." Clowers v. Wabash, &c., R. Co., 21 Mo. App. 213, 217.

[21] Ballou v. Chicago, &c., R. Co., 54 Wis. 259; 41 Am. Rep. 31; Smith v. Flint, &c., R. Co., 46 Mich. 258; Michigan, &c., R. Co. v. Smithson, 45 Mich. 212; Mackin v. Boston, &c., R. Co., 135 Mass. 201; Baldwin v. Chicago, &c., R. Co., 50 Iowa, 680. See, also, Davis v. Detroit, &c., R. Co., 20 Mich. 105; Hulett v. St. Louis, &c., R. Co., 67 Mo. 240; Lovejoy v. Boston,

§ 350. This rule criticised.— This is a harsh rule, and the reasoning upon which these cases are based is not satisfactory. In O'Neil v. St. Louis Iron Mountain & Southern Ry. Co.[22] it was denied by Treat, D. J., in the Circuit Court of the United States for the Eastern District of Missouri. In this case it was held that where an accident occurs to an employee, from such a cause, he may recover from the company, the court sturdily insisting upon the importance of holding employers to a strict account in the matter of injuries to their employees. It has also been held in Illinois that the responsibilities of a railroad company to its servants are the same in respect of cars of other companies which they are compelled to handle as in respect of its own cars.[23]

§ 351. Master must provide safe and good, but not the safest and best, appliances.—We have seen that the law requires the master to furnish safe and reasonable good machinery to his servant, and to keep that machinery in reasonably good order; or, in other words, that the law imposes upon an employer the duty of ordinary care, both as to furnishing the instrumentalities of labor, and also as to keeping them in repair. And here it is necessary to be careful not to go further. The law imposes no further or higher obligation upon an employer than this. As a general rule he is not under obligation to make use of the safest appliances and instruments, nor to change his machinery with every new invention, nor to introduce every supposed improvement in appliances.[24] In Kelley v. Silver Spring

&c., R. Co., 125 Mass. 79; 28 Am. Rep. 206; Foley v. Chicago, &c., R. Co., 48 Mich. 622; 42 Am. Rep. 481.

[22] 9 Fed. Rep. 337.

[23] Chicago, &c., R. Co. v. Avery, 109 Ill. 314. See, also, Bushby v. New York, &c., R. Co., 37 Hun, 104; Haugh v. Chicago, &c., Ry. Co., 73 Iowa, 66; 35 N. W. Rep. 116; Cincinnati, &c., R. Co. v. McMullen, 117 Ind. 439; 20 N. E. Rep. 287.

[24] Railroad Co. v. Wagner, 33 Kan. 660; 7 Pac. Rep. 201; Hannibal, &c., R. Co. v. Kanaley, 39 Kan. 1; 17 Pac. Rep. 324; Berns v. Coal Co., 27 W. Va. 285; 55 Am. Rep. 304; Robertson v. Cornelson, 34 Fed. Rep. 716; Hickey v. Taaffe, 105 N. Y. 26; 12 N. E. Rep. 286. A master may carry on his business with an old machine not provided with all the safeguards attached to newer machines; he may discharge a servant employed to run it, who refuses to perform his stipulated service, and a threat to do so is not coercion, which will make the master liable for injuries to the servant resulting from the use of the ma-

Co.[25] it was held that where an employer has kept imperfect and unfenced machinery in use for a long time, and it has been safely used by his employees, he is not liable in damages for an injury to one of them occasioned by its unfitness.[26] While, *per contra*, some courts go to the other verge of the rule and hold that railway companies, in equipping their roads with freight cars, as between those that are more and those that are less dangerous in their construction, are bound to use the safer kind, and are responsible to their employees if they do not.[27] Either extreme is within the rule. The obligation of the master is to act in good faith, with ordinary care, and whether the rule shall be more or less stringently applied will depend upon the circumstances of each case. In some vocations, good faith and ordinary

chine. Sweeney v. Berlin, &c., Envelope Co., 101 N. Y. 520; 54 Am. Rep. 722; Burns v. Chicago, &c., Ry. Co., 69 Iowa, 450; Chicago, &c., R. Co. v. Smith, 18 Ill. App. 119. An employer is not liable to his employee for injuries received because he had failed to furnish implements for shifting belting, when it does not appear that such implements would have prevented the accident if they had been furnished. Gordon v. Reynolds Card Manuf'g Co., 47 Hun, 278; Lehigh, &c., Coal Co. v. Hayes, 128 Penn. St. 294; 24 W. N. C. 559; 18 Atl. Rep. 387; Wright v. Delaware, &c., Canal Co., 40 Hun, 343; Tabler v. Hannibal, &c., R. Co. (Mo.), 5 S. W. Rep. 810; Wonder v. Baltimore, &c., R. Co., 32 Md. 411; 3 Am. Rep. 143; Jones v. Granite Mills, 126 Mass. 84; Keith v. Granite Mills, 126 Mass. 90; Ft. Wayne, &c., R. Co. v. Gildersleeve, 33 Mich. 133; Mad River R. Co. v. Barber, 5 Ohio St. 541. The master is simply required to furnish such appliances as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances. Burke v. Witherbee, 98 N. Y. 562; Western, &c., R. Co. v. Bishop, 50 Ga. 465; Leonard v. Collins, 70 N. Y. 90; Botsford v. Michigan, &c., R. Co., 33 Mich. 256; Ladd v. New Bedford, &c., R. Co., 119 Mass. 412; 20 Am. Rep. 331; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 14; Devitt v. Pacific, &c., R. Co., 50 Mo. 302; East Tennessee, &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319; Dynen v. Leach, 26 L. J. (Exch.) 221.

[25] 12 R. I. 112; 34 Am. Rep. 615.

[26] See, also, Sullivan v. India Manufacturing Co., 113 Mass. 396; Burke v. Witherbee, 98 N. Y. 562; Hayden v. Manuf. Co., 29 Conn. 548; Hobbs v. Stauer, 62 Wis. 108; 19 Am. Law Rev. 690; Schroeder v. Michigan Car Co., 56 Mich. 132; 32 Alb. Law Jour. 134.

[27] Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 14; St. Louis, &c., R. Co. v. Valirius, 56 Ind. 511. See, also, Abel v. Delaware, &c., Canal Co., 103 N. Y. 581; 57 Am. Rep. 773; Coppins v. New York, &c., R. Co., 43 Hun, 26; Toledo, &c., R. Co. v. Wand, 48 Ind. 476; Hegeman v. Western, &c., R. Co., 13 N. Y. 9; Smith v. New York, &c., R. Co., 19 N. Y. 127.

care alike may justify the continued use of very primitive and inefficient apparatus ; in others, nothing short of the most perfect appliances may be justifiable. The courts will hardly ever be in danger of misapplying so simple and so reasonable a rule.[28]

§ 352. Master not a guarantor of the safety or sufficiency of his appliances.— Neither is the master to be held to insure the safety, or sufficiency, of his machinery. His duty is fully discharged when he has furnished proper appliances and instrumentalities, and while he keeps them in ordinary repair. The test of his liability, therefore, is not the question : " Was the machinery absolutely safe ? " nor, " Could the master have done anything which he did not do to render it safe ? " but, " Did the master exercise ordinary care ? " " Did he do anything affecting the safety of the machinery, which, in the exercise of ordinary care, he should not have done ; or did he omit anything that ordinary prudence dictates ? "[29] It is obvious that, were the master the warrantor of the machinery in his factory, or the tools and appliances which he furnished to his servants—if he were held, as to his servants, to guarantee that no harm should come from defects or faults in the instrumentalities employed in performing their labor, there would be no end to his liability. It would be a most mischievous doctrine. The possibility of

[28] See the learned opinion of Justice Harlan in Hough v. Texas & Pacific R. Co., 100 U. S. 213; 1 Redfield on Railways, 521, note; Wharton on Negligence, §§ 211, 212, 213; Maginnis v. Canada Southern Bridge Co., 49 Mich. 171; Batterson v. Chicago, &c., R. Co., 49 Mich. 184.

[29] The Flowergate, 31 Fed. Rep. 762; The Lizzie Frank, 31 Fed. Rep. 477; Atchison, &c., R. Co. v. McKee, 37 Kan. 592; 15 Pac. Rep. 484; Leonard v. Collins, 70 N. Y. 90; Indianapolis, &c., R. Co. v. Troy, 91 Ill. 474; Ladd v. New Bedford, &c., R. Co., 119 Mass. 412; Indianapolis, &c., R. Co. v. Love, 10 Ind. 554. A ship-owner does not insure against latent and indiscoverable defects in the vessel. The Lizzie Frank, 31 Fed. Rep. 477. Nor does a railroad company guarantee the good condition of its tracks and roadway. St. Louis, &c., Ry. Co. v. Weaver, 35 Kan. 412; 11 Pac. Rep. 412; Little Rock, &c., Ry. Co. v. Townsend, 41 Ark. 382; Devlin v. Smith, 89 N. Y. 470; 42 Am. Rep. 311; East Tenn., &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319; Hard v. Vermont, &c., R. Co., 32 Vt. 473; Wood on Master and Servant, 696; Skerritt v. Scallan, 11 Ir. C. L. R. 389; Ormond v. Holland, El., Bl. & El. 102; Shearman & Redfield on Negligence (5th ed.), § 184. See, also, Chicago, &c., R. Co. v. Swett, 45 Ill. 197; Hayden v. Smithville Manfg. Co., 29 Conn. 548.

injury from machinery, under the rule of law requiring ordinary care in respect to it from the master, is one of the proper risks that the servant takes into account when he enters the service. The tendency of one or two of the State courts to extend the rule as to the responsibility of the master in this regard until it shall amount, for practical purposes, to a warranty of all his tools and machinery and premises, is, in the writer's opinion, without any sound basis in the reason of the case, and it may easily be believed that such a rule, as a rule, would be as nearly wholly bad as any rule of law is ever likely to be.[30]

§ 353. Incompetent and unfit employees.— The responsibility of a master to each of his servants for the competency and fitness of the other servants he employs to work with them is, in every way, analogous to the duty he owes them in regard to the machinery and all the other instrumentalities he furnishes for the performance of the work. As it is his duty to furnish only safe facilities for the work, in the shape of tools, machinery, premises, etc., and to use ordinary care, as we have shown, to keep them in a safe and sound condition, so the law imposes upon him the duty, as toward his servants, of seeing to it that only competent and suitable persons are employed to perform his work in association with them. And here, also, the measure of his obligation is ordinary care.[31] He must take ordinary and

[30] See *e. g.* East., &c., R. Co. v. Hightower, 92 Ill. 139; Indianapolis, &c., R. Co. v. Troy, 91 Ill. 474; Warner v. Erie Ry. Co., 49 Barb. 558; 39 N. Y. 468; Steffen v. Chicago, &c., R. Co., 46 Wis. 259; Morrison v. Construction Co., 44 Wis. 405; Smith v. Chicago, &c., R. Co., 42 Wis. 520; DeGraff v. New York, &c., R. Co., 76 N. Y. 125.

[31] "The defendant's duty to the plaintiff, so far as reasonable care would accomplish it, was to employ only competent men in the management of its road. A competent man is a reliable man, one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence, incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him his disposition toward his work and toward the general safety of the work of his employer and to his fellow-servants makes him an incompetent man." Coppins v. N. Y. C. & H. R. R. Co., 122 N. Y. 557, 564; 25 N. E. Rep. 915. A complaint which shows that the plaintiff and

reasonable precautions not to employ reckless, dissipated or incompetent servants for positions where their fault may injure their fellow-servants, and if he fail to do this, he is liable in case of such an injury.[31a] So the master is liable if his servant

the person by whose negligence he was injured were fellow-servants, and does not aver that the defendant was negligent in employing such servant, or retained him after he knew, or ought to have known, that he was negligent, nor that the plaintiff did not know it, and did not have means of knowledge equal to the defendant, is bad on demurrer. Indiana, &c., Ry. Co. v. Dailey, 110 Ind. 75; 10 N. E. Rep. 631.

[31a] Lakin v. Oregon Pac. R. Co., 15 Or. 220; 15 Pac. Rep. 641; Chesapeake, &c., R. Co. v. McMannon (Ky.), 8 S. W. Rep. 18; Maxwell v. Hannibal, &c., R. Co., 85 Mo. 95; Lyons v. New York, &c., R. Co., 39 Hun, 385; Brennan v. Gordon, 118 N. Y. 489. The mere fact that a railroad engineer is near-sighted does not prove him to be an improper person for the duty. Texas, &c., Ry. Co. v. Harrington, 62 Tex. 597. The plaintiff, a carpenter, employed on a building by defendant, was sent by one S., who had been placed in full control of the building by defendant, upon some stairs from which S. had removed the cleat which kept them from slipping. There was evidence that defendant knew S. was careless, and that he had been careless in other work about the building. Held, that an instruction that if the accident was caused by the negligence of S. and defendant knew S. was a careless workman in the place where he put him, and S. was in fact careless, then defendant was liable if plaintiff was in the exercise of due care and in ignorance that S. was careless, and had removed the cleat, was not erroneous. Slater v. Chapman, 67 Mich. 523; 35 N. W. Rep. 106. The burden of proof of incompetency is upon the plaintiff. Stafford v. Chicago, &c., R. Co., 114 Ill. 244. A servant has the right to presume that his master has performed the duty of exercising reasonable care in ascertaining the qualifications of other servants, and is not bound, at his peril, himself to investigate their qualifications. United States Rolling Stock Co. v. Wilder, 116 Ill. 100; Kean v. Detroit Rolling Mills, 66 Mich. 277; 33 N. W. Rep. 395; Probst v. Delamater, 100 N. Y. 266. The incompetency of intemperance must be a contributing cause of the injury in order to make the master liable. Harrington v. New York, &c., R. Co., 4 N. Y. Supl. 640; Johnston v. Pittsburgh, &c., R. Co., 114 Penn. St. 443; 7 Atl. Rep. 184; Galveston, &c., Ry. Co. v. Faber, 77 Tex. 153; 8 S. W. Rep. 64. Whether the master was negligent in employing an incompetent servant is a question for the jury. Newell v. Ryan, 40 Hun, 286; Cowles v. Richmond, &c., R. Co., 84 N. C. 309; 37 Am. Rep. 620; Laning v. New York, &c., R. Co., 49 N. Y. 521; Illinois, &c., R. Co. v. Welch, 52 Ill. 183; Houston, &c., R. Co. v. Oram, 49 Tex. 341; Tyson v. North Alabama, &c., R. Co., 61 Ala. 554; 32 Am. Rep. 8. It is not necessary that the master should know that the servants are unsafe

is injured, not through the unfitness or incompetence of a fellow-servant, but because an insufficient number of servants are provided to do the required work properly, and with due regard to the safety of those performing it. It is equally wrong to hire too few as to hire unfit servants. The master must provide servants enough in every instance to do his work.[32] A servant is not necessarily negligent who, in obedience to orders and with knowledge of the danger, attempts to do that which requires more assistants than the master has provided, where he believes, with reason, that by being careful they may succeed, even though he is mistaken in his judgment.[33] But while an employee has the right to presume that the other employees of their common employer will perform their duty, such presumption will not exempt such employee from responsibility for his own negligence; and where he does an act, which he knows, or by the exercise of due care could know, would probably result in his injury, by voluntarily incurring such risk, he becomes guilty of contributory negligence which will preclude his recovery for injuries while in the performance of such act.[34]

and incapable. It is sufficient that he would have known it if he had exercised reasonable care and diligence. Noyes v. Smith, 28 Vt. 63; Cayzer v. Taylor, 10 Gray, 274; McMahon v. Davidson, 12 Minn. 357; Hogan v. Central Pac., &c., R. Co., 49 Cal. 128; Davis v. Detroit, &c., R. Co., 20 Mich. 105; Moss v. Pacific, &c., R. Co., 49 Mo. 167; Frazier v. Penn., &c., R. Co., 38 Penn. St. 104.

[32] Johnson v. Ashland Water Co., 71 Wis. 553; 37 N. W. Rep. 823; Booth v. Boston, &c., R. Co., 73 N. Y. 38; 29 Am. Rep. 97, a case holding that the contributory negligence of an engineer of a train to an accident causing injury to a fellow-servant, would not excuse the company for not employing a sufficient number of brakemen to take charge of the train. Flike v. Boston, &c., R. Co., 53 N. Y. 549; 13 Am. Rep. 545; Chicago, &c., R. Co. v. Taylor, 69 Ill. 461; 10 Am. Rep. 626; Luebke v. Chicago, &c., R. Co., 59 Wis. 127; 48 Am. Rep. 483; Lake Shore, &c., R. Co. v. Lavalley, 36 Ohio St. 221; Smith v. Chicago, &c., R. Co., 42 Wis. 526; Vose v. London & Yorkshire Ry. Co., 2 Hurl. & N. 728. See, also, Harvey v. New York, &c., R. Co., 10 N. Y. Supl. 645.

[33] Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650.

[34] Alabama Great Southern R. Co. v. Roach, 110 Ala. 266; 20 So. Rep. 132. One employee has no more right to presume that another employee will do his duty than such other has the right to presume that he will perform his duty, and where both are guilty of negligence, each contributed to their own injury, in such case neither can recover. Alabama Great Southern R. Co. v. Roach, 110 Ala. 266; 20 So. Rep. 132.

§ 354. The duty as to servants also a continuing duty.— As in the matter of machinery, and the like, so, in regard to servants, the master must not only use ordinary care in hiring only such as are fit and competent and reasonably skillful, but it is his duty not to retain a servant in his employ when he discovers him to be unfit for the place he occupies. It is as wrong to retain an unfit servant as to employ one at the start, and this is the rule when a servant, who was originally competent and skillful when employed, has become, subsequently, either from habits of intemperance, or from any other cause, incompetent, or habitually careless and reckless.[35]

§ 355. The master not held to warrant the faithfulness or competency of his servants.— Again, as has appeared in regard to machinery, the master does not warrant the competency and faithfulness of any of his servants to the rest. His liability is not of so strict a nature as this. His duty in the matter of employing and retaining and watching over his servants is

35 Hilts v. Chicago, &c., Ry. Co., 55 Mich. 437; Lake Shore, &c., Ry. Co. v. Stupak, 123 Ind. 210; 23 N. E. Rep. 246; Bossout v. Rome, &c., R. Co., 10 N. Y. Supl. 602; Neilson v. Kansas City, &c., R. Co., 85 Mo. 599. One injured by the negligence of a fellow-servant must allege and prove his ignorance of the latter's negligent habits; and an allegation that he was "wholly unacquainted" with the fellow-servant is not sufficient. Lake Shore, &c., Ry. Co. v. Stupak, 108 Ind. 1. He must allege want of care in engaging the servant, or that he was retained after notice of his forthcomings. Indiana, &c., Ry. Co. v. Dailey, 110 Ind. 75; Laning v. New York, &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Columbus, &c., R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 578; Chapman v. Erie Ry. Co., 55 N. Y. 579; Corson v. Maine, &c., R. Co., 76 Me. 244; Baulec v. New York, &c., R. Co., 59 N. Y. 356; 5 Lans. 436; 62 Barb. 623; 17 Am. Rep. 325; Michigan, &c., R. Co. v. Dolan, 32 Mich. 510; Shanny v. Androscoggin Mills, 66 Me. 418; Illinois, &c., R. Co. v. Jewell, 46 Ill. 99. A single act of negligence does not necessarily charge the master with notice of his servant's incompetency so as to preclude him from defending an action brought by another servant injured by the negligence of the first servant. Baltimore Elevator Co. v. Neal, 65 Md. 438. Nor is negligence by the master to be inferred from the mere fact that the servant was slow and lazy, and that the master knew it. Corson v. Maine Cent. R. Co., 76 Me. 244. See, also, Curran v. Merchants' Manufacturing Co., 130 Mass. 374; 39 Am. Rep. 457; Ohio, &c., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; Gillenwater v. Madison, &c., R. Co., 5 Ind. 339; 61 Am. Dec. 101.

measured by the rule of ordinary carefulness and prudence, and when he has selected them with discretion, and omitted nothing that prudence dictates in overseeing them, he has done what the law requires of him.[36]

§ 356. The master may act through an agent and become responsible for his acts.— Obviously, an employer may perform all his duties in respect of the instrumentalities and surroundings of labor and his employees through agents, and will, in such a case, be responsible for their acts. In this respect a corporation stands on the same footing as an individual, and both are equally bound to use, with respect of employees and machinery, such care and prudence as the nature and dangers of their business require. If either intrust their duties to an agent they are equally responsible if injury results from the improper acts of their representative.[37] "Indeed," said Justice

[36] Tarrant v. Webb, 18 C. B. 797; Ormond v. Holland, El., Bl. & El. 102; Indianapolis, &c., R. Co. v. Love, 10 Ind. 554; Faulkner v. Erie Ry. Co., 49 Barb. 324; Columbus, &c., R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 578; Beaulieu v. Portland Co., 48 Me. 291; Moss v. Pacific, &c., R. Co., 49 Mo. 167; 8 Am. Rep. 126. In Blake v. Maine Central Ry. Co., 70 Me. 60, 64; 35 Am. Rep. 297, it was held that when suitable and competent persons have been employed, the same degree of diligence is no longer required. Proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change. Lawler v. Androscoggin R. Co., 62 Me. 467; 16 Am. Rep. 492. See, also, Cotton v. Edwards, 123 Mass. 484; Cummings v. Grand Trunk Ry. Co., 4 Cliff. 478.

[37] Hawkins v. N. Y., L. E. & W. R. Co., 142 N. Y. 416; 37 N. E. Rep. 466; Brown v. Gilchrist, 80 Mich. 56; 45 N. W. Rep. 82; Missouri Pac. Ry. Co. v. Peregoy, 36 Kan. 427; 14 Pac. Rep. 7; Louisville, &c., Ry. Co. v. Graham, 124 Ind. 89; 24 N. E. Rep. 668. Plaintiff was injured in a collision between a special freight train and a working train. The freight train had orders to look out for the working train, but the latter, although it was all the previous night at a telegraph station, had no such orders in regard to the former. Held, that the neglect of the defendant's superintendent to give such orders was the negligence of the defendant, imposing a liability on the latter if the injury resulted therefrom. Galveston, &c., Ry. Co. v. Smith, 76 Tex. 611; 13 S. W. Rep. 562; Lewis v. Seifert, 116 Penn. St. 628; 11 Atl. Rep. 514; Johnson v. Spear, 76 Mich. 131; Van Dusen v. Letellier, 78 Mich. 492; Morton v. Detroit, &c., R. Co., 81 Mich. 423; Everson v. Rollinson (Penn.), 8 Atl. Rep. 194; Missouri Pac. Ry. Co. v. McElyea, 71 Tex. 386; 9 S. W. Rep. 313; Moynihan v. Hills Co., 146

Field, "no duty required of him [the master] for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery, or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that

Mass. 586; 16 N. E. Rep. 574; Pennsylvania, &c., R. Co. v. Mason, 109 Penn. St. 296; 58 Am. Rep. 722; Hoke v. St. Louis, &c., Ry. Co., 88 Mo. 360; Douglas v. Texas, &c., Ry. Co., 63 Tex. 564; Kelley v. Cable Co., 7 Mont. 70; 14 Pac. Rep. 633; Rogers v. Ludlow Manufg. Co., 144 Mass. 198; 11 N. E. Rep. 77, in which the Massachusetts decisions are collected. *Cf.* Sanborn v. Madera Flume Co., 70 Cal. 261; St. Louis, &c., Ry. Co. v. Weaver, 35 Kan. 412; 11 Pac. Rep. 408; Benzing v. Steinway, 101 N. Y. 547; Indiana Car Co. v. Parker, 100 Ind. 181; Mayhew v. Sullivan Mining Co., 76 Me. 100. A master cannot escape responsibility to his servant for an accident resulting from defective machinery by delegating to another servant the duty of seeing that the machinery is safe. Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; Hall v. Galveston, &c., Ry. Co., 39 Fed. Rep. 18; Torians v. Richmond, &c., R. Co., 84 Va. 192; 4 S. E. Rep. 339; Atchison, &c., R. Co. v. McKee, 37 Kan. 592; 15 Pac. Rep. 484; Kelly v. Howell, 41 Ohio St. 438; Cregan v. Marston, 10 N. Y. Supl. 681; Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468; 11 Pac. Rep. 612; Texas & Pac. Ry. Co. v. Kirk, 62 Tex. 227; Ryan v. Miller, 12 Daly, 77; Kruger v. Louisville, &c., Ry. Co., 111 Ind. 51; 11 N. E. Rep. 957; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; 12 N. E. Rep. 380; Sangamon Coal Min. Co. v. Wiggerhaus, 122 Ill. 279; 13 N. E. Rep. 648; Moore v. Wabash, &c., Ry. Co., 85 Mo. 588. In Iowa it is held that in order to render the master liable for the negligence of an inspector of machinery the latter must be confined by his duty to a mere inspection, and that if it be also his duty to repair it when broken or defective this duty is not separated from the operation of the machinery, and he is deemed a co-servant of one who is actually operating the machine. Theleman v. Moeller, 73 Iowa, 108; 34 N. W. Rep. 765. See, also, on this point, McGee v. Boston Cordage Co., 130 Mass. 445; Benn v. Null, 65 Iowa, 407; Rogers, &c., Works v. Hand, 50 N. J. Law, 464; 14 Atl. Rep. 766; Luebke v. Chicago, &c., Ry. Co., 63 Wis. 91; 53 Am. Rep. 266; Filbert v. Delaware, &c., Canal Co., 121 N. Y. 207; 23 N. E. Rep. 1104; McCoy v. Empire Warehouse Co., 10 N. Y. Supl. 99. In Pennsylvania the owners of a mine are not liable for the negligence of a mining boss employed pursuant to a statutory requirement to look after the ventilation, etc., the court holding that it has no authority to impose any obligation in addition that of reasonable care in selecting the boss. Redstone Coke Co. v. Roby (Penn.), 8 Atl. Rep. 593; Waddell

no danger shall ensue to him."[38] Nor is the master relieved from liability in such case by the fact that he has promulgated rules or regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter.[39]

§ 357. The rule as to minor servants.— The rule of law which exempts an employer from liability to one of his employees for an injury occasioned by the fault of a co-employee, proceeding upon the theory of the implied contract that the servant takes the risks of his employment, has been applied in many jurisdictions to minor servants. Assuming that an adult employee does tacitly contract with his employer that if he is injured through the carelessness of a fellow-employee he will bear the consequences, the rule, in all its strictness, has been held to apply to children ten, twelve and fourteen years old, injured without any contributory carelessness through the carelessness of some other so-called fellow-employee, with whom, in some instances, they had no association or connection. If this rule has any substantial basis it is the basis of an implied contract. Upon no other ground yet suggested is it for an instant tenable. Inasmuch as minors are not bound by their

v. Simonson, 112 Penn. St. 567; Reese v. Biddle, 112 Penn. St. 72; Michigan, &c., R. Co. v. Dolan, 32 Mich. 510; Corcoran v. Holbrook, 59 N. Y. 517; Crispin v. Babbitt, 81 N. Y. 516; 37 Am. Rep. 521; Mitchell v. Robinson, 80 Ind. 281; 41 Am. Rep. 812; Flike v. Boston, &c., R. Co., 53 N. Y. 549; 13 Am. Rep. 545. An agent may appoint one who shall stand in such relation to the other servants that the master may be held responsible for his negligence; as where the agent of an owner of a mine appointing a mining captain. Ryan v. Bagaley, 50 Mich. 179; 45 Am. Rep. 35; Tyson v. North Ala., &c., R. Co., 61 Ala. 554; Harper v. Indianapolis, &c., R. Co., 47 Mo. 567; Brickner v. New York, &c., R. Co., 2 Lans. 506; affirmed, 49 N. Y. 672; Wilson v. Willmantic, &c., Co., 50 Conn. 433; 47 Am. Rep. 653; Cowles v. Richmond, &c., R. Co., 84 N. C. 309; Gunter v. Graniteville Manfg. Co., 18 S. C. 362; 44 Am. Rep. 573. If for the purpose of instruction the master selects another servant in his employ, the latter must be, not simply as competent as the master, but absolutely competent; if he is incompetent or negligent while performing the duty of instructor, or if he discontinues his instruction before completion, and in consequence the promoted servant is injured, the master is liable. Brennan v. Gordon, 118 N. Y. 489; 23 N. E. Rep. 810.

[38] Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 647.

[39] Hankins v. N. Y., L. E. & W. R. Co., 142 N. Y. 416; 37 N. E. Rep. 466.

express contracts with their employers,[40] having, in contemplation of law, no power to make a contract, it is not plain upon what theory this rule can in justice be held to apply to them. If the policy of the law refuses to bind a minor by his own deliberate express contract to his employer, much more, it is submitted, should the policy of the law refuse to fix upon an employee of tender years so onerous and artificial an implied contract as this. The law in this regard is in a very unsatisfactory condition. It is held that the fact of infancy does not alter or modify the rule, and in this position, as in very many of the others tending to extend the rule, the Massachusetts Supreme Judicial Court takes the lead.[41] Even in those cases in which the facts were such that a judgment for the infant plaintiff was sustained, and in which the master was held to a somewhat higher degree of responsibility and care as to his infant employees, the rule itself is not questioned. It is in every such case that I have found, assumed to be the law, that under a proper state of facts an infant employee can, neither less nor more than an adult, recover for injuries that befall him through the carelessness of his co-employees.[42]

[40] 2 Kent's Commentaries, 193; Gartland v. Toledo, &c., R. Co., 67 Ill. 498; Nashville, &c., R. Co. v. Elliott, 1 Caldw. 611; Fones v. Phillips, 39 Ark. 17; 43 Am. Rep. 264; Wood v. Fenwick, 10 M. & W. 195; Keane v. Boycott, 2 Henry B. 511; R. v. St. Petroix, 4 T. R. 196; R. v. Arundel, 5 Mau. & Sel. 257; R. v. Chillesford, 4 Barn. & C. 94.

[41] King v. Boston, &c., R. Co., 9 Cush. 112; Curran v. Manfg. Co., 130 Mass. 374; 39 Am. Rep. 457; Sullivan v. India Manfg. Co., 113 Mass. 396; O'Connor v. Adams, 120 Mass. 427; Fones v. Phillips, 39 Ark. 17; 43 Am. Rep. 264. Where a child is injured by dangerous machinery, upon which he is negligently set to work by a fellow-servant, the case is held to come within the rule which excuses the master from liability. Fisk v. Central Pac. R. Co., 72 Cal. 38; 13 Pac. Rep. 144; North Chicago Rolling Mills Co. v. Benson, 18 Ill. App. 194; Brown v. Maxwell, 6 Hill, 592; 41 Am. Dec. 771; Gartland v. Toledo, &c., R. Co., 67 Ill. 498. "The question whether the minor had a sufficient understanding of the hazards of the employment to bring him within the general rule was one of fact to be decided by the jury." Hayden v. Smithville Manfg. Co., 29 Conn. 548; Nashville, &c., R. Co. v. Elliott, 1 Cold. 611; Ohio, &c., R. Co. v. Hamersley, 28 Ind. 371. *Cf.* Hickey v. Taafe, 99 N. Y. 204, a decision under the New York statute designed to protect minor servants. In Evans v. American Iron & Tube Co., 42 Fed. Rep. 519, the jury were instructed that if the child by reason of his youth and inexperience

§ 358. Where the master orders the servant into danger or into a service which he did not contract to perform.— If an employee of full age and ordinary intelligence upon being required by his employer to perform duties more dangerous or complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly, from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action therefor against his employer.[43] The servant is presumed to be a free moral agency, he is competent to act and judge for himself; it is optional with him to quit the service or perform the act required, and if he chooses the latter, it must be considered as voluntary no his part.[44] Thus

was incapable of appreciating the dangerous character of the machinery, he was not a fellow-servant of the adult servants employed in the factory. Niantic Coal & Min. Co. v. Leonard, 25 Ill. App. 95; affirmed, 126 Ill. 216.

[42] Hill v. Gast, 55 Ind. 45; Coombs v. New Bedford Co., 102 Mass. 572; 3 Am. Rep. 506; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298; Wood on Master and Servant, § 349; Fort v. Union Pacific R. Co., 2 Dill. 259; 17 Wall. 553; Atlanta Cotton Factory v. Speer, 69 Ga. 137; 47 Am. Rep. 750; Grizzle v. Frost, 3 Fost. & Fin. 622; Britton v. Great Western Co., L. R. 7 Exch. 120; Anderson v. Morrison, 22 Minn. 274.

[43] Reed v. Stockmeyer, 34 U. S. App. 727, 741-742; 74 Fed. Rep. 186; Leary v. B. & O. R. Co., 139 Mass. 580; 2 N. E. Rep. 115; Bradshaw's Adm'r v. L. & N. R. Co. (Ky.), 21 S. W. Rep. 346; Woodley v. Metropolitan R. Co., 46 L. J. (Exch. Div.) 521.

[44] Leary v. Boston & Albany R. Co., 139 Mass. 580; 2 N. E. Rep. 115; Dougherty v. West Superior Iron & Steel Co., 88 Wis. 343, 350; 60 N. W. Rep. 274. In the latter case the court observed: "The fact that Burns, the foreman, told the plaintiff when he objected to working on spindles driven by steam, 'either go there or get out,' does not obviate the objection to the plaintiff's right to recover." But see McKee v. Tourtellotte, 167 Mass. 69, 70-71; 44 N. E. Rep. 1071, where it is said: "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this assumption is set the judgment of a superior, one who, too, from the nature of the callings of the two men, and of the superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal

where an employee of a railroad company, in the discharge of his duties, is directed to lift and carry an ordinary object, like a cross tie, he is bound to take notice that it is heavy and that a certain amount of physical strength will be required to accomplish the task; and if he misconceives the amount of physical strength to be exerted, and overstrains himself in lifting the tie, and is thereby injured, the master is not liable. The fact that he was acting under the orders of a superior at the time does not alter the question, even though he might have had reason to believe that disobedience of the order would result in his dismissal.[45]

rule can be laid down." See Hennessy v. Boston, 161 Mass. 502; 37 N. E. Rep. 668; Coan v. Marlborough, 164 Mass. 206; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. Rep. 501. The right of a servant to recover for injuries will not be defeated by some knowledge of the attendant danger, if, in obeying the order of the master to perform the work, he acts with the degree of intelligence which an ordinarily prudent man would exercise under the circumstances. The Illinois Steel Co. v. Schymanowski, 162 Ill. 447; 44 N. E. Rep. 876. Where a servant, in obedience to the requirement of the master, incurs the risks of machinery which is dangerous, but it is reasonably probable that danger may be avoided, if extraordinary care and skill be used, and the servant uses such care and skill as the exigencies of the situation seem reasonably to demand, and when injury results, the master is liable. The servant is only required to do that which a man of ordinary prudence would have done under like circumstances. Norfolk & Western R. Co. v. Ampey, 93 Va. 108; 25 S. E. Rep. 226. The performance of an act by an employee not within the usual line of his duties and in obedience to a command acting instantly and under circumstances permitting no deliberation, is not the assumption of a risk ordinarily incident to the employment, and is, therefore, not one of the assumed risks of the service. The right to recover for injuries sustained in the course of performing such acts depends upon ordinary considerations of negligence and contributory negligence. The test of negligence is whether a man of ordinary prudence would so conduct himself under the circumstances, and, therefore, the master is in such case only liable for the consequences of a command which a person of ordinary prudence would not have given under the circumstances, and which a man of ordinary prudence would have obeyed under the circumstances. Chicago, Rock Island & Pacific Ry. Co. v. McCarty, 49 Neb. 475, 483-484; 68 N. W. Rep. 633.

[45] Worlds v. Georgia R. Co., 99 Ga. 283; 25 S. E. Rep. 646. A switchman who was injured while attempting, as he walked in front of an ordinary road locomotive, having a pilot, while in motion, to uncouple a care from

§ 359. The patent and latent dangers of the employment. It follows almost necessarily from what has gone before, in view of the consideration that a master is not to be held to warrant the safety of the machinery he furnishes to his servants, but that the measure of his responsibility in regard to it is ordinary care and prudence, that a master is not liable to an employee for latent defects in the tools, machinery, materials or appliances furnished for the work. If an injury befalls an employee by reason of a defect which ordinary inspection and oversight would not, or did not detect, ordinary care in the premises having been exercised, then the master is not liable. It is one of the assumed risks of the employment.[46] It is the theory of the decisions that the servant takes the risk only of what may be denominated "seen dangers," but by this is understood nothing more than that a servant is entitled, when there is any danger connected with the machinery or employment in which he is engaged and which ordinary inspection and carefulness on his part will not enable him to avoid, to have it distinctly announced to him. It is meant that, as to such danger, it is particularly the duty of the employer to warn him. He is plainly entitled to have them pointed out when he enters upon the service. When this is done in good faith they become a part of his contract, but for any failure in this regard, when injury ensues, the master is liable;[47] and the obligation to warn the employee of danger is

the locomotive, — such act being shown to be very dangerous,— when the engineer was subject to his orders and signals, and he had the right to have the engine stopped while uncoupling the car, was guilty of contributory negligence, though expressly ordered to perform the service in that way by a superior to all whose reasonable and proper orders he was bound to conform; and the supposed exigencies of the employer's business, requiring that the work of switching should be done in that way, because more expeditious, will not excuse such contributory negligence. George v. Mobile & Ohio R. Co., 109 Ala. 245; 19 So. Rep. 784.

[46] Georgia R. & B. Co. v. Nelms, 83 Ga. 70; 9 S. E. Rep. 1049; Louisville & Nashville R. Co. v. Allen, 78 Ala. 494; O'Donnell v. Baum, 38 Mo. App. 245; Reitman v. Stolte, 120 Ind. 314; 22 N. E. Rep. 304; Malone v. Hathaway, 64 N. Y. 5; 21 Am. Rep. 573; Georgia, &c., R. Co. v. Kenney, 58 Ga. 485; Ladd v. New Bedford, &c., R. Co., 119 Mass. 412; 20 Am. Rep. 331; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. Rep. 598; Riley v. Steamship Co., 29 La. Ann. 791; 29 Am. Rep. 342; Murphy v. Boston, &c., R. Co., 88 N. Y. 146; 42 Am. Rep. 240; Readhead v. Midland Ry. Co., L. R. 2 Q. B. 412.

[47] McDonald v. Chicago, &c., Ry. Co., 41 Minn. 439; 43 N. W. Rep.

the greater in proportion as the employee is inexperienced and in need of the caution, and greater as to minor employees than to adults.[48] It is no excuse for the master's neglect that the servant did not solicit information.[49] Nor is the master's duty to give notice confined to cases where the servant is a man of manifest imbecility.[50] But it is held that wherever the employee's means of information are equal to or greater than those of his employer, the employer will be excused from giving the warning, and will not be liable in case of injury from a defect of that sort.[51] But this is, perhaps, but little more than to say that the servant, as well as the master, is bound to ordinary care. For patent dangers or defects the master, as a rule, is not liable, and in many cases it has been held that they need not

380; Lofrano v. New York & M. V. Water Co., 8 N. Y. Supl. 717; 55 Hun, 452; Smith v. Peninsular Car Works, 60 Mich. 501; 27 N. W. Rep. 662; Parkhurst v. Johnson, 50 Mich. 70; 45 Am. Rep. 28; Swoboda v. Ward, 40 Mich. 420; Baker v. Allegheny R. Co., 95 Penn. St. 211; 40 Am. Rep. 634; Smith v. Oxford Iron Co., 42 N. J. Law, 467; 36 Am. Rep. 535; Coombs v. New Bedford, &c., Co., 102 Mass. 585; 3 Am. Rep. 506; Spelman v. Fisher Iron Co., 56 Barb. 151; Paulmier v. Erie Ry. Co., 34 N. J. Law, 151; Sullivan v. India Manfg. Co., 113 Mass. 396; International &c., R. Co. v. Doyle, 49 Tex. 190; Herdler v. Buck's Stove & Range Co., 136 Mo. 3; 37 S. W. Rep. 115.

[48] An inexperienced servant employed to run an elevator is entitled to be instructed, and the master is liable for injuries arising from the incompetency or negligence of the instructor. Brennan v. Gordon, 118 N. Y. 489; 23 N. E. Rep. 810; Parkhurst v. Johnson, 50 Mich. 70; 45 Am. Rep. 28; Coombs v. New Bedford, &c., Co., 102 Mass. 585; O'Connor v. Adams, 120 Mass. 427; Wood on Master and Servant, § 349; Sullivan v. India Manfg. Co., 113 Mass. 396; Grizzle v. Frost, 3 Fost. & Fin. 622; Fort v. Pacific, &c., R. Co., 17 Wall. 554; 2 Dill. 259.

[49] Missouri Pac. Ry. Co. v. Watts, 64 Tex. 568.

[50] Atkins v. Merrick Thread Co., 142 Mass. 431.

[51] This is usually the case in the railroad employees. Georgia, &c., R. Co. v. Kenney, 58 Ga. 485; Mad River R. Co. v. Barber, 5 Ohio St. 541. A workman was ordered by his master's foreman to go up a ladder which was in an obviously dangerous position. Instead of moving the ladder the workman attempted to ascend it where it stood, and sustained injuries. It was held, that he had no cause of action against the master. Russell v. Tillotson, 140 Mass. 201; Thorn v. N. Y. Ice Co., 46 Hun, 497; Gilbert v. Guild, 144 Mass. 601; 12 N. E. Rep. 368; The Truro, 31 Fed. Rep. 158. Where the danger of an employment is obvious to any one of ordinary intelligence, the employer is under no obligation to warn an employee. Johnson v. Ashland Water Co., 77 Wis. 51.

be pointed out, even to minor employees, if the latter be capable of discerning them.[52]

§ 360. The servant's assumption of risk.— Illustrations.— The servant assumes the ordinary risks incident to his employment, and also all dangers which are obvious and apparent; and so, if he voluntarily enters into or continues in the service, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risks, and to waive any claim for damages against the master in case of personal injury.[53] And the true test is, not whether he did comprehend the danger, but whether he ought to have comprehended it; and he is chargeable with knowledge of such dangers as he might have known and comprehended by the exercise of ordinary care.[54] And though the employment be a hazardous one, he assumes all the risks incident thereto.[55] But the doctrine of a voluntary as-

[52] Fones v. Philips, 39 Ark. 17; 43 Am. Rep. 264, a decision not to be commended. But in two Tennessee cases, a railway company is held liable to employees for patent defects in tools furnished them, the tools being in each case a maul or hammer, and the defect in one case being of such a character that the servant might have seen it if he had looked. Guthrie v. Louisville, &c., R. Co., 11 Lea, 372; 47 Am. Rep. 286, and in the other, of such an obvious nature that the servant used it only under protest. East Tennessee, &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319. See § 362, *infra*.

[53] Crown v. Orr, 140 N. Y. 450; 35 N. E. Rep. 648; Knisley v. Pratt, 148 N. Y. 372; 42 N. E. Rep. 986; Western Union Telegraph Co. v. McMullen, 58 N. J. L. 155; 33 Atl. Rep. 385; Wood v. Heighes, 83 Md. 257; 34 Atl. Rep. 872; C., B. & Q. R. Co. v. McGinnis, 49 Neb. 649; 68 N. W. Rep. 1057; Koehler v. Syracuse Specialty Co., 12 App. Div. (N. Y.) 50, 53; Regan v. Palo (N. J.), 41 Atl. Rep. 364. Assumption of the risks and perils of an employment is regarded as a species of contributory negligence. Hazen v. West Superior Lumber Co., 91 Wis. 208, 213; 64 N. W. Rep. 857; Peterson v. Sherry Lumber Co., 90 Wis. 83, 93; 62 N. W. Rep. 948; Darcey v. Farmers' Lumber Co., 87 Wis. 245, 249; 58 N. W. Rep. 382.

[54] Klatt v. U. C. Foster Lumber Co., 92 Wis. 622, 626-627; 66 N. W. Rep. 791; Luebke v. Berlin Machine Works, 88 Wis. 442; 60 N. W. Rep. 711. But see Warren v. Boston & Maine R. Co., 163 Mass. 484, 488; 40 N. E. Rep. 895.

[55] Berrigan v. N. Y., L. E. & W. R. Co., 131 N. Y. 582, 585; Nuss v. Rofsnyder, 178 Penn. St. 397; 35 Am. Rep. 958. But while one who engages in a hazardous employment assumes all the risks incident thereto, he is not bound to anticipate such dangers connected therewith, as arise solely from the negligence of others, not in law his fellow-servants; and therefore

sumption of risk is of practical application only when the risk is not assumed under such constraint of any kind as deprives the act of its voluntary character.[56] While, however, the servant, on his part, undertakes the risks of the employment as far as they spring from defects incident to the service, he does not take the risks of the negligence of the master himself.[57] But where a defect or danger is open and obvious, although it exists in consequence of the negligence or default of the employer, still knowledge of it on the part of an employee of mature years will be presumed, and, although the employer may be said to be guilty of negligence in keeping his premises or machinery in a dangerous condition, the employee is also guilty of negligence in accepting the service, or continuing in it, and this becomes equivalent to contributory negligence on his part, and prevents any recovery.[58] The reports contain a multitude of cases

his failure to foresee and guard against dangers of the latter class, does not raise against him, nor his personal representatives, a presumption of contributory negligence. C., C. & St. L. Ry. Co. v. Kernochan, 55 Ohio St. 306; 45 N. E. Rep. 531. And if after he has entered the service any change is made in the mode of doing the business so as to increase its dangers, he cannot be heard to complain that it might have been made safer, or that it was conducted in a hazardous manner. Caron v. Boston & Albany R. Co., 164 Mass. 523; 42 N. E. Rep. 112.

[56] Burgess v. Davis Sulphur Ore Co., 165 Mass. 71, 73; 42 N. E. Rep. 501; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155; 29 N. E. Rep. 464; Mahoney v. Dore, 155 Mass. 513; 30 N. E. Rep. 366; Hickey v. Waltham, 159 Mass. 460; 34 N. E. Rep. 681. Nor does it apply to risks which are not contemplated by the servant in entering upon the service. Burke v. Anderson, 34 U. S. App. 132; 69 Fed. Rep. 814. And to hold an employee guilty of contributory negligence when injured in the course of his employment, it must appear that he was sufficiently acquainted with the work assigned to him to know the dangers incident to it. Pillings v. Narragansett Machine Co., 19 R. I. 666; 36 Am. Rep. 130. The driver of a hose cart connected with the fire department, when going to a fire, does not assume the risks of the insecurity of streets, resulting from the culpable negligence of the city. Farley v. Mayor, 152 N. Y. 222; 46 N. E. Rep. 506.

[57] Union Pacific Ry. Co. v. O'Brien, 161 U. S. 451.

[58] Hazen v. West Superior Lumber Co., 91 Wis. 208, 213; 64 N. W. Rep. 857. A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, or such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he

wherein it has been determined what risks are and what are not assumed by the servant upon entering the master's service. The following are a few illustrations of the risks deemed to have been assumed. An employee assumes the risk of injury by elks and deer kept by his employer, when he voluntarily engages to work inside of the inclosure in which they are kept.[59] One who works on a raised platform without a railing takes the risk of falling off;[60] and a laborer employed to wheel earth along the

voluntarily enters into the employment, or continues in it without complaint or objection as to hazards. Missouri P. R. Co. v. Baxter, 42 Neb. 793; 60 N. W. Rep. 1044; Malm v. Thelin, 47 Neb. 686; 66 N. W. Rep. 650. But the doctrine of an assumption of risk by the employee does not detract from or lessen in the least the duty of the employer toward the former to supply and maintain suitable and safe instrumentalities, and a reasonable and safe place, for the performance by the employee of the work required of him, since it embraces, as an inseparable prerequisite, complete knowledge and understanding on the part of the employee of the risk of danger, and an intelligent and full consent, express or implied, to abide by the consequences. Southern Pacific Co. v. Johnson's Adm'x, 44 U. S. App. 1, 25; 69 Fed. Rep. 559. The master is bound to furnish his servant reasonable and safe appliances with which to perform his work, and the servant does not assume the risk of danger from the use of the unsafe machinery, unless the defects are so glaring that a reasonably prudent person would not attempt to use it. Bender v. St. Louis & S. F. Ry. Co., 137 Mo. 240; 37 S. W. Rep. 132. An employee may, by entering upon the employment with a full knowledge of all the facts, waive, under the common-law doctrine of obvious risks, the performance by the employer of the duty to furnish the special protection prescribed by the Factory Act. Knisley v. Pratt, 148 N. Y. 372; 42 N. E. Rep. 986; White v. Wittemann Lithographic Co., 131 N. Y. 631; 30 N. E. Rep. 236; Higgins' Carpet Co. v. O'Keefe, 51 U. S. App. 74; 79 Fed. Rep. 900; Hortin v. Vulcan Iron Works, 13 App. Div. (N. Y.) 508.

[59] Bormann v. City of Milwaukee, 93 Wis. 522; 67 N. W. Rep. 924.

[60] Moulton v. Gage, 138 Mass. 300. If a master furnishes his servants suitable materials for the construction of a scaffold or platform on which to do their work, and the servants voluntarily construct it according to their own judgment, the master is not liable to the servants for the manner in which they used the material. Kimmer v. Weber, 151 N. Y. 417; 55 N. E. Rep. 860. The risk from an uncovered saw projecting over its frame and partly across a narrow passage-way, over which a servant in a mill is obliged to go in the performance of his duties, being apparent, is assumed by the servant in accepting and remaining in the service. Stevenson v. Duncan, 73 Wis. 404; 41 N. W. Rep. 337.

edge of a bank when the posts are coming out of the ground, is presumed to know the danger and to assume the risk of the bank caving in.[61] Where a servant who was killed by falling through a hatchway, knew when he entered the employment that there were no guards around it, he took all risks incident to the employment.[62] So, also, a workman employed by a railroad company to stand in a dangerous place to signal trains assumes the obvious risks of the position,[63] and a railroad track walker, who knew that coal was customarily over-loaded on tenders, could not recover for injuries from the fall of a piece of it;[64] and a section hand cannot complain of the increased risk in being ordered out to work on a foggy day,[65] nor, while pushing a hand-

[61] Olson v. McMullen, 34 Minn. 94; Pederson v. City of Rushford, 41 Minn. 289. An employer is not liable for the death of a servant caused by the falling in of a bank of earth upon him, he having been for a long time engaged in removing the same by digging under it. Rasmussen v. Chicago, &c., Ry. Co., 65 Iowa, 236; 42 N. W. Rep. 1063.

[62] Gleason v. Excelsior Manfg. Co. (Mo.), 7 S. W. Rep. 188. A machinist employed by a corporation in its factory, not to use machinery, but to keep it in good order, and having knowledge that some of it is imperfect, and that employees cannot be relied upon to prevent it from becoming dangerous for lack of oil, takes the risk of discovering the condition of the machinery at the time he attempts to repair it, such risk being incident to his vocation. Dartmouth Spinning Co. v. Achard, 84 Ga. 14; 10 S. E. Rep. 449.

[63] Kennedy v. Manhattan Ry. Co., 33 Hun, 457. A fireman who knows that for want of a turntable the engine is run backward three times every day, assumes the risk incident thereto. Kuhns v. Wisconsin, &c., Ry. Co., 70 Iowa, 561. Where an inexperienced man enters on the duties of a conductor of a railroad train, he cannot recover for damages resulting from his inexperience, though the company knew of his want of skill when it employed him. Alexander v. Louisville, &c., R. Co., 83 Ky. 589. A fireman was killed, while cleaning the ash-pan of his locomotive, by the running of a work-train, contrary to the rules of the road, into the fireman's trains. Held, that this was one of the ordinary hazards of his employment for which his administrator could not recover. Wabash, &c., Ry. Co. v. Conkling, 15 Ill. App. 157. See, also, Austin v. Boston & Maine R. Co., 164 Mass. 282; 41 N. E. Rep. 288.

[64] Schultz v. Chicago, &c., Ry. Co., 67 Wis. 616; 58 Am. Rep. 881. The throwing of a barrel from a fourth-story window so as to strike and kill a fellow-servant, is not such an unforeseen and extraordinary act of carelessness as not to come within the risks of employment assumed by the deceased. Brodeur v. Valley Falls Co., 16 R. I. 448; 17 Atl. Rep. 54.

[65] International, &c., R. Co. v. Hester, 64 Tex. 401. Where

car, of falling into a properly constructed water-way,[66] nor the risk from special trains not running on schedule time.[67] One, however, whose employment in a railroad yard requires him to

plaintiff has been railroading for thirty years, sixteen with defendant, and eight on the run where he was injured, defendant is entitled to an instruction that if plaintiff knew of the risks he ran, as the business was conducted, he could not recover even though the business might have been conducted in a safer way, whereby the injury might have been prevented. Hewitt v. Flint, &c., R. Co., 67 Mich. 61; 34 N. W. Rep. 659.

[66] A section-hand, while pushing a hand-car under orders from the foreman, fell into a water-way, of which he was not specially warned, and which was properly constructed. Held, in his action against the railroad company, that a non-suit was properly ordered, the risk being incident to the employment. Couch v. Charlotte, &c., R. Co., 22 S. C. 557. Where a switchman had for a long time been employed in a railroad yard, and knew the shape and purpose of a "frog," and knew that it was unblocked, it was error to submit to the jury, as a question of fact, whether he was charged with notice of the difficulty of removing his foot from the converging rails, and of the danger resulting from having his foot caught therein. Appel v. Buffalo, &c., R. Co., 111 N. Y. 550; 19 N. E. Rep. 93. A competent switchman, employed for two years in switching, cannot recover against the railroad for failure to provide certain safeguards to prevent the injury complained of, since the condition of the railway tracks and the danger must have been known to the employee, and he, therefore, assumed the risk, and waived any negligence that might otherwise be imputable to the railway company. As between the railway company and himself, the railway company cannot be charged with culpable negligence; and all these questions are questions of law for the court, and not questions of fact for the jury. Rush v. Missouri Pac. Ry. Co., 36 Kan. 129; 12 Pac. Rep. 582.

[67] Larson v. St. Paul, &c., Ry. Co., 43 Minn. 423; 45 N. W. Rep. 722; Olson v. St. Paul, &c., Ry. Co., 38 Minn. 117; 35 N. W. Rep. 866. Where a man applies for the post of fireman on a short line without a turn-table, and on which he is well aware that it is the custom to run the engine backward, the fact that so running the engine was dangerous cannot be relied upon in an action for the death of such fireman, caused by the engine leaving the rails when running backward. Kuhns v. Wisconsin, &c., Ry. Co., 70 Iowa, 561; 31 N. W. Rep. 868. Where an engineer has knowledge that the flues of his locomotive leak, the result being that it is difficult to maintain sufficient steam to enable him to control and check the speed, he assumes the risk of an accident resulting from an inability to check the speed as soon as could have been done with a better supply of steam. Monaghan v. New York, &c., R. Co., 45 Hun, 113.

move damaged cars, takes the risk of mistaking damaged cars for sound ones.[68] So, also, a fireman assumes the risk incident to the use of snow-ploughs,[69] and where an unfenced railroad runs through pasture land cattle must be expected on the track at any point, and it is not the duty of the company to warn employees of the danger of encountering cattle.[70]

§ 361. Risks not assumed.— Illustrations.— The rule that a servant engaged in a dangerous employment assumes the risk of injury which exists while the business is carried on in the

[68] Fraker v. St. Paul, &c., Ry. Co., 32 Minn. 54. And the risk of the negligence of his fellow-servants in handling such cars. Kelly v. Chicago, &c., Ry. Co., 35 Minn. 490. The evidence being that plaintiff, an engineer of defendant, was leaving the shops to go home on a dark night, walking through the yard on the tracks, as was the custom of the employees, when he was struck by a yard engine, going backwards, with no light on the rear end, and that he was well acquainted with the tracks, and the customs of the yard, it is error to refuse an instruction that in walking on the track he assumed the risk of being injured by the ordinary operation of trains on defendant's road. Williams v. Delaware, &c., R. Co., 2 N. Y. Supl. 435.

[69] Brown v. Chicago, &c., Ry. Co., 69 Iowa, 161; Drake v. Union Pac. Ry. Co. (Idaho), 21 Pac. Rep. 560; Bryant v. Burlington, &c., Ry. Co., 66 Iowa, 305; 55 Am. Rep. 275. A railroad hand who rides on a hand-car, knowing that a train may come along at any time, assumes the risk. McGrath v. New York, &c., R. Co., 14 R. I. 357. So in the case of a brakeman injured by the sudden jerk of the train while a "flying switch" was being made. Youll v. Sioux City, &c., Ry. Co., 66 Iowa, 346. A brakeman who, in attempting to let off a defective brake, is struck by a cattle-guard, which, like all the guards along the road, is dangerously near the track, and who knows the defective character of the brake, and that many of the guards were so near as to be dangerous, though he did not know as to the one in question, cannot recover, as he will be held to take the risk incident to the employment. Missouri Pac. Ry. Co. v. Somers, 71 Tex. 700; 9 S. W. Rep. 741. See, also, Kelly v. Baltimore, &c., R. Co. (Penn.), 11 Atl. Rep. 659.

[70] Patton v. Central Iowa Ry. Co. (Iowa), 35 N. W. Rep. 149; C., St. P. & K. C. Ry. Co. v. Chamber's Admx., 32 U. S. App. 253; 68 Fed. Rep. 148. A declaration alleging that it was plaintiff's duty at a railroad station to throw the mail-bags into the train while in motion, "a service known to defendants to be dangerous," and while so engaged without fault on his part he was thrown under the train and injured. Held, to show no more than the ordinary and apparent risks which a servant in such case assumes. Coolbroth v. Maine Central R. Co., 77 Me. 165.

usual and ordinary way does not apply when recovery is sought from a third person, whose negligence caused the injury, although exposure to such injury is one of the risks of the employment.[71] Thus, a carpenter working on the roof of a building in process of construction is not bound to inspect the condition of the walls, and does not take the risk of the building falling in consequence of their insufficiency;[72] and railroad employees have a right to assume that the company will use all reasonable care in keeping its road and appliances in good order, and if any injury occurs to them other than by their own negligence, it is not a risk incident to the employment.[73] An engineer of a railroad, which is in general use, although he have knowledge that the rails of the track are old, light and well worn, is not bound to pursue the inquiry and to determine for himself and at his own peril whether the road is or is not fit for use;[74] and the fact that a brakeman, who has been injured in an accident caused by a bull on the track, knew that the engine was without a cow-catcher; that the fences along the track were defective, and that cattle frequently intruded on the track, was not held to warrant a nonsuit in an action by him for the injuries, as the question is for the jury whether his negligence had any share in causing the injury.[75] A servant does not necessarily assume the risks incident to the use of unsafe machinery

[71] Penn. Co. v. Backes, 133 Ill. 255; 24 N. E. Rep. 563.

[72] Giles v. Diamond State Iron Co. (Del.), 8 Atl. Rep. 368.

[73] Knapp v. Sioux City, &c., Ry. Co., 71 Iowa, 41; 32 N. W. Rep. 18. The fact that a brakeman has been on a local run for some three weeks, and had passed over the road twice each day, is not sufficient to charge him with notice of the unsafe and defective condition of the track within the switching limits at one of the way stations. Illinois Central R. Co. v. Sanders, 166 Ill. 270; 46 N. E. Rep. 799. See, also, Crandall v. N. Y., N. H. & H. R. Co., 19 R. I. 594; 35 Atl. Rep. 307.

[74] Devlin v. Wabash, &c., Ry. Co., 87 Mo. 545. Where an employee is injured by reason of a latent defect in the handle of a hand-car which he was using, the mere fact that he was in view of those who placed the handle in the car, he being engaged at the time in other business, does not relieve his employer from liability, on the ground that, as the employee remained and performed the same services on the hand-car as before, without complaint, he must be deemed to have undertaken the risk of the danger which might result from the condition of the handle. Burton v. Missouri Pac. Ry. Co., 32 Mo. App. 455.

[75] Magee v. North. Pac. R. Co., 78 Cal. 430. In entering defendant's employment as locomotive engineer, the plaintiff assumed the risk of having to act in haste

furnished by his master, because he knows its character and condition; it is also necessary that he should know, or by the exercise of common observation might have known, the risks attending its use.[76] And although it be negligence on the part of the master to leave dangerous machinery uncovered, yet the servant is not necessarily guilty of contributory negligence because he works in the vicinity of it, knowing its condition.[77]

§ 362. The master's duty toward minor servants.— Although, as we have seen,[78] minor servants are held to assume

in sudden emergencies; but he did not assume the risk, from the negligence of the company in failing to keep its road-bed in good order, which required the prompt action, and which was the proximate cause of plaintiff's injury. Knapp v. Sioux City, &c., Ry. Co., 71 Iowa, 41; 32 N. W. Rep. 18. Risks of employment do not include risks arising from neglect to use safety blocks in frogs, on the employer's railroad track; that being a reasonable means to prevent injury to employees making couplings. Seley v. Southern Pac. Ry. Co. (Utah), 23 Pac. Rep. 751.

[76] Russell v. Minneapolis, &c., Ry. Co., 32 Minn. 230. Plaintiff was employed by defendant to keep in motion a heavy iron pipe suspended above some open vats containing hot liquors. He performed his work by pushing against the pipe with a pole, and was stationed upon some pipes laid upon the top of the vats, and along their sides. Held, that it could not be said, as a matter of law, that plaintiff assumed the risk of falling into the vats. Heavey v. Hudson River Water-Power & Paper Co., 10 N. Y. Supl. 585. Where defects in the internal construction of an emery-wheel are not apparent or visible, and are unknown to one who attempts to operate it, he does not assume the risks and perils arising from such defects. Murtaugh v. New York, &c., R. Co., 3 N. Y. Supl. 483; 49 Hun, 456. In an action for damages caused by the death of an employee through exposure, in defendant's service, to a danger not commonly connected with the employment, knowledge of such danger cannot be presumed in proof of contributory negligence, but must be brought home to deceased. Smith v. Peninsular Car Works, 60 Mich. 501; 27 N. W. Rep. 662. A farm hand was kicked by a vicious horse, which he had attended for months without complaint. He knew the horse was vicious, but it did not appear that the master knew it. Held, that there was no right of action against the master on account of the injury. Shaw v. Deal, 7 Pa. Co. Ct. Rep. 378.

[77] Wuotilla v. Duluth Lumber Co., 37 Minn. 153; 33 N. W. Rep. 551. Knowledge by an employee set to work by the side of a pile of ore that the light is insufficient, and his continuance at the work, do not constitute an assumption of the risk of the unsafe condition of the pile. Illinois Steel Co. v. Schymanowski, 162 Ill. 447; 44 N. E. Rep. 876.

[78] § 357, *supra*.

the full measure of risk of injury by the negligence of fellow-servants, some indulgence is conceded to their tender years in respect of the other dangers of the employment. It is generally held to be incumbent upon the employer of an infant to explain to him fully the hazards and dangers connected with the business, and to instruct him how to avoid them.[79] And if, in employing a person of immature years and judgment to work upon dangerous machinery, the employee is too young to realize, after full instruction, the danger of the work, and the necessity of exercising care, the employer puts or keeps him at such work at his own risk.[80] But where the servant, despite his youth, is capable of appreciating obvious dangers, or they are pointed out

[79] Smith v. Irwin, 51 N. J. Law, 507; 18 Atl. Rep. 852; Thall v. Carnie, 5 N. Y. Supl. 244; Louisville, &c., Ry. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; Whitelaw v. Memphis, &c., R. Co., 16 Lea, 391; 1 S. W. Rep. 37; Louisville, &c., Ry. Co. v. Frawley, 110 Ind. 18; Hayes v. Bush & Denslow Manuf. Co., 41 Hun, 407; Carey v. Arlington Mills, 148 Mass. 338; 19 N. E. Rep. 525; Cleveland Rolling-Mill Co. v. Corrigan, 46 Ohio St. 283; 20 N. E. Rep. 466; Robertson v. Cornelson, 34 Fed. Rep. 716; Gamble v. Hine, 2 N. Y. Supl. 778; Lynn v. Illinois Central R. Co., 63 Miss. 157; Norton v. Volzke, 158 Ill. 402, 408; 41 N. E. Rep. 1085. This duty toward minor employees is personal to the master, and a neglect of it renders him liable though the negligence of a fellow-servant is the immediate cause of the injury. Jones v. Florence Mining Co., 60 Wis. 268; 57 Am. Rep. 269. See, also, § 304, *supra*.

[80] In employing a person of immature years and judgment to work upon dangerous machinery, it is the duty of the master to see that such person fully understands its dangerous character, and appreciates such dangers, and the consequences of a want of care; and if the employee is too young to realize, after full instruction, the danger of the work, and the necessity of exercising care, the employer puts or keeps him at such work at his own risk. Hickey v. Taafe, 99 N. Y. 204; Sharp v. Pathhead Spinning Co., 12 Ct. of Ses. Cas. 574. A boy of ten years of age, who is employed at a coal mine, and directed to couple coal-cars, a hazardous duty, does not assume the risks of the employment, as they cannot be apparent to his immature judgment, but the master impliedly agrees to require no work of the boy beyond his capacity, and the latter can recover for injuries received in the attempt to obey his instructions. Brazil Block Coal Co. v. Gaffney, 119 Ind. 455; 21 N. E. Rep. 1102. A girl of eleven, under an agreement between her father and A., worked for A. at his house. He permitted her to go across a prairie so insufficiently clothed that she suffered severely from the cold. She recovered damages. Nelson v. Johnson, 18 Neb. 180; 53 Am. Rep. 806.

to him so that he understands them, the master's duty is fulfilled,[81] and all these are questions of fact for the jury.[82]

[81] Smith v. Irwin, 51 N. J. Law, 507; 18 Atl. Rep. 852; Goins v. Chicago, &c., R. Co., 37 Mo. App. 676; Gordon v. Reynolds' Card Manuf'g Co., 47 Hun, 278; Oszkoscil v. Eagle Pencil Co., 6 N. Y. Supl. 501; Probert v. Phipps, 149 Mass. 258; 21 N. E. Rep. 370; Crowley v. Pacific Mills, 148 Mass. 228; 19 N. E. Rep. 344; O'Keefe v. Thorn (Penn.), 24 W. N. C. 379; 16 Atl. Rep. 737; Palmer v. Harrison, 57 Mich. 182; Buckley v. Gutta-Percha, &c., Manuf'g Co., 113 N. Y. 540; 21 N. E. Rep. 717; Sanborn v. Atchison, &c., R. Co., 35 Kan. 292; Hickey v. Taafe, 105 N. Y. 26; Rock v. Indian Orchard Mills, 142 Mass. 522. A person, under age, who is employed in operating a dangerous machine, knowing it to be so, and being old enough to appreciate its dangers, assumes those risks which are incident to its operation, to the same extent as a person of mature years, and no action will lie against his employer for injuries received by him in such a case. Dunn v. McNamee, 59 N. J. Law, 498; 37 Atl. Rep. 61; Ogley v. Miles, 139 N. Y. 458; 34 N. E. Rep. 1059. The true test as to a minor servant's assumption of the ordinary risks of the employment, and his contributory negligence, is not whether he knew and comprehended the danger, but whether he ought to have known and comprehended it. Klatt v. The N. C. Foster Lumber Co., 92 Wis. 622; 66 N. W. Rep. 791. "The conduct of the child, however, is and should be viewed and measured by a different rule. [The rule which applies to adults.] Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but, in addition to this and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire; but the ability to apply his knowledge, or to reason upon his facts, comes to him later in life. A child might be capable of understanding the construction, the use, and the danger of fire-arms; yet one would not for that reason feel justified, after due explanation, in giving them to him as playthings. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. When sent out to labor, they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent; they must do as they are told. It would be barbarous to hold them to the same accountability as is held the adult employee, who is an independent, free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his ex-

§ 363. **Overhead railway bridges and depot roofs.**— Among "seen dangers," or patent defects, some courts have classed such railway bridges as have covers or overhead frame work, so constructed that a man standing upon the top of a freight car cannot pass under them without being struck. There are a number of cases which, in substance, have held that it is neither negligent nor criminal for a railway company to build bridges in this way; that such structures are among the ordinary risks of the employment of freight train-men; that, when they are informed of the existence and situation of such bridges, they must be held to assume the risk of being hit by them, and that, therefore, when they are hit and killed, or injured by them, it is the result of their own negligence, for which the company is not liable. The duty of freight train-men requires them, or some of them, to be upon the top of the cars much of the time when the train is in motion; they must stand erect and go rapidly from one car to another, in the night as well as in the day-time. If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps. Such bridges are, notwithstanding all that can be urged against them, lawful structures in Alabama, Kentucky, Kansas, Minnesota, Vermont, Indiana, Georgia, South Carolina, New Jersey, New York, Maryland, Missouri, Pennsylvania, and Virginia.[83] But a brakeman who places some re-

perience and his ability." Foley v. California Horseshoe Co., 115 Cal. 184, 191-192; 47 Pac. Rep. 42. See, also, Turner v. Norfolk & W. R. Co., 40 W. Va. 675, 692; 22 S. E. Rep. 83.

[82] Ogley v. Miles, 8 N. Y. Supl. 270; Steiler v. Hart, 65 Mich. 644; 32 N. W. Rep. 875; Ciriack v. Merchants' Woolen Co., 151 Mass. 152; 23 N. E. Rep. 829; Rummel v. Dillworth, Porter & Co., 131 Penn. St. 509; 19 Atl. Rep. 345. See, also, Neilon v. Marinette Paper Co., 75 Wis. 579; 44 N. W. Rep. 772; Nadau v. White River Lumber Co., 76 Wis. 120; 43 N. W. Rep. 1135; Schwander v. Birge, 33 Hun, 186.

[83] Louisville, &c., R. Co. v. Hall, 87 Ala. 708; 6 So. Rep. 277; Jones v. Louisville, &c., R. Co., 82 Ky. 610; St. Louis, &c., R. Co. v. Irwin, 37 Kan. 701; 16 Pac. Rep. 146; Robel v. Chicago, &c., Ry. Co., 35 Minn. 84. By continuing in the service of the company with knowledge of the dangerous condition of a bridge, the employee assumes the risk. Carbine's

liance upon tell-tales required by a statute to be maintained near bridges is not guilty of contributory negligence.[84]

Adm'r v. Bennington, &c., R. Co., 61 Vt. 348; 17 Atl. Rep. 491. The company is liable if it fails to warn a brakeman of the danger of bridges so low as to require him to stoop to pass under them safely. Baltimore, &c., R. Co. v. Rowan, 104 Ind. 88; Stirk v. Central R. B. Co., 79 Ga. 495; 5 S. E. Rep. 105; Altee v. South Carolina Ry. Co., 21 S. C. 550; 53 Am. Rep. 699, note; Baylor v. Delaware, &c., R. Co., 40 N. J. Law, 23; 29 Am. Rep. 208; Owen v. New York, &c., R. Co., 1 Lans. 108. See, also, Gibson v. Erie Ry. Co., 63 N. Y. 449, where plaintiff's intestate, a conductor of a freight train, was struck and killed by the projecting roof of a depot building. The same rule was applied as stated in the text, the risk being held apparent to ordinary observation and part of the contract of employment. 20 Am. Rep. 552; Williams v. Delaware, &c., R. Co., 116 N. Y. 628; 22 N. E. Rep. 1117; Ryan v. Long Island R. Co., 51 Hun, 607; 4 N. Y. Supl. 381. But where a brakeman went to his place on the train in response to a signal for brakes, and was struck by a bridge which he could not see on account of smoke from the engine, he was held not guilty of contributory negligence. Dukes v. Eastern Distilling Co., 4 N. Y. Supl. 562; 51 Hun, 605; Baltimore, &c., R. Co. v. Strickler, 51 Md. 47; 34 Am. Rep. 291; Devitt v. Pacific, &c., R. Co., 50 Mo. 302; Rains v. St. Louis, &c., R. Co., 71 Mo. 164; 36 Am. Rep. 459; Pittsburgh, &c., R. Co. v. Sentmeyer, 92 Penn. St. 276; 37 Am. Rep. 684; Brossman v. Lehigh Valley R. Co., 113 Penn. St. 490; 57 Am. Rep. 479; Sheeler v. Chesapeake, &c., R. Co., 81 Va. 188; Clark's Adm'r v. Richmond, &c., R. Co., 78 Va. 709; 49 Am. Rep. 394. See, also, Lovejoy v. Boston, &c., R. Co., 125 Mass. 79; 28 Am. Rep. 206; Wells v. Burlington, &c., R. Co., 56 Iowa, 520; Hall v. Union Pac. R. Co., 5 McCrary, 465; Chicago, &c., R. Co. v. Russell, 91 Ill. 298; 33 Am. Rep. 54; Sewell v. City of Cohoes, 75 N. Y. 45; 31 Am. Rep. 418; Warden v. Old Colony R. Co., 137 Mass. 204.

[84] Wallace v. Central Vt. R. Co., 138 N. Y. 302, 306; 33 N. E. Rep. 1069. In this case the court said: "A brakeman on the top of a moving train cannot always be expected to know when he is approaching a low bridge. His duties may require his attention to the rear of the train, away from the place of danger, and he cannot be expected to bear constantly in mind as to where the train is, or where a bridge is. He knows that if the statutory requirement is obeyed by the railroad company, and the tell-tales are kept in order, they will always warn him of danger, and he cannot, therefore, be charged with carelessness if he places some reliance upon them. Suppose some statute or rule of the company requires the engineer always to blow a whistle for the express purpose of warning the brakeman of the approach to a low bridge, could he not place some reliance upon that circumstance, and omit that degree of care which he would otherwise take for his own safety, without the imputation of

§ 364. Injuries to train-men in coupling cars.— It is not, as has already appeared,[85] negligence *in se* to engage in a dangerous occupation, or to do dangerous work. It is accordingly held not negligence, as a matter of law, for a brakeman to make dangerous couplings of freight cars;[86] nor even to go between the cars while the train is in motion to couple or uncouple them.[87] While it is the duty of train-men to observe the condition of the cars or other appliances with which they are required to work;[88] and although it is negligent in them voluntarily and unnecessarily to use defective or dangerous tools or machinery;[89] still, in rushing in between moving cars to make a coupling, it is not negligent in a brakeman to assume that the bumpers are in proper condition, and to act upon that assumption.[90] He must, however, obey all the rules prescribed by the company, with respect to couplings, looking to his safety and convenience; a failure in any respect to do this is such negligence upon his part, as will wholly prevent a recovery in the event of an injury of which such disobedience upon his part may be regarded a cause; as, for an example, omitting to use a stick in making the coupling, as the rule required, if the requirement of the rule had been properly brought to his knowl-

culpable negligence? There is no principle or authority which requires this question to be answered in the negative."

85 §§ 36, 37, *supra.*

86 Baird v. Chicago, &c., R. Co., 61 Iowa, 359; Beems v. Chicago, &c., R. Co., 58 Iowa, 150; Pennsylvania Co. v. Long, 94 Ind. 250. *Cf.* Farley v. Chicago, &c., R. Co., 56 Iowa, 337; Missouri Pac. Ry. Co. v. Holley, 30 Kan. 465.

87 Snow v. Housatonic R. Co., 8 Allen, 441; Beems v. Chicago, &c., R. Co., 58 Iowa, 150. But see, *contra*, Williams v. Iowa, &c., R. Co., 43 Iowa, 396; Marsh v. South Carolina R. Co., 56 Ga. 274.

88 Scott v. Oregon Ry. & Nav. Co., 14 Or. 211; Lake Shore, &c., R. Co. v. McCormick, 74 Ind. 440. Where a defect in the machinery used for coupling was unknown to the brakeman, and was not obvious, and could have been discovered only by stooping down and looking under the car, he was not guilty of contributory negligence in going in between the cars to uncouple them. Louisville, &c., Ry. Co. v. Buck, 116 Ind. 566; 19 N. E. Rep. 453.

89 Umback v. Lake Shore, &c., R. Co., 83 Ind. 191; Perigo v. Chicago, &c., R. Co., 55 Iowa, 326; Jackson v. Kansas, &c., R. Co., 31 Kan. 761.

90 King v. Ohio, &c., R. Co., 11 Biss. 326; Wedgewood v. Chicago, &c., R. Co., 41 Wis. 478. See, also, Texas, &c., R. Co. v. McAtee, 61 Tex. 695; Haugh v. Chicago, &c., Ry. Co., 73 Iowa, 66; 35 N. W. Rep. 116; Goodrich v. New York, &c., R. Co., 116 N. Y. 398; 22 N. E. Rep. 397.

edge; [91] or uncoupling cars in motion, in violation of the company's rule;[92] or getting between the deadwoods of cars;[93] or coupling cars without waiting to know if the engineer has understood his signal to slacken the speed.[94]

§ 365. The same subject continued.— In general, any negligence on the part of a brakeman, in making couplings, if it amount to a want of ordinary care, contributing proximately to cause the injury, will prevent a recovery from the company.[95] In Georgia it is held negligent for a conductor to make couplings, it being the duty of the brakeman, unless in some emergency, it be especially necessary for the conductor to do it.[96] But when the cars are so constructed, the bumpers being of different heights, or being in any other respect so made that the slightest indiscretion on the part of the operative will prove fatal to him, it has been held that when injury results from such causes,

[91] Fay v. Minneapolis, &c., R. Co., 30 Minn. 231; Hulett v. St. Louis, &c., R. Co., 67 Mo. 239; Memphis, &c., Ry. Co. v. Askew, 90 Ala. 5; 7 So. Rep. 823. Conflicting testimony as to plaintiff's knowledge of the rule makes a proper question for the jury. Seese v. Northern Pac. R. Co., 39 Fed. Rep. 487; Louisville, &c., R. Co. v. Perry, 87 Ala. 392; 6 So. Rep. 40; Probst v. Georgia Pac. Ry. Co. (Ala.), 3 So. Rep. 764. See, also, Whalen v. Chicago Pac. Ry. Co. 75 Iowa, 563; 39 N. W. Rep. 894.

[92] Sedgwick v. Illinois Cent. R. Co., 76 Iowa, 340; 41 N. W. Rep. 35; Sedgwick v. Illinois Cent. R. Co., 73 Iowa, 158; 34 N. W. Rep. 790; Tuttle v. Detroit, &c., Ry. Co., 122 U. S. 189; Savannah, &c., Ry. Co. v. Barber, 71 Ga. 644; Henry v. Sioux City, &c., Ry. Co., 66 Iowa, 52; Goulin v. Canada Southern Bridge Co., 64 Mich. 130; 31 N. W. Rep. 44; Webb v. Richmond, &c., R. Co., 97 N. C. 387; 2 S. E. Rep. 440; Rebelsky v. Chicago, &c., R. Co., 79 Iowa, 55; 44 N. W. Rep. 536; St. Louis, &c., Ry. Co. v. Rice, 51 Ark. 467; 11 S. W. Rep. 699; Barkdoll v. Pennsylvania R. Co. (Penn.), 18 Atl. Rep. 82; Lockwood v. Chicago, &c., R. Co., 55 Wis. 50.

[93] Alabama Great Southern R. Co. v. Richie, 111 Ala. 297; 20 So. Rep. 49.

[94] Deeds v. Chicago, &c., Ry. Co., 74 Iowa, 154; 37 N. W. Rep. 124.

[95] Muldowney v. Illinois, &c., R. Co., 39 Iowa, 615; Chicago, &c., R. Co. v. Ward, 61 Ill. 130; Riley v. Connecticut, &c., R. Co., 135 Mass. 292; Toledo, &c., R. Co. v. Asbury, 84 Ill. 429; Sears v. Central, &c., R. Co., 53 Ga. 630; Cunningham v. Chicago, &c., R. Co., 5 McCrary, 465; Kresanowski v. Northern Pac. R. Co., 5 McCrary, 528; Hallikan v. Hannibal, &c., R. Co., 71 Mo. 113; Sweeney v. Boston, &c., R. Co., 128 Mass. 5.

[96] Sears v. Central, &c., R. Co., 53 Ga. 630.

the company is liable.[97] "The machinery and cars," said the Supreme Court of Illinois, "furnished for use, should not be so unskillfully constructed that the slightest indiscretion on the part of the operatives would prove fatal."[98] It is, as the weight of authority indicates, well settled that, however dangerous it may be to make these couplings, when one, after being duly advised of the danger, and warned to take care, undertakes the work, the manifest risk involved becomes a part of his contract, and if injury result, in the absence of wantonness on the part of the company, there can be no recovery.[99] The railways have,

[97] Toledo, &c., R. Co. v. Fredericks, 71 Ill. 294; Crutchfield v. Richmond, &c., R. Co., 76 N. C. 320; 78 Ill. 300. See, also, Guthrie v. Maine Cent. R. Co., 81 Me. 572; 18 Atl. Rep. 295. And it makes no difference that the cars belonged to another company. Gottlieb v. New York, &c., R. Co., 100 N. Y. 462. See, however, on this point, Scott v. Oregon Ry. & Nav. Co., 14 Or. 211; 13 Pac. Rep. 98. An inexperienced brakeman is entitled to be cautioned against such danger. Missouri Pac. Ry. Co. v. White (Tex.), 76 Tex. 102; 13 S. W. Rep. 65; Missouri Pac. Ry. Co. v. Calbreath, 66 Tex. 526. See, also, Drane v. Missouri Pac. Ry. Co., 87 Mo. 588. But if the disparity in height is evident, the brakeman takes the risk. Kelly v. Abbott, 63 Wis. 307; 53 Am. Rep. 292; Norfolk, &c., R. Co. v. Emmert, 83 Va. 640; 3 S. E. Rep. 145; St. Louis, &c., Ry. Co. v. Higgins, 44 Ark. 203. Where the increased risk or hazard of coupling cars with a different coupling apparatus than those in ordinary use by a railroad company is open to the ordinary observation of any person using reasonable care and prudence, the failure of the railroad company to instruct or warn brakemen specially in regard to the increased risk of coupling such cars, is not negligence on the part of the company; the danger being obvious and incident to the employment. Boland v. Louisville & Nashville R. Co., 106 Ala. 641; 18 So. Rep. 99. The master has the right to haul over his road cars or engines of different construction, particularly if they are in ordinarily safe condition. The risk in operation is assumed by the servant, although it is thereby enhanced, provided the risk be apparent, not requiring special skill or knowledge to detect it. In such case, the master and the servant stand on common ground, with equal means of knowledge. Pierce v. Bane, 53 U. S. App. 297, 301; 80 Fed. Rep. 988.

[98] In Ft. Wayne, &c., R. Co. v. Gildersleeve, 33 Mich. 133, Judge Cooley said, however, that even if the bumpers are of different heights, and the coupler makes no protest, he is held to assume all risks. Toledo, &c., R. Co. v. Fredericks, 71 Ill. 274; Schroeder v. Michigan Car Co., 56 Mich. 132; 32 Alb. Law Jour. 134; Indianapolis, &c., R. Co. v. Flanigan, 77 Ill. 365; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 14.

[99] Hathaway v. Michigan, &c., R. Co., 51 Mich. 253; 47 Am. Rep 569 (a case in which this branch of the general question is fully

by no means, it is believed, provided as they ought against accidents to train-men in making couplings in freight trains. The greater part of the present contrivances for connecting the cars of a freight train are rude and murderous, but as the law stands, if one chooses to run the risk, and contracts to perform such service as is required of a brakeman on a freight train, he has, in case he is hurt, no legal remedy.

§ 366. Knowledge on the part of the employer.— In determining the master's liability, inasmuch as the measure of it is ordinary care, it is plain that his knowledge or want of knowledge of that which occasioned the injury, will be a most material element in the case. If he knew, or was under a legal obligation to know, and the servant did not know, or was not bound to know, of the danger, the servant having exercised due care, then the master is, as we have already shown, liable. So it will come to pass, generally, that the master's knowledge is of the essence of his liability.[1]

§ 367. The same subject continued.— To state it broadly, without the qualifications, if the master knows of the danger, or defect, he is liable; if he does not know, he is not liable. By knowledge, in such a statement as this, is meant both what the master actually knows and what it is negligence for him not to know.[2] Said Lord Cranworth, in Patterson v. Wallace:[3] — "It is the master's duty to be careful that his servant is not

discussed); Northern, &c., R. Co. v. Husson, 101 Penn. St. 1; 47 Am. Rep. 690. See, also, Smith v. Flint, &c., R. Co., 46 Mich. 258; 41 Am. Rep. 161; Ballou v. Chicago, &c., R. Co., 54 Wis. 250; 41 Am. Rep. 31; Louisville, &c., R. Co. v. Gower, 1 Pickle, 465; 3 S. W. Rep. 824; Brice v. Louisville, &c., R. Co. (Ky.), 9 S. W. Rep. 288; Louisville, &c., R. Co. v. Gower, 85 Tenn. 465; Atchison, &c., R. Co. v. Wagner, 33 Kan. 660; Wormell v. Maine Cent. R. Co., 79 Me. 397; 10 Atl. Rep. 49; Viets v. Toledo, &c., Ry. Co., 55 Mich. 120.

[1] Nason v. West, 78 Me. 253; Chicago, &c., R. Co. v. Montgomery, 15 Ill. App. 205. Ignorance by a servant of a malady which he had, and which rendered certain labor dangerous, and knowledge of it by his master, is not sufficient to entitle the servant to recover where the master places him at such labor; it being necessary to show further that the master did know that the servant was ignorant of it. Crowley v. Appleton, 148 Mass. 98; 15 N. E. Rep. 675. See, also, the cases cited in § 346, *supra*.

[2] See §§ 36, 37, *supra*, for a discussion of the element of knowledge on the part of a plaintiff.

[3] 1 Macq. H. L. Cas. 748.

induced to work under the notion that tackle or machinery is staunch and secure, when, in fact, the master *knows*, or *ought to know*, that it is not so." This rule is everywhere sustained.[4] It being the duty of the employer to keep himself informed of the condition of his machinery, tools, premises, etc., notice of a defect will be presumed after the lapse of a sufficient time.[5] But in insisting upon the rule that the master's knowledge, or negligent ignorance, will render him liable to an employee for an injury resulting from dangerous or defective machinery, and the like instrumentalities of labor, the correlative duty on the part of the servant is not to be overlooked. In connection with the master's knowledge, there must be the servant's want of knowledge. If the servant run the risk with his eyes open, he will ordinarily have no remedy, no matter what the knowledge

[4] "Ignorance by the master of defects in the instrumentalities used by his servants in performing his work is no defense to an action by the employee who has been injured by them when, by the exercise of proper care and inspection, the master could have discovered and remedied the defects, or avoided the danger incident therefrom." Benzing v. Steinway, 101 N. Y. 547, 553; Wright v. New York, &c., R. Co., 25 N. Y. 562; Gibson v. Pacific, &c., R. Co., 46 Mo. 163; 2 Am. Rep. 497; Lewis v. St. Louis, &c., R. Co., 59 Mo. 495; 21 Am. Rep. 385; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 14; Sullivan v. Louisville Bridge Co., 9 Bush, 81; Mobile, &c., R. Co. v. Thomas, 42 Ala. 672; Colorado, &c., R. Co. v. Ogden, 3 Colo. 497; Walsh v. Peet Valve Manfg. Co., 110 Mass. 23. See, also, Johnson v. Boston Towboat Co., 135 Mass. 209, in which the rule is evaded on the ground that when the master employs a servant to see that machinery is renewed, he has done his duty, and failure of the servant to remedy defects is a risk which fellow-servants must take. Columbus, &c., R. Co. v. Troesch, 68 Ill. 545; 18 Am. Rep. 578; Baxter v. Roberts, 44 Cal. 187; Spelman v. Iron Co., 56 Barb. 151; Strahlendorf v. Rosenthal, 30 Wis. 674; Guthrie v. Louisville, &c., R. Co., 11 Lea, 372; 47 Am. Rep. 286. *Cf.* Frazier v. Penn., &c., R. Co., 38 Penn. St. 104; Boyle v. Mowry, 122 Mass. 251; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Texas, &c., R. Co. v. Carlton, 60 Tex. 397; Mo. Pac. R. Co. v. Haley, 25 Kan. 35; Russell v. Village of Canastota, 98 N. Y. 496.

[5] Chicago, &c., R. Co. v. Russell, 91 Ill. 298; 33 Am. Rep. 54; Kibele v. City of Philadelphia, 105 Penn. St. 41. In the absence of evidence showing how long a defect in machinery, by which a servant is injured, has existed, the complaint will be dismissed. Oehme v. Cook, 7 N. Y. Supl. 764; Indianapolis, &c., R. Co. v. Flanigan, 77 Ind. 365; Chicago, &c., R. Co. v. Doyle, 18 Kan. 58. See, also, Vosburgh v. Lake Shore, &c., R. Co., 94 N. Y. 374; 46 Am. Rep. 148; Edwards v. New York, &c., R. Co., 98 N. Y. 245.

on the part of the master. This rule is fully considered in the following sections.[6]

§ 368. The obligation of the servant.— The obligation of the servant to use ordinary care to prevent and avoid injuries to himself is correlative to the duty of the master to exercise ordinary care not to expose him to danger. The servant is under no less obligation to provide for his own safety than the master is to provide for it for him. He may, like any other plaintiff, in various ways contribute, to such a degree, to his injury as to destroy his right of action. The measure of his duty is ordinary care, and unless he exercise that, in good faith, his conduct is negligent; and when such negligence contributes, in the legal sense, to an injury that happens to him, it is held to be contributory negligence, and his action against his master is barred. His duty, as affecting his right of recovery against his master in case of injury while in his service, may be considered under the following heads, proceeding from the general rule that he must exercise ordinary care to the specific and particular obligations imposed upon him.

§ 369. He must possess a fair measure of skill for the service he undertakes, and must inform himself at the outset of the duties and dangers peculiar to his work.— It is not properly within the scope of this treatise to consider particularly the duty of a servant to be qualified for the position he assumes. It need not here be more than alluded to, but when a servant enters upon his duties in any employment involving risk of life or limb, it is his duty to inform himself of the danger to which he is to be exposed. As we have seen it to be the duty of the master to point out such dangers as are not patent,[7] so it is the duty of the employee to go about his work with his eyes open. He may not wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. If the master provides written or printed instructions or warning, it is his duty to read them. He must not go blindly and heedlessly to his work, when there is danger. He must inform himself. This is the law everywhere.[8]

6 See, also, §§ 36, 37, *supra*.

7 § 359, *supra*.

8 Wilson v. Willimantic, &c., Co., 50 Conn. 433; 47 Am. Rep.

§ 370. **His knowledge when a bar.**— The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part.[9] He has, therefore, no right of action,

653; Chicago, &c., R. Co. v. Clark, 108 Ill. 113; Chicago, &c., R. Co. v. Warner, 108 Ill. 538; Lake Shore, &c., R. Co. v. McCormick, 74 Ill. 440; Illinois, &c., R. Co. v. Jewell, 46 Ill. 99; Chicago, &c., R. Co. v. Jackson, 55 Ill. 492; 8 Am. Rep. 661; Ladd v. New Bedford R. Co., 119 Mass. 412; 20 Am. Rep. 331; Hathaway v. Michigan, &c., R. Co., 51 Mich. 253; 47 Am. Rep. 569. And in some cases it seems that the master need not expressly notify his servant of a risk where the only effective notice he can have is from the visible presence of that from which the danger is to be apprehended. Michigan Central R. Co. v. Smithson, 45 Mich. 212 (by Cooley, J.); Cunningham v. Chicago, &c., R. Co., 5 McCrary, 465; Northern, &c., R. Co. v. Husson, 101 Penn. St. 1; 47 Am. Rep. 690; Atchison, &c., R. Co. v. Plunkett, 25 Kan. 188; 2 Am. & Eng. Ry. Cas. 128; Wait's Actions & Defenses, 417, and the cases there cited.

[9] A distinction is well elucidated by the Supreme Court of Minnesota and is also recognized elsewhere, that it is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows of the defects may not charge him with contributory negligence, or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed? Wuotilla v. Duluth Lumber Co., 37 Minn. 153; 33 N. W. Rep. 551; Russell v. Minneapolis, &c., Ry. Co., 32 Minn. 230; Cook v. St. Paul, &c., Ry. Co., 34 Minn. 45; Johnson v. St. Paul, &c., Ry. Co., 43 Minn. 53; Davis v. St. Louis, &c., Ry. Co., 53 Ark. 117; 13 S. W. Rep. 801. See, also, Eddy v. Aurora Iron Min. Co., 81 Mich. 548; 48 N. W. Rep. 17; Colbert v. Rankin, 72 Cal. 197; 13 Pac. Rep. 491; Huhn v. Missouri Pac. Ry. Co., 92 Mo. 440; 4 S. W. Rep. 937; Massie v. Peel Splint Coal Co., 41 W. Va. 620; 24 S. E. Rep. 644. The fact that the servant's work is done in the presence of, and under the immediate direction of the master's foreman, is equivalent to an assurance that the servant may safely proceed with it; he is not bound in such case to search for danger, but may rely for his safety on the judgment and conduct of the foreman. Herdler v. Buck's Stove and Range Co., 136 Mo. 3; 37 S. W. Rep. 115. The law does not require that a railroad brakeman should know, absolutely, all the defects of construction and all the obstructions which may exist on the company's line. Illinois Central R. Co. v. Sanders, 166 Ill. 270; 46 N. E. Rep. 799. The question

in general, against his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know of it, it was part of his contract, and he cannot, in general, recover.[10] There need be no

whether the obligation of inspection rests upon the servant or not, in any given case, is a question of fact for the determination of the trial court. McGorty v. Southern New England Telephone Co., 69 Conn. 635; 33 Atl. Rep. 359.

[10] Linch v. Sagamore Manuf. Co., 143 Mass. 206; Hurst v. Burnside, 12 Or. 520; Missouri Pac. Ry. Co. v. Watts, 63 Tex. 549. The owner of a printing establishment is not liable to an employee who sustains an injury by falling on a slippery floor against an uncovered cog of a printing-press. Clark v. Barnes, 37 Hun, 389; Batterson v. Chicago, &c., Ry. Co., 53 Mich. 125; Tuttle v. Detroit, &c., Ry. Co., 122 U. S. 189; Richards v. Rough, 53 Mich. 212; Anderson v. Winston, 31 Fed. Rep. 528; Wells v. Coe, 9 Colo. 159. Where the control of an employer does not extend over the work being done by his employee, who has the entire charge and control thereof, and directs his own acts, and the manner of doing the work, the employer is not liable for an injury caused by the employee's negligence. Brown v. McLeish, 71 Iowa, 381; 32 N. W. Rep. 385; Stroble v. Chicago, &c., Ry. Co., 70 Iowa, 555; Wells v. Coe, 9 Colo. 159; 11 Pac. Rep. 50; Bunt v. Sierra Buttes Gold Mining Co., 24 Fed. Rep. 847. The fact that a servant contracted for a certain sum per day while learning the business, and a larger sum after he should be taught, does not affect the assumption of risk. Taylor v. Carew Manuf'g Co., 143 Mass. 470; 10 N. E. Rep. 308; Wilson v. Louisville, &c., R. Co., 85 Ala. 269; 4 So. Rep. 701. A brakeman is not bound to look for latent or hidden defects in the brake. Carpenter v. Mexican Nat. R. Co., 39 Fed. Rep. 315; Monaghan v. New York, &c., R. Co., 45 Hun, 113. An employee of a railroad company sustained injury from catching his foot in a frog without a guard. It was held to be a question for the jury whether so many of the frogs were thus unprotected as to charge the employee with notice. Sherman v. Chicago, &c., Ry. Co., 34 Minn. 259. A workman in a mine does not assume risks incident to defects in the hoisting apparatus used for lowering him to the place where he works. This is not machinery about which he is employed. Moran v. Harris, 63 Iowa, 390. See, also, Giles v. Diamond S. I. Co. (Del.), 8 Atl. Rep. 368; Chicago, &c., R. Co. v. Bragonier, 119 Ill. 51; Houston, &c., Ry. Co. v. O'Hare, 64 Tex. 600. An ordinary laborer is not supposed to know whether the banks of a ditch will cave in, the question being one of engineering. Doyle v. Baird, 6 N. Y. Supl. 517; Taylor v. Baldwin, 78 Cal. 517; 21 Pac. Rep. 124; Kossmann v. Stutz, 5 N. Y. Supl. 764. A laborer employed in stacking ice assumes the risk incident thereto, which is apparent, and the employer, though he

confusion here between the ordinary risks of his employment on the one hand, and his contributory negligence on the other. Assuming the risks of an employment is one thing, and quite an essentially different thing, from incurring an injury through contributory negligence. It is not contributory negligence, *per se*, to engage in a dangerous occupation. Men may properly and lawfully do work that is essentially dangerous work, or work that is, for some reason or another, more than ordinarily dangerous for the time being, and to contract to do such work is not, in

has erected no barrier around the stack to prevent persons from falling off, is not liable for injuries resulting to a laborer from such a fall. Thorn v. New York City Ice Co., 46 Hun, 497; Schmidt v. Leistekow, 6 Dak. 386; 43 N. W. Rep. 820; Eicheler v. St. Paul Furniture Co., 40 Minn. 263; 41 N. W. Rep. 975; Odell v. New York, &c., R. Co., 120 N. Y. 323; 24 N. E. Rep. 478; Haas v. Buffalo, &c., R. Co., 40 Hun, 145. A car inspector and repairer who voluntarily goes to work between cars, knowing that a newly-loaded car is liable to be "kicked" up against the cars behind him, and thus push them forward upon him, is guilty of contributory negligence. Whitmore v. Boston, &c., R. Co., 150 Mass. 474; 23 N. E. Rep. 220; Simmons v. Chicago, &c., R. Co., 110 Ill. 340; Woodward Iron Co. v. Jones, 80 Ala. 123; The Sir Garnet Wolseley, 41 Fed. Rep. 896; Kinney v. Corbin, 132 Penn. St. 341; 19 Atl. Rep. 141; Rickert v. Stephens (Penn.), 19 Atl. Rep. 410; McDonald v. Rockhill Iron & Coal Co. (Penn.), 19 Atl. Rep. 797; 26 W. N. C. 101; Jenkins v. Mahopac Iron-Ore Co., 10 N. Y. Supl. 484; O'Rorke v. Union Pac. Ry. Co., 22 Fed. Rep. 189; English v. Chicago, &c., Ry. Co., 24 Fed. Rep. 906; Mayes v. Chicago, &c., Ry. Co., 63 Iowa, 562; Sanborn v. Madera Flume & Trading Co., 70 Cal. 261. There is no presumption that a brakeman has sufficient skill to determine, from an inspection of the brakes, their fitness for use. Central R. Co. v. Haslett, 74 Ga. 59; Kelley v. Wilson, 21 Ill. App. 141; Mad River, &c., R. Co. v. Barber, 5 Ohio St. 541; Dale v. St. Louis, &c., R. Co., 63 Mo. 455; Mansfield, &c., Co. v. McEnery, 91 Penn. St. 185; 36 Am. Rep. 662; Pingree v. Leyland, 135 Mass. 398; Umbeck v. Lake Shore, &c., R. Co., 83 Ind. 191; Perigo v. Chicago, &c., R. Co., 55 Iowa, 326; Shanny v. Androscoggin Mills, 66 Me. 420; Coombs v. New Bedford, &c., Co., 102 Mass. 572; 3 Am. Rep. 506; Chicago, &c., R. Co. v. Jackson, 55 Ill. 492; Toledo, &c., R. Co. v. Asbury, 84 Ill. 429; Chicago, &c., R. Co. v. Clark, 108 Ill. 113; Chicago, &c., R. Co. v. Warner, 108 Ill. 538; Davis v. Detroit, &c., R. Co., 20 Mich. 105; Dillon v. Union Pac. Ry. Co., 3 Dill. 319; Bryant v. Burlington, &c., R. Co., 66 Iowa, 305; 19 Am. Law Rev. 669; Coolbroth v. Maine, &c., R. Co., 77 Me. 165; 1 East. Rep. 140; Powers v. New York, &c., R. Co., 98 N. Y. 274; Jackson v. Kansas, &c., R. Co., 31 Kan. 761. But see, also, where judgments have been sustained, notwithstanding that the servant had knowledge of the defect or danger which resulted in

itself, an act of negligence.[11] Accordingly, an employee may know that his work is dangerous, and yet not be guilty of contributory negligence in doing it. This is not such knowledge as the rule in question contemplates.[12]

§ 371. Continued service after knowledge a waiver of the defect or danger.— This is, by far, the most important branch of the subject. It is the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge — when he discovers that the machinery, buildings, premises, tools, or other instrumentalities of his labor, are unsafe or unfit, or that a fellow-servant is careless or incompetent — continues in the employment, without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury.[13] But, as

his injury, White v. Nonantum Worsted Co., 144 Mass. 276; Dorsey v. Phillips, 42 Wis. 583; Fairbanks v. Haentzsche, 73 Ill. 236; Holmes v. Clarke, 6 Hurl. & N. 349; 7 Hurl. & N. 937; Mo. Pac. R. Co. v. Holley, 30 Kan. 465; Baird v. Chicago, &c., R. Co., 61 Iowa, 359; Farley v. Chicago, &c., R. Co., 56 Iowa, 337; Beems v. Chicago, &c., R. Co., 58 Iowa, 150; Lawless v. Conn., &c., R. Co., 136 Mass. 1. In a note in 30 Cent. Law Jour. 464, by R. K. Boney, Esq., the matter of assumption of risk by the employees of railway companies, and whether the question is one for the jury, is discussed, and many authorities collected. See, also, §§ 360, 361, *supra*, and the cases cited in the preceding note.

[11] Pennsylvania Co. v. Long, 94 Ind. 250; Baird v. Chicago, &c., R. Co., 61 Iowa, 350; Beems v. Chicago, &c., R. Co., 58 Iowa, 150; Flynn v. Kansas, &c., R. Co., 78 Mo. 195; 47 Am. Rep. 99; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. Rep. 425.

[12] Laning v. New York, &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Mehan v. Syracuse, &c., R. Co., 73 N. Y. 585; Hawley v. New York, &c., R. Co., 82 N. Y. 370; Daley v. Shaaf, 28 Hun, 314; Aldridge v. Blast Co., 78 Mo. 559. The fact that an employee has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he performed that which was dangerous in a negligent manner. Mobile, &c., Ry. Co. v. Holborn (Ala.), 4 So. Rep. 146. But the rule is modified in case of an infant employee. Smith v. Hestonville, &c., R. Co., 92 Penn. St. 450; 37 Am. Rep. 705.

[13] Swift v. Rutkowski, 167 Ill. 156; 47 N. E. Rep. 362; Thompson v. Missouri Pac. Ry. Co., 51 Neb. 527; 71 N. W. Rep. 61; Oliver v. Ohio River R. Co., 42 W. Va. 703; 26 S. E. Rep. 444; Conley v. American Express Co., 87 Me. 352, 356; 32 Atl. Rep. 965; C., B. & Q. R. Co. v. McGinnis, 49 Neb. 649; 68 N. W. Rep. 1057; Worden v. Humeston, &c., R. Co., 72 Iowa, 201; 33 N. W. Rep. 629; Patton v. Cent-

has already been suggested, the severity of this rule is somewhat relaxed in favor of persons who are too young or too ignorant to appreciate the dangers to which they are exposing them-

ral Iowa Ry. Co., 73 Iowa, 306; 35 N. W. Rep. 149; Hewitt v. Flint, &c., R. Co., 67 Mich. 61; 34 N. W. Rep. 659; Wilson v. Winona, &c., R. Co., 37 Minn. 326; 33 N. W. Rep. 908. The rule applies although the servant uses the defective appliances by the order of his superior. Texas, &c., Ry. Co. v. Bradford (Tex.), 2 S. W. Rep. 595; Linch v. Sagamore Manufg. Co., 143 Mass. 206; 9 N. E. Rep. 728; Schultz v. Chicago, &c., Ry. Co., 67 Wis. 616; 31 N. W. Rep. 321; Hatt v. Nay, 144 Mass. 186; 10 N. E. Rep. 807; Neilling v. Industrial Manf'g Co., 78 Ga. 260; Rogers v. Galveston City R. Co., 76 Tex. 502; 13 S. W. Rep. 540; Rush v. Missouri Pac. Ry. Co., 36 Kan. 129; Pollich v. Sellers (La.), 7 So. Rep. 786; Smith v. Sibley Manuf'g Co., 85 Ga. 333; 11 S. E. Rep. 616; Lord v. Pueblo Smelting & Refining Co., 12 Colo. 390; 21 Pac. Rep. 148; Hawk v. Pennsylvania R. Co. (Penn.), 11 Atl. Rep. 459; Beittenmiller v. Bergner, &c., Brewing Co. (Penn.), 12 Atl. Rep. 599. In an action by an employee against a railroad company for injuries, it appears that these were caused by the carelessness and recklessness of an engineer, who was in the habit of acting recklessly, to the danger of his co-employees; that the company knew his character; that plaintiff had been in the employ of the company with this engineer only a week. It was held that whether the failure of the plaintiff to refuse to work amounted to negligence was a question for the jury. Northern Pac. R. Co. v. Mares, 123 U. S. 710; New York, &c., R. Co. v. Lyons, 119 Penn. St. 324; 13 Atl. Rep. 205; McDermott v. Hannibal, &c., R. Co., 87 Mo. 285; Hatt v. Nay, 144 Mass. 186; Texas & Pacific Ry. Co. v. Bradford, 66 Tex. 732; Pleasants v. Raleigh, &c., R. Co., 95 N. C. 195; Bogenschutz v. Smith, 84 Ky. 330; 1 S. W. Rep. 578; Grube v. Missouri Pac. Ry. Co., 98 Mo. 330; 11 S. W. Rep. 736; Needham v. Louisville, &c., R. Co., 85 Ky. 423; Anthony v. Leeret, 105 N. Y. 591; 12 N. E. Rep. 561; Devitt v. Pacific, &c., R. Co., 50 Mo. 302; O'Rourke v. Pacific, &c., R. Co., 22 Fed. Rep. 189; Foley v. Chicago, &c., R. Co., 48 Mich. 622; 42 Am. Rep. 481; Fort Wayne, &c., R. Co. v. Gildersleeve, 33 Mich. 133; Davis v. Detroit, &c., R. Co., 20 Mich. 105; Fones v. Philips, 39 Ark. 17; 43 Am. Rep. 264; Dillon v. Union Pacific Ry. Co., 3 Dill. 319; Kielley v. Belcher, &c., Co., 3 Sawyer, 500; Jones v. Yeager, 2 Dill. 64; Ladd v. New Bedford R. Co., 119 Mass. 412; 20 Am. Rep. 331. But the acquiescence of the servant must rest upon positive knowledge, or reasonable means of positive knowledge of the precise danger assumed, and not on vague surmise of the possibility of danger. Dorsey v. Phillips Construction Co., 42 Wis. 583; Waldhier v. Hannibal, &c., R. Co., 87 Mo. 37; Robinson v. Houston, &c., R. Co., 46 Tex. 540; Dale v. St. Louis, &c., R. Co., 63 Mo. 455; Buzzell v. Manfg. Co., 48 Me. 113; Sullivan v. Louisville Bridge Co., 9 Bush, 81; Hayden v. Manfg. Co., 29

selves.[14] Neither does the rule apply to the case of a seaman serving on board a ship, as his refusal to work might be visited with corporal punishment.[15] Whenever an employee discovers anything affecting the safety of the machinery, or appliances, which he is obliged to use, or the fitness and competence of the servants with whom he is associated, it is his duty to inform his employer at once of the fact. He cannot be silent and escape the consequences. Failure to speak promptly is such contributory negligence as will bar a recovery from the master in case he is injured by the defect in the machinery, or the unfitness of the servant.[16] That the servant, in such a case, has lost his right

Conn. 548; Kelley v. Silver Spring Co., 12 R. I. 112; 34 Am. Rep. 615; Hough v. Texas, &c., R. Co., 100 U. S. 213, and the cases collected in the Reporter's note; Cooley on Torts, 559; Shearman & Redfield on Negligence (5th ed.), §§ 211, 215; LeClaire v. First Div., &c., R. Co., 20 Minn. 9; Wright v. New York, &c., R. Co., 25 N. Y. 562; Laning v. New York, &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Gibson v. Erie Ry. Co., 63 N. Y. 449; 20 Am. Rep. 552; Georgia, &c., R. Co. v. Kenney, 58 Ga. 485; Western, &c., R. Co. v. Johnson, 55 Ga. 133; Lumley v. Caswell, 47 Iowa, 159. While such defect or danger is notice in law to the servant, whether his knowledge will prevent recovery for injuries received is always a question for the jury. Chicago, &c., R. Co. v. Jackson, 55 Ill. 492; 8 Am. Rep. 661; Hulehan v. Green Bay, &c., R. Co., 68 Wis. 520; 32 N. W. Rep. 529; Murtaugh v. New York, &c., R. Co., 49 Hun, 456; Chicago, &c., R. Co. v. Asbury, 84 Ill. 429; Perigo v. Chicago, &c., R. Co., 55 Iowa, 326; Parker v. South Carolina, &c., R. Co., 48 S. C. 364; 26 S. E. Rep. 669; Hanrathy v. Northern, &c., R. Co., 46 Md. 280; Crutchfield v. Richmond, &c., R. Co., 78 N. C. 300; Frazier v. Penn. R. Co., 38 Penn. St. 104; Cowles v. Richmond, &c., R. Co., 84 N. C. 309; 37 Am. Rep. 620; Sullivan v. India Manufacturing Co., 113 Mass. 396; Clark v. St. Paul, &c., R. Co., 28 Minn. 128; Assop v. Yates, 2 Hurl. & N. 767; Skipp v. Eastern Ry. Co., 24 Eng. L. & E. 396; 9 Exch. 223; Griffith v. Gidlow, 3 Hurl. & N. 648; Woodley v. Metropolitan, &c., Ry. Co., 2 Exch. Div. 384; Ogden v. Rummens, 3 Fost. & Fin. 751; Dynen v. Leach, 26 L. J. (N. S.) Exch. 221.

[14] Coombs v. New Bedford Cordage Co., 102 Mass. 572; 3 Am. Rep. 506; Laning v. New York, &c., R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Hill v. Gast, 55 Ind. 45; Grizzle v. Frost, 3 Fost. & Fin. 622; Brittou v. Great Western Cotton Co., L. R. 7 Exch. 130.

[15] Eldridge v. Atlas S. S. Co., 55 Hun, 309; 8 N. Y. Supl. 433; Rothwell v. Hutchison, 13 Ct. of Ses. Cas. 463.

[16] Patterson v. Pittsburgh, &c., R. Co., 76 Penn. St. 389; 18 Am. Rep. 412; Toledo, &c., R. Co. v. Eddy, 72 Ill. 138; Lumley v. Caswell, 47 Iowa, 159; Crutchfield v. Richmond, &c., R. Co., 78 N. C. 300; Allerton Packing Co. v. Egan,

of action is conceded, but the authorities disagree somewhat as to whether it should be upon the ground of waiver or of contributory negligence.[17]

§ 372. Where master promises to remove the danger.— But to the general doctrine above stated there is this exception: That when an employee notifies the master of a special risk, and objects to continuing the work under the existing conditions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employee is not presumed to assume such risk.[18] And to warrant a servant in relying upon his master's promise it is not necessary that the master should fix any time for removing the danger, as, in the absence of an express arrangement, a reasonable time will be implied.[19] But a servant who continues in his employment after expiration of the time at which the master has promised to repair a defect, without the repair being made, assumes the risk.[20] And

86 Ill. 253; Davis v. Detroit, &c., R. Co., 20 Mich. 105; Clark v. St. Paul, &c., R. Co., 28 Minn. 128.

[17] Clark v. St. Paul, &c., R. Co., 28 Minn. 128. Section 193, of the Constitution of Mississippi (1890), which provides that knowledge by employees of the dangerous or defective condition of machinery or appliances shall not be a defense to a railroad company in an action for the injuries thereby caused, does not destroy the defense of contributory negligence. It merely abrogates the previous rule that said knowledge was, of itself, a bar. Employees are not absolved from the duty, binding on all, to use ordinary care to avoid injury, and such knowledge, though no longer of itself a defense, is yet material in determining whether, with such knowledge, the employee exercised due care. Buckner v. Richmond & Danville R. Co., 72 Miss. 873; 18 So. Rep. 449.

[18] Swift v. Madden, 165 Ill. 41; 45 N. E. Rep. 979; Harris v. Hewitt, 64 Minn. 54; 65 N. W. Rep. 1085; Bridge's Adm'r v. Tennessee Coal, &c., Co., 109 Ala. 287, 293; 19 So. Rep. 495; Taylor v. Felsing, 164 Ill. 331; 45 N. E. Rep. 161; Stephens v. Duncan, 73 Wis. 404; 41 N. W. Rep. 337; Sweet v. Ohio Coal Co., 78 Wis. 127; 47 N. W. Rep. 182.

[19] Swift v. Madden, 165 Ill. 41; 45 N. E. Rep. 979.

[20] Trotter v. Chattanooga Furniture Co. (Tenn.), 47 S. W. Rep. 425; Railroad Co. v. Drew, 59 Tex. 10; 46 Am. Rep. 261; Gulf, &c., Ry. Co. v. Donnelly, 70 Tex. 371; 8 So. Rep. 52; Webber v. Piper, 38 Hun, 353; Atchison, &c., R. Co. v. McKee, 37 Kan. 592; 15 Pac. Rep. 484; Sioux City, &c., R. Co. v. Finlayson, 16 Neb. 578; 20 N. W. Rep. 860; Central Trust Co. v. Wabash, &c., Ry. Co., 26 Fed. Rep. 897; Wilson v. Winona, &c., R. Co., 37 Minn. 326; 33 N. W. Rep. 908; McDowell v. Chesapeake, &c., R. Co. (Ky.), 5 S. W. Rep. 413; Worden v. Humestown, &c., R. Co., 72 Iowa, 201; 33 N.

it must appear that the servant was led to continue the employ-

W. Rep. 629; East Tenn., &c., R. Co. v. Duffield, 12 Lea, 63; 47 Am. Rep. 319; Kroy v. Chicago, &c., R. Co., 32 Iowa, 257; Ford v. Fitchburg R. Co., 110 Mass. 241; 14 Am. Rep. 598; Hough v. Texas, &c., R. Co., 100 U. S. 213; Conroy v. Vulcan Iron Works, 62 Mo. 38; Cooley on Torts, § 559; Shearman & Redfield on Negligence (5th ed.), § 215; Wharton on Negligence, § 220; Snow v. Housatonic R. Co., 8 Allen, 441; Huddleston v. Machine Shop, 106 Mass. 282; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. Rep. 425; Man'fg Co. v. Morrisey, 40 Ohio St. 148; 48 Am. Rep. 669; Greene v. Minneapolis, &c., R. Co., 31 Minn. 248; 47 Am. Rep. 785. A promise to repair dangerous machinery when the work on hand was completed does not relieve an employee from the assumption of risk until that time, and hence, to avail himself thereof, he must show that the injury occurred after the completion of the work, and within a reasonable time thereafter for such repairs. Standard Oil Co. v. Helmick, 148 Ind. 457; 47 N. E. Rep. 14. "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care when he knew there was danger. But no case, we believe, has gone the length of deciding that the promise entitles the servant to recover, as matter of law, which was the effect of the ruling asked. And if, as is supposed in the request, the time for performance has gone by before the accident, as must have been the fact, the servant knows that the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise but has decided to take the risk." Holmes, J., in Counsell v. Hall, 145 Mass. 468; 14 N. E. Rep. 530. A laborer working under a gravel bank saw that the bank was in danger of falling, and asked the supervisor that a man should be placed to watch it. The supervisor promised to send a man, but failed to do so. The laborer went on working until the bank fell and injured him. It was held by the Supreme Court of the United States that he had no cause of action. District of Columbia v. McElligott, 117 U. S. 621. A lamplighter continued to use a ladder without hooks or spikes, knowing that without them it was dangerous. His master had several times promised that it should be hooked and spiked. One stormy night the ladder slipped. Held, that for the resulting injury the lamplighter could not maintain an action against his master. (Ruger, C. J., dissenting.) Marsh v. Chickering, 101 N. Y. 396; 5 N. E. Rep. 56. But there is no waiver on the part of the servant if there has been any notice given by him, though timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists and that the servant de-

ment by the master's promise.[21] If the risk is so obvious and immediate that serious injury may probably result from a continuance of the work, then the doctrine that the employee can proceed, relying upon the promise to repair or remove the danger, does not apply.[22]

§ 373. Servant must obey rules established to promote his safety.—It is contributory negligence of an aggravated character on the part of an employee to disobey reasonable rules and regulations enacted to protect him from injury. If he is injured through such a gross and unwarranted disregard of his own safety, his remedy is gone. Such negligence is the most pronounced contributory negligence possible. It properly leaves the person injured by it wholly remediless.[23] The disobe-

sires its removal. Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650; 2 S. W. Rep. 3. But notice given by a servant to a subordinate is ordinarily not sufficient, however exclusive the latter's authority, he being but a fellow-servant. Patterson v. Pittsburgh, &c., R. Co., 76 Penn. St. 389; 48 Am. Rep. 412.

[21] Brewer v. Tennessee Coal, &c., Co., 97 Tenn. 615, 619; 35 S. W. Rep. 549; 37 S. W. Rep. 549. See, also, cases cited in preceding note.

[22] Erdman v. Illinois Steel Co., 95 Wis. 6, 13; 69 N. W. Rep. 993; Rothenberger v. N. W. C. M. Co., 57 Minn. 461; 59 N. W. Rep. 531. In the case first cited it was said: "This exception to the exception, if we may call it such, is supported by several good reasons, among which are that it is not consistent with reasonable prudence for one to submit himself voluntarily to imminent danger of probably immediate and serious injury, relying upon a mere promise on the part of anybody that such danger will be removed after a time; and further, that, when such danger exists, there is no such thing as a reasonable time to repair, other than immediately and before the work proceeds further."

[23] Darracutts v. Chesapeake, &c., R. Co., 83 Va. 288; 2 S. E. Rep. 511; Olson v. Chicago, &c., R. Co., 38 Minn. 412; 38 N. W. Rep. 352; LaCroy v. N. Y., L. E. & W. R. Co., 132 N. Y. 570; 30 N. E. Rep. 391. The question of contributory negligence is for the jury, when the servant's knowledge of the rule is a matter of dispute. Dunlap v. Northeastern R. Co., 130 U. S. 649; Gulf, &c., Ry. Co. v. Ryan, 69 Tex. 665; 7 S. W. Rep. 83; Alexander v. Louisville, &c., R. Co., 83 Ky. 589; Murray v. Gulf, &c., R. Co., 73 Tex. 2; 11 S. W. Rep. 125; Prather v. Richmond, &c., R. Co., 80 Ga. 427; 9 S. E. Rep. 530; International, &c., R. Co. v. Hester, 72 Tex. 40; 11 S. W. Rep. 1041. A conductor's place on his freight train going down a grade was, under the rule of the company, in the middle of the train. He was killed while he was forward warning the engineer to look out

dience of the servant must, however, have been the proximate cause of the injury.[24] Accordingly, it was held in Indiana, that a locomotive engineer, although violating the rules of the company in running his engine at a rate of speed far in excess of that prescribed by the printed regulations furnished him, and by which he was bound to be guided, was, nevertheless, not guilty of contributory negligence in standing at his post in the face of an impending collision which was rendered imminent by a misplaced switch, when, by jumping from the locomotive, he might have escaped injury. For an injury which he sustained under such circumstances, although at the time he was violating

for certain obstructions ahead. The fact that he was not in the middle of the train, under these circumstances, did not preclude a recovery against the company. Somerset & Cambria R. Co. v. Galbraith, 109 Penn. St. 32. But see Central Trust Co. v. East Tennessee, V. & G. Ry. Co., 69 Fed. Rep. 353. Ignorance of rules which have never been brought to his attention does not prejudice the servant. Brown v. Louisville & U. R. Co., 111 Ala. 275, 288; 19 So. Rep. 1001; Le Croy v. New York, &c., R. Co., 10 N. Y. Supl. 382; Carroll v. East Tenn., &c., Ry. Co., 82 Ga. 452; Central R. Co. v. Ryals (Ga.), 11 S. E. Rep. 499; Covey v. Hannibal, &c., R. Co., 27 Mo. App. 170; Gardner v. Michigan Central R. Co., 58 Mich. 584; Beckham v. Hillier, 47 N. J. Law, 12; Quick v. Indianapolis, &c., Ry. Co., 130 Ill. 334; Abend v. Terre Haute, &c., R. Co., 111 Ill. 202; Memphis, &c., R. Co. v. Thomas, 51 Miss. 637; Lockwood v. Chicago, &c., R. Co., 55 Wis. 50; Fay v. Minneapolis, &c., R. Co., 30 Minn. 231; Lyon v. Detroit, &c., R. Co., 31 Mich. 429; Shanny v. Androscoggin Mills, 66 Me. 420; Gates v. Burlington, &c., R. Co., 39 Iowa, 45; Locke v. Sioux City, &c., R. Co., 46 Iowa, 109; Hubgh v. New Orleans, &c., R. Co., 6 La. Ann. 495; 54 Am. Dec. 565; Illinois, &c., R. Co. v. Houck, 72 Ill. 285. It is not negligence upon the part of the employee to act, in an emergency, upon the verbal order of the train dispatcher, although a rule of the road required that the specific order should be in writing. Smith v. Wabash, &c., Ry. Co., 92 Mo. 359; 4 S. W. Rep. 129. And see, also, Ohio, &c., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134. *Cf.* George v. Gobey, 128 Mass. 289; 35 Am. Rep. 376; Beckham v. Hillier, 47 N. J. Law, 312, in which a boy of sixteen, who had been told to get assistance in replacing a belt in a machine shop, was held guilty of contributory negligence if he failed to do so and was injured. Case of violation of rules by brakemen. Alabama Great Southern R. Co. v. Richie, 111 Ala. 297; 20 So. Rep. 49; Mason v. Richmond & Danville R. Co., 114 N. C. 718; 19 S. E. Rep. 362.

[24] Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. Rep. 598; Marshall v. Stewart, 2 Macq. H. L. Cas. 30; 1 Pat. Sc. App. 447; 33 Eng. Law & Eq. 1.

a plain rule of the company, he was held entitled to recover, it not appearing that his violation of the rule was the proximate cause of the collision.[25] And so, it has been held that the fact that a servant, who was injured by the bursting of a grindstone while operating it, was at the time violating the rules of the master in changing his clothes before the time for quitting work, would not prevent his recovery, it appearing that such conduct on his part in no wise contributed to the accident.[26] Where the rule is habitually disregarded and a different practice has long been followed by the employees with the knowledge and approval of the master, the rule will be regarded as inoperative.[27] But mere disobedience of employees, without the knowledge or acquiescence of the employer, will not justify any inference of an abandonment or waiver of the rules and regulations.[28]

§ 374. Liability of a servant to a fellow-servant.— It is now well settled that one servant may maintain an action against a fellow-servant for damages resulting from such fellow-servant's negligence in the discharge of his duties in the common employment.[29] In Albro v. Jaquith [30] the Supreme Judicial Court of

[25] Pennsylvania R. Co. v. Roney, 89 Ind. 453; 46 Am. Rep. 173. See, also, Cottrill v. Chicago, &c., R. Co., 47 Wis. 634; 32 Am. Rep. 796. *Cf.* § 45, *supra.*

[26] Helfenstein v. Medart, 136 Mo. 595; 36 S. W. Rep. 863; 37 S. W. Rep. 829; 38 S. W. Rep. 294.

[27] A., T. & S. F. R. Co. v. Slattery, 57 Kan. 499; 46 Pac. Rep. 941. Evidence of a customary disregard of the rules of a railroad company by its employees, with the knowledge and approval of the agents of the company, is competent as tending to show that the rule was abrogated or waived. Wright v. Southern Pacific Co., 14 Utah, 383; 46 Pac. Rep. 374. No distinction exists in principle between permitting the use of defective machinery and permitting employees to habitually disregard the safeguards that have been provided to insure the safe running and operations of trains. Coppins v. N. Y. C. & H. R. R. Co., 122 N. Y. 557, 563; 25 N. E. Rep. 915.

[28] Railroad Co. v. Reagan, 96 Tenn. 128; 33 S. W. Rep. 1050.

[29] Hare v. McIntire, 82 Me. 240; 19 Atl. Rep. 453; Osborn v. Morgan, 130 Mass. 102; 39 Am. Rep. 467; 137 Mass. 1 (overruling Albro v. Jaquith, 4 Gray, 99; 64 Am. Dec. 56); Hinds v. Harbou, 58 Ind. 121; Hinds v. Overacker, 66 Ind. 547; 32 Am. Rep. 114; Rogers v. Overton, 87 Ind. 410; Griffiths v. Woltram, 22 Minn. 185; Swainson v. Northeastern Ry. Co., 3 Exch. Div. 341, 343; Wright v. Roxburgh, 2 Ct. of Sess. Cass. (3d series) 748. *Cf.* Wiggett v. Fox, 11 Exch. 832, 839; Degg v. Midland Ry. Co., 1 Hurl. & N. 773, 781.

[30] 4 Gray, 99; 64 Am. Dec. 56.

Massachusetts decided in 1855 that such actions were not maintainable. This was an action of tort against the superintendent of the cotton and woolen mill of the Agawam Canal Company, to recover damages for an injury sustained from the escape of gas, caused by the negligence of the defendant in the management of the apparatus used in lighting the mill, and the defendant had judgment upon the ground that there was no contract stipulating for care between the defendant and the plaintiff, and that the act complained of was a mere act of non-feasance for which the servant was liable only to the master, and also upon the further ground that the matter was *res adjudicata*, because an action had been previously brought against the mill-owners for the same injury by the same plaintiff,[31] wherein it adjudicated that the negligence of the superintendent, being the negligence of a fellow-servant, did not confer upon the injured employee any right of action against the common employer. This was equivalent to holding that servants in a common employment owe to each other no duty even of ordinary care that can be enforced in a court of justice — a doctrine which has been much criticised by the text-writers,[32] and one so obviously opposed to plain principles of justice and right legal reason that, in 1881, the court completely receded from its anomalous and erratic position, and, in a case in which the facts were for substance the same, held — overruling Albro v. Jaquith — that in Massachusetts such actions may be maintained, thereby falling in line with other courts in this country, as well as those of England and Scotland, upon this point. The right to bring these actions, which ought never to have been for an instant questioned, will, it may safely be said, never hereafter be denied in any court where the common law obtains.

§ 375. His liability to the master and to third persons.— The servant, moreover, is liable as well to his master as to his

[31] Albro v. Agawam Canal Co., 6 Cush. 75.

[32] Shearman & Redfield on Negligence (5th ed.), § 244; Thompson on Negligence, 1062, § 3; Wharton on Negligence, § 245; Story on Agency, § 453 (*d*) note; Bigelow's Leading Cases on Torts, 710; Addison on Torts, 245; Dicey on Parties, 465, note. Judge Thompson says: — "This case must rank as a mere judicial aberration. If it had been decided by a less eminent court it would not deserve to be mentioned in terms of respect." Thompson on Negligence, 1062, § 3.

fellow-servant for any damage that comes of his negligence,[33] and when a master has been compelled to pay the damages caused by the negligence of his servant, he may sue the servant and recover back the money paid.[34] The servant is also, as of course, liable to any third person injured by his negligent wrong-doing. He is in no way excused or shielded, by reason of the liability of his master in cases for the consequences of his acts, from personal responsibility for the wrong he does. This, however, is not pertinent to our treatise, and is, therefore, here merely alluded to.

§ 376. Statutory modifications of the rule which exempts a master from liability to one servant for the negligent wrong-doing of a co-servant.— It becomes evident, early in the course of the development of the law upon this point, that, in order to preserve to the employee any vestige of the right of action which the common law gave him against his employer, in a proper case, for personal injuries attributable to the negligence of another, and received in the course of the common employment, the tendency to extend the rule which had its inception in England, in the case of Priestley v. Fowler,[35] and, in the United States, in the early cases of Murray v. South Carolina R. Co.,[36] and Farwell v. The Boston & Worcester R. Co.,[37] and under the operation of which the defense of a common employment had come to be urged to the practical destruction of all such rights of action, would have to be checked, and could only be checked, by legislation. Accordingly, on the 7th of September, 1880, Parliament changed the law of England by passing the Employers' Liability Act,[38] which, pending its final enactment, was popularly known as "the Gladstone Bill," and which, at the time, attracted much attention both here and in England.

§ 377. The Employers' Liability Act in England.— The statute provides, in sections 1 and 2, that common employment, so called, shall not be a defense where a workman receives personal injury:— 1. By reason of any defect in the ways, works,

[33] Page v. Wells (by Cooley, J.), 37 Mich. 415, 421.

[34] Davis v. Garrett, 6 Bing. 716; Zulke v. Wing, 20 Wis. 408. See, however, White v. Phillipston, 10 Metc. 108.

[35] 3 M. & W. 1.

[36] 1 McMullan's Law, 385; 36 Am. Dec. 268.

[37] 4 Metc. 49; 38 Am. Dec. 339.

[38] 43 and 44 Vict., chap. 42.

machinery or plant connected with or used in the business of the employer, which defect existed in consequence of the negligence of the employer, or of an employee by him entrusted with the duty of guarding against any defect. 2. By reason of the negligence of any person entrusted with superintendence. 3. By reason of the negligence of any superior workman whose orders the person injured was bound to obey. 4. By reason of obeying proper rules or by-laws, or any rule or by-law duly approved by certain public officers therein specified. 5. By reason of the negligence, on a railway, of any person at the time in control of the train. Unless the person injured knew, or failed, when necessary, to give notice of the defect which caused the injury. Section 3 limits the sum recoverable as compensation. Section 4 limits the time for recovery of compensation. Section 5 makes any penalty received by any other act part payment. Section 6 relates to the trial of actions. Section 7 provides for the service of a notice of any injury received. Sections 8, 9 and 10, respectively, define terms used in the act, tell when it shall go into operation, by what title it shall be called, and how long it shall continue in force.[39]

§ 378. **The effect of the act.**— From this resume of the statute it appears that the defense of common employment has not been wholly abolished in England, and that where the employee who causes and the employee who receives the injury are fellow-servants of the same grade, the liability of the master remains as before. Had it been intended to abolish this defense in all cases, it might have been accomplished in a single sentence. It rather brings back the law to the original position in which it stood in 1837, after Priestley v. Fowler[40] had been decided. The authority of that case is not overthrown, and it is still good law in Westminster Hall; but the thousand refinements upon the doctrine of Priestley v. Fowler, which the English courts were not slow to distinguish, and under the operation of which English employers in recent years have, for the most part, gone scot-free of any liability or responsibility for the personal injuries which their servants or employees have sustained in the course of their employment through the negligence of

[39] The operation of the statute has by subsequent enactments been indefinitely extended.

[40] 3 M. & W. 1.

others, for whom the common employer was justly responsible, will no longer avail as defenses in actions of this nature.[41]

§ 379. Legislation on the subject in the United States.— Comparatively recent legislation in several of the States of the Union has in some degree modified for us in this country the rule of non-liability which the courts of every jurisdiction, as we have seen, have uniformly declared. In California,[42] Dakota,[43] Georgia,[44] Kansas,[45] Iowa,[46] Mississippi,[47] Montana,[48] North Caro-

41 A collection of cases that have arisen under the Employers' Liability Act may be found in Shirley's Leading Cases, p. 279, and in McKinney on Fellow-Servants, § 98, and the notes.

42 Codes and Statutes of California, 6971, § 1971, modified by 6970, § 1970, so as to make the change in the law of no practical value.

43 Civil Code Dak., § 1130, precisely, *verbatim et literatim*, the same as the law of California.

44 Code of 1873, page 521, § 3036 (2981). In this State the law, so far as the liability of railway companies is concerned, is completely changed. The material part of the statute is, viz.: — "Injury by co-employee. If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." Code, § 3036 (2981), enacted by the legislature during the session of 1855-56. It was the first State to make any change in the common law doctrine of co-service. See, also, Thompson v. Central, &c., R. Co., 54 Ga. 509.

45 Revised Laws of Kansas, 1879, page 784, chap. 84, § 4914, taken from Statutes of 1876, 869, § 4604, enacted March 4, 1874, viz.: — "Every railroad company, organized or doing business in this State, shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." In 1873 the case of Kansas Pacific R. Co. v. Salmon, 11 Kan. 93, was decided, and owing to the hardship felt to exist in this case, the law was changed by the statute referred to above in the following year. The jury in the court below had given a verdict for $7,500 to a widow for personal injuries resulting in the death of her husband, and a new trial was refused. The case was then taken up on error and decided against the plaintiff, upon the ground that a previous statute making railways liable for negligence in certain cases (Laws of 1870, chap. 93, § 1), did not apply to negligence between co-employees of a railway company.

46 Revised Code of 1880, vol. I, page 342, § 1307, viz.: — "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of

lina, [49] Rhode Island,[50] Texas,[51] Wisconsin,[52] Wyoming,[53] Ala-

agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." The note to this section is as follows, viz.: — "Under the statute prior to the passage of chapter 169, Laws of 1862, it was held in harmony with the current of common-law authority that the principal is not liable for damages sustained by an employee for the negligence of a co-employee in the same general service, and that the fourteenth section of the act entitled An Act to grant railroad companies the right of way, approved January 18, 1853, did not change the general rule on the subject. After the act of 1862 took effect, it was held that while the seventh section thereof gave an employee of a railroad company a right to recover for injuries caused by the negligence of a co-employee, the liability was nevertheless measured by a different standard and rule as to negligence from what it is in cases of injuries to passengers. While extraordinary care and caution are required with respect to passengers, ordinary care only is due to the employee." See, also, a long list of authorities in support of the new doctrine, in the same note, pp. 343, 344, 345, 346.

[47] Revised Code of 1880, p. 309, § 1054, viz.: — "Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of their agents, engineers, or clerks, or for the mismanagement of their engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for the gross negligence of its servants."

[48] Laws of Revised Statutes (1879), 471, § 318, viz.: — "That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger." See, also, Laws, &c., of the Territory of Montana, 1873 (extra), 104 and 109, note.

[49] Laws of 1897, chap. 57. The act does not apply to an action for injuries received before its passage. Rittenhouse v. Wilmington Street Ry. Co., 120 N. C. 544; 26 S. E. Rep. 922.

[50] Public Statutes of 1882, p. 553, chap. 204, § 15, viz.:—"If the life of any person, being a passenger in any stage-coach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such

bama,[54] Massachusetts,[55] and Missouri,[56] statutes, the substance of which is set out in the notes, have been passed, under the wholesome operation of which the old rule of non-liability is

common carriers, proprietor or proprietors, or by the unfitness, or negligence, or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages, for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased."

[51] For the construction of this statute see Texas Central R. Co. v. Frazier, 90 Tex. 33; 36 S. W. Rep. 432; Culpepper v. International & G. N. Ry. Co., 90 Tex. 627; 40 S. W. Rep. 386.

[52] Laws of 1875, published March 18, 1875, approved March 4, 1875, viz.: — "Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other servant or agent thereof, without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in, this State; and no contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability." The influence of the railroads procured a repeal of this statute in 1880. Laws of 1880, chap. 332.

[53] Compiled Laws of Wyoming (1876), 512, chap. 97, § 1. Approved December 7, 1869, viz.: — "An act to protect railroad employees who are injured while performing their duty." "Any person in the employment of any railroad company in this Territory, who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock, of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company." § 2. "This act shall take effect from and after its passage."

[54] Code 1886, § 2590, *et seq.*, passed February 12, 1885. Masters in general are made liable for injuries caused by reason of defective ways, works, or machinery, or by the negligence of superior servants, or by the act of any employee while obeying

practically abrogated. Except in California and Dakota, it may be said that in each of the States just mentioned the old rule is entirely abandoned, and an adequate remedy provided by the

rules and regulations of the master, or by executing particular instructions. It is a substantial copy of the English act.

55 Acts and Resolves of Mass., 1887, chap. 270. It is modelled after the Employers' Liability Act, and comprehends all classes of employees except domestic servants and farm laborers. For the construction of the statute see Adasken v. Gilbert, 165 Mass. 443; 43 N. E. Rep. 199; Crowley v. Cutting, 165 Mass. 436; 43 N. E. Rep. 197; Reynolds v. Barnard, 168 Mass. 226.

56 1 Revised Statutes (1879), 349, chap. 25, § 2121, viz.: — "Damages for injuries resulting in death in certain cases, when and by whom recoverable." "Whensoever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars; or of any master, pilot, engineer, agent or employee, whilst running, conducting or managing any steamboat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage-coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them he dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency." "Although," says Mr. Fall ("Employers' Liability," 41), "at first sight this law would seem to afford a remedy for injuries sustained by a servant, and was quoted during the discussion in England" (over the Gladstone Bill) "to show that in Missouri it changed the rule of the common law, the Court of Appeals has decided (one judge dissenting) that the phrase 'any per-

statutes for the proper protection of railway employees, while in California and Dakota the statutes define the limit of liability, and *quoad hoc* recognize and assert the propriety of legislation upon this subject.[57]

§ 380. Should the employee be allowed to make a contract releasing his employer from the liability imposed by these statutes.— Immediately upon the passage of such statutes as are considered in the preceding section, the question arose whether the employee might lawfully contract himself out of the operation of the act. In the English Act,[58] there is nothing either permitting or forbidding such a contract; and, no sooner was it enacted, than many railway and mining corporations, as also many other companies and private individuals, who employ large numbers of servants, attempted to compel their laborers to sign contracts of hire releasing them from liability for damage under the act; and these contracts have been declared valid and enforcible, in the Court of Queen's Bench, in the case of Griffiths v. The Earl of Dudley.[59] Such contracts are, I am informed, very generally made by English operatives; and, inasmuch as the courts uphold them, and all efforts to amend the act of 43 and 44 Vict. so as to render them illegal have failed, when it is considered that in more than ninety per centum of all the actions of this nature which are brought in the English Courts of Record, the contributory negligence of the plaintiff is, as has been shown by a careful examination of the court records as to this very point, a valid defense, we see that the practical benefits of the act are in reality, speaking from the standpoint of the employee, less than they at first sight appeared to be. It is, moreover, asserted, and the assertion has at least a show of foundation, that English employers have found that the operation of the act, in connection with the contract of exemption required from the employee, has been to diminish materially the amount

son' does not include fellow-servant, and that his remedy (see 64 Mo. 112; overruling 36 Mo. 13; 59 Mo. 285; Revised Statutes, p. 350, note) remains the same as it was before the statute was passed."

[57] See, also, "Liability of Masters to Servants," by Judge Cooley, 2 Southern Law Rev. (N. S.) 108; "Master's Liability to Servants," by Francis Wharton, 3 Southern Law Rev. (N. S.) 730; and two articles upon the same subject, by A. B. Jackson, Esq., of the Minneapolis, Minn., bar, 5 Southern Law Rev. 200 and 380.

[58] 43 and 44 Vict., chap. 42.

[59] L. R. 9 Q. B. Div. 357.

of gross recoveries by employees in actions of this nature, in the English courts since 1880 — which is only another way of saying that the Employers' Liability Bill is money in the pocket of the employer, and a corresponding actual money loss to the employee.

§ 381. The same subject continued.— Griffiths v. The Earl of Dudley.— In this country, so far as my reading goes, such contracts are forbidden by statute only in Iowa,[60] Wisconsin, Wyoming,[61] and in Massachusetts.[62] But it is held in Kansas, that a railway company may not contract in advance with its employees for the waiver and release of the statutory liability imposed upon such companies for the negligence of one employee causing injury to another employee without regard to the negligence of the company.[63] In Griffiths v. The Earl of Dudley,[64] it is held that an employee may not only contract himself out of the operation of the act of 43 and 44 Vict., chap. 42, but that such a contract on his part will operate so as to bind his widow in the event of his death from injury, and thus bar her right to sue; that is to say, that an employee, by such a contract, not only cuts himself off from his right of action under the act, but also prevents the prosecution of an action by his widow under Lord Campbell's Act. It not being questioned that the contract bars an action by the personal representatives, it was argued that the widow obtained a new independent right of action under the act of 27 and 28 Vict., chap. 95; that this

60 In the statute to which reference has already been made. (1 Rev. Code of 1880, p. 342, § 1307), viz.: "No contract which restricts such liability" (*i. e.* the liability imposed by the statute) "shall be legal or binding."

61 See "Contracts in Contravention of Statute," in McKinney on Fellow-Servants, whose excellent treatise I have freely consulted in writing this chapter.

62 Chap. 74, § 3, of the public statutes says: — "No person or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence, or from the negligence of other persons in his or its employ." This must, however, be understood to refer only to the common-law liability of the employer as understood by the courts of Massachusetts.

63 Kansas, &c., R. Co. v. Peavey, 29 Kan. 169; 44 Am. Rep. 630. See, also, Union Pacific Ry. Co. v. Harris, 33 Kan. 416; 19 Am. Law Rev. 669.

64 L. R. 9 Q. B. Div. 357.

right her husband had no power to contract away, and that while he might have the power to bargain away his own right to recover damages, he should not be allowed to bargain away the right of his family, under the Act of Lord Campbell. But the court thought this an unsound view, and held, without any dissent, that the contract was valid to bar alike the one right and the other.[65]

§ 382. The English doctrine not approved in America.— The weight of authority in this country is plainly in favor of a doctrine upon this point the opposite of that asserted in the English case of Griffiths v. The Earl of Dudley[66] and it is easy to learn from the practical outcome of the English act — which was intended to secure greater protection for the employee, but which in verity does him more harm than good — that if anything of substantial benefit is to come to the serving class, from legislation of this character, such contracts of exemption as we have been considering must be made illegal and impossible; otherwise, the shield turns itself into a sword, and the last end of such legislation is, for the class sought to be benefited, worse than the first.

§ 383. Contracts releasing the employer from his common law liability.— In addition to the restraint imposed by the statutes hereinbefore referred to, contracts waiving a claim for damages against the master have also been declared invalid at common law by several courts of the highest rank. In Roesner v. Hermann,[67] it was held by Judge Gresham, in the United States Circuit Court, that an employer cannot protect himself by contract with his employee against the consequences of his own negligence in not providing safe and suitable machinery. It was also decided by the Supreme Court of Ohio, in Railroad Com-

[65] Griffiths v. Earl of Dudley, L. R. 9 Q. B. Div. 357. *Cf.* Wilson v. Merry, L. R. 1 H. L. Sc. App. 326; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555.

[66] L. R. 9 Q. B. Div. 357.

[67] 10 Biss. 486, Judge Gresham saying: — "If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer will be of no avail." This case is criticised by the editor of the Albany Law Journal (24 Alb. Law Jour. 383), who cites the Georgia cases with approbation, and declares that he has no doubt the decision of Judge Gresham is wrong.

pany v. Spangler,[68] that railroad companies are liable to their servants for injuries caused by the carelessness of those who are superior in authority and control over them on grounds of public policy, and that a contract for exemption from such liability contravenes the policy thus established and is void. The Supreme Court of Arkansas also declares such contracts iniquitous. In Little Rock, &c., Ry. Co. v. Eubanks,[69] that court, after suggesting that it might be a question whether under the constitution of that State railroad companies could denude themselves of responsibility by stipulation in advance, put the contention on higher grounds and said:— "But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servants with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited (Griffith v. Earl of Dudley) it is said this is not against public policy because it does not affect all society, but only the interest of the employed. But surely the State has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community, and it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company and every owner of a factory, mill or mine would make it a condition, precedent to the employment of labor, that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supply of machinery and materials, and thus increase the perils of occupations which are hazardous, even when well managed; and the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity." In Memphis, &c., R. Co. v. Jones,[70] the Supreme Court of Tennessee has held that

[68] 44 Ohio St. 471.
[69] 44 Ark. 460, 468.
[70] 2 Head, 517.

such a contract would not protect the master against gross negligence.

§ 384. **The Georgia cases.**— On the other hand, the Supreme Court of Georgia have in several cases[71] held contracts of this character legal and binding upon the employee so far as they do not waive any criminal neglect of the employer. The effect of these decisions is that the servant of a railroad company, for instance, not only takes upon himself the incidental risks of the service, but he may, by previous contract, release the company from its duty to furnish him a safe track, safe cars, machinery, and materials, and suitable tools with which to work.

§ 385. **The laws of other countries as to the liability of an employer for injuries to an employee caused by the carelessness of a fellow-employee.— Scotland.**— In Scotland, the courts made a persistent but ineffectual fight against the influence of the case of Priestley v. Fowler.[72] In the case of Sword v. Cameron,[73] decided in 1839, a year after Priestley v. Fowler, the Scotch judges declined to follow the English authority. It was an action to recover damages from the owner of a quarry, because one of the quarrymen, while carelessly blasting a rock, had injured a fellow-workman. The court held the employer responsible for the negligence of his workman, and the plaintiff had judgment against him. In Dixon v. Rankin,[74] decided in 1852, the Scotch Court again disapproved of the position taken by the English Court, and after carefully reviewing Priestley v. Fowler,[75] unanimously followed the rule of Sword v. Cameron.[76] Lord Justice Clerk, in delivering the opinion, after declaring the obligation of the employer as to safe and suitable machinery and apparatus, it being an action wherein a master was held liable for an accident in a coal-pit, said:— "In this obligation is equally included — as he cannot do everything himself — the duty to have all acts by others whom he

[71] Hendricks v. Western, &c., R. Co., 52 Ga. 467; Western, &c., R. Co. v. Bishop, 50 Ga. 465; Western, &c., R. Co. v. Strong, 52 Ga. 461; Galloway v. Western, &c., R. Co., 57 Ga. 512. See a criticism of these cases by Judge Thompson, in Thompson on Negligence, 1025, and 1 Cent. Law Jour. 465.

[72] 3 M. & W. 1. See §§ 308, 309, *supra*.

[73] 1 Ct. of Ses. Cas. 493.

[74] 14 Ct. of Ses. Cas. 420.

[75] 3 M. & W. 1.

[76] 1 Ct. of Ses. Cas. 493.

employs done perfectly and carefully in order to avoid risk. The obligation to provide for the safety of the lives of his servants by fit machinery, is not greater or more inherent in the contract, than the obligation to provide for their safety, from the acts done by others whom he also employs. The other servants are employed by him to do acts which, of course, he cannot do himself; but they are acting for him, and instead of himself, as his hands. For their careful and cautious attention to duty, for their neglect of precautions, by which danger to life may be caused, he is just as much responsible as for such misconduct on his own part if he were actually working or present; and this particularly holds to the person he entrusts with the direction and control over any of his workmen, and who represents him in such a matter. The servant, then, in the contract of service in Scotland, undertakes no risks from the dangers caused by other workmen from want of care, attention, prudence and skill which the attention and presence of the master, or others acting for him, might have prevented. His master is bound to him in obligations which are to protect him from such dangers. The principle of the contract in England being different, of course, different results follow."[77]

§ 386. **The Scotch rule further stated.**— Again, in Gray v. Brassey,[78] the same doctrine is emphasized, the judges still refusing to follow the rule of Priestley v. Fowler. The Lord President said that the master was liable for the negligence of his authorized servants as well as for his own negligence, and Lord Cunningham, for the court, said:— "Although our reports for many years show that masters have been held liable to all third parties (without excepting fellow-servants) suffering from the negligence and unskillfulness of other servants hired by the employer, followed up by the late case of Rankin v. Dixon, in the Second Division, the books hardly show the extent of the understanding in Scotland, as it is believed there is no man of common intelligence, and experience in our affairs, who entertains a different opinion. Many industrious people may have relied on that security; and, at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abrogate the responsibility of the latter, existing at the date of their em-

[77] Dixon v. Rankin, 14 Ct. of Ses. Cas. 420.

[78] 15 Ct. of Ses. Cas. 135.

ployment. The law of Scotland on this point has been long established and acted on, while this question is new in England, arising merely under an act recently passed; and I must, with perfect deference, remark that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to be altogether satisfactory or reasonable."[79] But, in 1858, the House of Lords, in the cases of Bartonshill Coal Co. v. Reid, and Bartonshill Coal Co. v. McGuire,[80] overruled the unanimous judgments of the Scotch judges in favor of the plaintiffs in the actions to which I have referred, which had been rendered upon the ground that an employer is liable to his employee for the negligence of his authorized agent, although that agent is a fellow-servant of the injured person, in accordance with the rule of the earlier case of Sword v. Cameron.[81] "Thus the Scotch law was brought into harmony with the position taken by the English courts upon this question, and what had been declared law by twenty-five judges was changed by this judgment, and the law of both countries was made the same."[82]

§ 387. **The rule in Ireland.**— In Ireland, the courts have always followed Priestley v. Fowler. The question first came before those courts in 1858, in McEnery v. Waterford & Kilkenny Ry. Co.,[83] which affirmed the English rule, and all of the subsequent Irish decisions uniformly accept it.

§ 388. **The rule on the Continent of Europe.**— In France, under the Civil Code, it seems that an employer is liable to an employee for negligence of a co-employee.[84] And in Italy the law is the same. The Italian Code was modeled upon the French Code, and that section which considers this subject is an almost literal translation of the French.[85] In Prussia, upon the author-

79 See, also, Baird v. Addie, 16 Ct. of Ses. Cas. 490; Brownlie v. Tennant, 16 Ct. of Ses. Cas. 998; O'Byrne v. Burns, 16 Ct. of Ses. Cas. 1025; Hill v. Caledonian Ry. Co., 16 Ct. of Ses. Cas. 569.

80 3 Macq. H. L. Cases, 266; 4 Jur. (N. S.) 767, 772; 1 Pat. Sc. App. 785, 796.

81 1 Ct. of Ses. Cas. 493.

82 Fall's Employer's Liability, 33.

83 8 Ir. C. L. R. 312.

84 Civil Code, Art. 1382, 1383, 1384. *Cf.* Serandat v. Saisse, L. R. 1 P. C. 152, a decision by the judicial committee of the Privy Council on appeal from the Mauritius which is under the control of the French law. See, also, Fall's Employer's Liability, 33.

85 Italian Civil Code, art. 1153.

ity of Mr. Fall, who may be called as an expert witness, it may be said that employers are held liable, for the most part, for injuries to their servants occasioned by the negligence of their fellow-servants.[86] It appears, therefore, that the position of the English and American courts upon the matter of an employer's liability to his employees for personal injuries is somewhat anomalous; that it is very far from being a satisfactory position, and that there is a growing tendency to modify by legislation the extreme grounds the courts have taken, and even to abolish entirely common employment as a defense. The law in its present attitude upon these questions seems to have been developed under the more or less conscious influence of the great railway corporations of the country. It cannot be doubted that such an influence is, upon the whole, unfavorable to the servant, and the tendency of the courts to go to the very verge upon this point in the interest of these companies has in some cases been not improperly checked by appropriate legislation.

[86] Fall's Employer's Liability, 35, citing Holtzendorff's Encyclopædia.

CHAPTER XIV.

SPECIAL AND PARTICULAR CASES.

§ 389. Intoxication as contributory negligence.
390. Intoxication as want of ordinary care.
391. The intoxication of trespassers.
392. This rule illustrated.
393. The presumption of sobriety.
394. This rule further stated.
395. One intoxicated not beyond the pale of the law.
396. Deafness, blindness, or other physical infirmity as a defense.
397. The rule as to physical disabilities further considered.
398. Negligence as a defense in actions upon policies of insurance.
399. The same subject continued.
400. In actions for failure to transmit or deliver telegraphic dispatches.
401. The same subject continued.
§ 402. The rule in the admiralty.
403. Lord Stowell's rules considered.
404. Lord Stowell's second rule defined.
405. Contributory negligence in actions between attorney and client.
406. In actions between physician and patient.
407. The same subject continued.
408. In actions between innkeeper and guest.
409. Cayle's case.
410. The key of the guest's room.
411. Duty of the guest to exercise care.
412. The rule illustrated.
413. Accidents in discharge of fire-works.
414. Injury to one walking on the sea shore.
415. Where the plaintiff's property is a nuisance.
416. Miscellaneous.

§ 389. Intoxication as contributory negligence.— The circumstance that at the time of the accident, the person injured was intoxicated is not an excuse for his failure to exercise that degree of care which is demanded of a sober man under the same circumstances.[1] But, on the other hand intoxication on the part of a plaintiff is not, as a general rule, in itself, and as a matter of law, such negligence, or evidence of such negligence, as will

[1] Price v. Philadelphia, Wilmington & Baltimore R. Co., 84 Md. 506; 36 Atl. Rep. 263; Fisher v. West Virginia R. Co., 42 W. Va. 183; 24 S. E. Rep. 570.

bar a recovery when an action is brought for injuries sustained by reason of the culpable and negligent default of another.[2] "A drunken person sometimes acts with great care, although the contrary is undoubtedly the general rule."[3] The law refuses, therefore, to impute negligence, as of course, to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing, and negligence sufficient to bar an action for damages quite another thing. "Intoxicated persons," it is said in Alger v. Lowell,[4] "are not removed from all protection of law, the plaintiff was bound to show that he was in the exercise of due care, and the jury were so instructed. If he used such care, by himself or others, his intoxication had nothing to do with the accident; the city may be liable under some circumstances[5] for an injury sustained by * * * an intoxicated person if the condition of the injured person does not contribute in any degree to occasion the injury"— which is very nearly the same thing as to say that the mere occurrence in point of time between the plaintiff's intoxication and the happening of the injury will not, in itself, be sufficient to bar the right to recover.

§ 390. Intoxication as want of ordinary care.— When contributory negligence is the issue, it must appear that the plain-

2 Ford v. Umatilla County, 15 Or. 313; Seymer v. Lake, 66 Wis. 651; Stuart v. Machias Port, 48 Me. 477; Weymire v. Wolfe, 52 Iowa, 533; Loewer v. City of Sedalia, 77 Mo. 431; City of Salina v. Trosper, 27 Kan. 545; Alger v. Lowell, 3 Allen, 406; Baker v. Portland, 58 Me. 199, 205; 4 Am. Rep. 274, where the court said:— "Recrimination is not a good plea in bar in actions of this kind, unless the plaintiff's claim originates in his offense (drunkenness), or unless the offense has in some way contributed to produce the injury. * * * It has been settled that intoxication is not conclusive evidence of a want of ordinary care." Baltimore, &c., R. Co. v. Boteler, 38 Md. 568; Burns v. Elba, 32 Wis. 605; Thorp v. Brookfield, 30 Conn. 321; Healy v. New York, 3 Hun, 708; Ditchett v. Spuyten Duyvil, &c., R. Co., 5 Hun, 165; O'Hagan v. Dillon, 10 Jones & S. 456; Cramer v. Burlington, 42 Iowa, 315; Robinson v. Pioche, 5 Cal. 460; Shearman & Redfield on Negligence (5th ed.), § 93; Thompson on Negligence, 1174, § 22, 1203, § 50. See, also, § 197, *supra*.

3 Shearman & Redfield on Negligence (5th ed.), § 93 (n.).

4 3 Allen, 406.

5 "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it," said Heydenfelt, J., in the case of Robinson v. Pioche, 5 Cal. 460.

tiff did not exercise ordinary care, and that, too, without reference to his inebriety, or he may have his action. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk. If his drunkenness in no way contributed to the injury it is immaterial whether he was or was not drunk.[6] This principle is well illustrated in the case of Ford v. Umatilla County,[7] decided by the Supreme Court of Oregon. The plaintiff, while intoxicated and driving across a bridge, was injured by the falling of the structure. The court in delivering judgment against the defendant said:—"Whether the respondent (the plaintiff) was drunk or sober, he had the right to suppose that a bridge open to the use of the public, and under control of the county officials, would bear up his load in crossing it. Possibly his judgment as to its strength would have been better while sober than while drunk, but the appellant can claim nothing upon that ground. The county, by leaving the bridge open to public travel said, in effect, that it was secure, and because the respondent might be inclined to be more credulous when intoxicated than when sober, it was no fault that would excuse the appellant. We are unable to discover where or how the question of negligence could have arisen. The traveling public are not required to be bridge inspectors in order to entitle them to recover for such neglect, and their attempting to cross such a structure circumstanced as this one seems to have been under the assumption that it was safe, could not be charged as contributory negligence whatever might be their condition as to intoxication or sobriety. There is no pretense that the respondent drove his team carelessly or recklessly, or did any act which contributed to the injury, except in attempting to cross the bridge, and the appellant in the manner before suggested invited him to do that." As sober men are frequently careless and guilty of negligence, so it very occasionally happens that drunken men are careful and prudent, or if negligent, that their intoxication cut no figure in the matter. From which the law infers that there is no proper and necessary connection between sobriety and carefulness, nor between inebriety and negligence. This is a view, however, to be taken with the qualification that while intoxication is not,

[6] Ward v. C., St. P., Minn. & O. Ry. Co., 85 Wis. 601; 55 N. W. Rep. 771.

[7] 15 Or. 313.

as a matter of law, to be regarded contributory negligence, it is held that it tends to show negligence on the part of the plaintiff.[8] "Intoxication is competent, but not conclusive evidence of negligence."[9] The plaintiff is, therefore, on the one hand, entitled to an instruction to the effect that his intoxication is not, as matter of law, contributory negligence or conclusive evidence of such negligence as will prevent a recovery; and the defendant on his part is entitled to an instruction to the effect that the intoxication of the plaintiff is evidence of negligence, from which the jury are at liberty to infer such negligence as will bar the action.[10] Under the Georgia Code in certain classes of actions against railway companies, the intoxication of the plaintiff is made an absolute defense,[11] but this is counter to the current of authority.

§ 391. The intoxication of trespassers.— Drunkenness, however, on the part of a trespasser is universally held to be

[8] Aurora v. Hillman, 90 Ill. 61; Illinois, &c., R. Co. v. Cragin, 71 Ill. 177; City of Rock Island v. Vanlandschoot, 78 Ill. 485.

[9] Abbott's Trial Evidence, 585, § 12, citing Stuart v. Machias Port, 48 Me. 477; Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274; Wynn v. Allard, 5 Watts & S. (Penn.) 524. The fact that the person injured was at the time of his injury under the influence of liquor or intoxicated is evidence of contributory negligence to be considered by the jury, but it does not conclusively establish that defense unless it is proved to have been the proximate cause of the injury. Northern Pacific Ry. Co. v. Craft's Administratrix, 29 U. S. App. 687, 694; 69 Fed. Rep. 124; Holmes v. Or. & Cal. Ry. Co., 6 Sawyer, 262, 290; Fitzgerald v. The Town of Weston, 52 Wis. 354; 9 N. W. Rep. 13; Loewer v. The City of Sedalia, 77 Mo. 431; Cramer v. The City of Burlington, 42 Iowa, 315; Ward v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 85 Wis. 601; 55 N. W. Rep. 771; Bradwell v. Pittsburgh & West End Passenger Ry. Co., 153 Penn. St. 105; 25 Atl. Rep. 623.

[10] Wynn v. Allard, 5 Watts & S. 524; Illinois, &c., R. Co. v. Cragin, 71 Ill. 177; Cleghorn v. New York, &c., R. Co., 56 N. Y. 44; People v. Eastwood, 14 N. Y. 562; Wood v. Andes, 11 Hun, 543; Cassedy v. Stockbridge, 21 Vt. 391; Chicago, &c., R. Co. v. Bell, 70 Ill. 102; Fitzgerald v. Weston, 52 Wis. 354; City of Salina v. Trosper, 27 Kan. 545. In an action for personal injuries, where defendant introduced evidence that plaintiff was intoxicated at the time of receiving the injuries, evidence as to plaintiff's general reputation and character for sobriety was not admissible in rebuttal, since it raised a collateral question. 53 Pac. Rep. (Wash.) 110.

[11] Code of Ga., §§ 2972, 3034. *Cf.* Southwestern R. Co. v. Hankerson, 61 Ga. 114.

such negligence as will prevent entirely any recovery of damages for injuries sustained at the time, or by reason of the trespass. Intoxication under these circumstances is, in law, a more serious irregularity than intoxication merely. When one comes upon my premises without warrant, and in addition to the wrongdoing involved in the trespass, drinks himself drunk, and thus renders himself helpless and irresponsible, and under these circumstances, and being in that condition, sustains an injury, he is in no position to call upon me for damages for anything he has suffered, for which any conduct upon my part, short of a wanton and wilful infliction of injury, is the cause or occasion.[12] Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we instinctively concede to blindness, or deafness, or any other physical infirmity. Trespassers go at their peril. That is settled law. Much more is it just to hold that they make themselves drunk at their peril. Disabilities, moreover, of any kind are to be a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blameworthy upon the part of a sober man, but that held the same conduct, on the part of the same man when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances.[13] Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that helpless condition wander upon the premises of sober men and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence; and the courts consistently hold that such intoxicated trespassers have no standing in any forum where justice is impartially administered.

§ 392. This rule illustrated.— Many cases illustrate and enforce this doctrine. Herring v. Wilmington & Raleigh R. Co.[14] is the leading case. The facts were these:—Two of the

[12] Mulherrin v. Delaware, &c., R. Co., 81 Penn. St. 366.

[13] Chicago, &c., R. Co. v. Bell, 70 Ill. 102; Toledo, &c., R. Co. v. Riley, 47 Ill. 514; Price v. P. W. B. R. Co., 84 Md. 506, 512-513; 36 Atl. Rep. 263; Smith v. Norfolk & Southern R. Co., 114 N. C. 728; 19 S. E. Rep. 863, 923; Ellerbe v. Carolina Central R. Co., 118 N. C. 1024; 24 S. E. Rep. 808.

[14] 10 Ired. 402; 51 Am. Dec. 395.

plaintiff's slaves, being allowed to go about on Sundays as they pleased, became intoxicated; and, wandering upon defendant's track, lay down and fell asleep at a point upon a straight line in the road where they could be seen from an approaching train for more than a mile. They were, however, run over by a passing train, one of them being killed and the other being seriously injured. The plaintiff argued that under these circumstances the law should imply negligence upon the part of the defendant's train-men, but the court held that position not tenable, and insisted that being upon the track in a condition of helpless intoxication, was in itself such contributory negligence as would prevent a recovery. This is the rule consistently adhered to by all the courts in actions brought by trespassers upon railway property for injuries sustained in a fit of intoxication.[15]

§ 393. The presumption of sobriety.— It is to be presumed that a person of mature years will not stand still upon a railway track and deliberately suffer himself to be run down. It is also a presumption that all men are in the possession of their senses, and will exercise ordinary diligence in times of danger to take care of themselves. It is in accordance with these assumptions held, that when an engineer of a locomotive engine sees ahead of him a man upon the track, he may presume that the man possesses ordinary capacity, that he can see, and hear, and reason from cause to effect, and that, as a train approaches him, he will step aside and not be run over. It is, therefore, not negligence on the part of the engineer not to stop his train and go forward and push such a person off the track, nor is it wrong not to slacken the speed of the train, but to rely upon the person on the track, if he may reasonably be supposed to see or hear the train, to take care of himself.[16] The train-men need not, in order to escape

[15] Denman v. St. Paul, &c., R. Co., 26 Minn. 357; McClelland v. Louisville, &c., R. Co., 94 Ind. 276; Yarnall v. St. Louis, &c., R. Co., 75 Mo. 575; Little Rock, &c., R. Co. v. Pankhurst, 36 Ark. 371; Houston, &c., R. Co. v. Smith, 52 Tex. 178; Houston, &c., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632; Illinois, &c., R. Co. v. Hutchinson, 47 Ill. 408; Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Richardson v. Wilmington, &c., R. Co., 8 Rich. (Law) 120; Felder v. Louisville, &c., R. Co., 2 McMull. 403; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Weymire v. Wolfe, 52 Iowa, 543; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 279.

[16] Indianapolis, &c., R. Co. v. McClaren, 62 Ind. 568; Lake

the imputation of negligence, assume that persons they see upon the track are deaf or blind, or paralyzed or idiots, or drunk, but are justified in acting freely upon the contrary assumptions.

§ 394. **This rule further stated.**— "If an engineer," said the Supreme Court of Michigan, in a leading case, "sees a team and carriage, or a man, in the act of crossing the track far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is deaf or insane, or, from some other cause, insensible of the danger; or if he sees a man or a team approaching a crossing, too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things and to presume that the man driving the team, or walking upon the track, has the use of his senses, and will act upon the principles of common sense, and the motive of self-preservation, common to mankind in general, and that they will, therefore, get out of the way; that those on the track will get off, and those approaching it will stop in time to avoid the danger; and he, therefore, has the right to go on without checking his speed, until he sees that the team, or man, is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster. If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not or would not, and he should, therefore, take means to stop his train in time. A more stringent rule than this—a rule that would require the engineer to check his speed, or stop his train, whenever he sees a team crossing the track, or a man walking on it, far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not; or which would require the engineer to know the deafness or blindness,

Shore, &c., R. Co. v. Miller, 25 Mich. 279; Philadelphia, &c., R. Co. v. Spearen, 47 Penn. St. 304; Houston, &c., R. Co. v. Smith, 52 Tex. 178.

or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities, of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching the crossing upon a highway—though not seen—any such rule, if enforced, must effectually put an end to all railroads as a means of speedy travel or transportation, and reduce the speed of trains below that of canal boats forty years ago, and would effectually defeat the object of the legislature in authorizing this mode of conveyance. But how are railway companies, or their engineers or employees, to know the personal peculiarities, the infirmities, personal character, or station in life, of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road, or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers, of which they know nothing? These questions suggest their own answers."[17]

§ 395. One intoxicated not beyond the pale of the law.—An intoxicated person, it is, however, to be remembered, is not, by reason of his intoxication, so far beyond the pale of the law that he may be injured with impunity. He is as much entitled to care and caution on the part of others as though he were sober, and plainly much more in need of it.[18] Accordingly, if he is injured when, by the exercise of ordinary care upon the part of the person inflicting the injury, he might have escaped the injury, he may, in spite of his intoxication, have his action.[19] Where the plaintiff became intoxicated in the defendant's saloon, and a companion, also intoxicated, pinned paper to the back of the former, in the defendant's presence, it was held that the plaintiff might sustain his action for the injuries received.[20] And in a case in Michigan it was held that if the goods of a guest are placed in charge of an innkeeper, and the guest gets intoxicated at the bar, the landlord is, if anything, required to exercise

17 Lake Shore, &c., R. Co. v. Miller, 25 Mich. 279. See, also, Wharton on Negligence, § 389, *a*.

18 Robinson v. Pioche, 5 Cal. 460; O'Keefe v. Chicago, &c., R. Co., 32 Iowa, 467; Whalen v. St. Louis, &c., R. Co., 60 Mo. 323.

19 Kean v. Baltimore, &c., R. Co., 61 Md. 154; Houston, &c., R. Co. v. Reason, 61 Tex. 613; Thompson on Negligence, 1174, § 22.

20 Rammell v. Schambacher, 120 Penn. St. 579; 11 Atl. Rep. 779.

a higher degree of care.[21] So, too, where a helpless drunken passenger on a railway train refusing to pay fare, the conductor knowing his condition expelled him, not at a station, and in the snow, by reason whereof the passenger was severely frozen, the company was compelled to pay him damages.[22] In an action to recover for injuries sustained by the plaintiff to his property, by reason of the negligent and careless conduct of the defendant, it is insufficient as a defense to admit the injury, and aver that at the time the damage was done the defendant was intoxicated by liquor, sold to him by the plaintiff.[23] This sort of a plea amounts to setting up the contributory negligence of the plaintiff in selling liquor, by means of which the defendant became intoxicated and did the damage, in bar of the action. Neither does the purchasing and drinking of liquor constitute contributory negligence, which would bar a recovery in an action in which it appears that the plaintiff, having bought liquor from the defendant, drank of it until he became intoxicated and unconscious; and in that condition was expelled from the defendant's saloon late in the night, and died from the consequent exposure.[24] From these two cases it appears that it is not contributory negligence either to sell liquor to the man who, when he is made drunk by it, does you an injury, or to buy and drink the liquor yourself, although, as a result of your spree, you suffer an injury at the hands of the liquor-seller.[25] Intoxication is one of the things that may be proven by the opinions of witnesses, and it is held that in this particular, one need not be an expert in order to be a competent witness.[26] It is, also, error to exclude evidence that the plaintiff was intoxicated at the time of the happening of the accident.[27] While what constitutes negligence is a question

21 Rubenstein v. Cruikshank, 54 Mich. 199. But if the intoxication of the guest actually contributes to his loss he is without remedy. Shultz v. Wall, 134 Penn. St. 262; 19 Atl. Rep. 742; following Walsh v. Porterfield, 87 Penn. St. 376.

22 Louisville, &c., R. Co. v. Sullivan, 81 Ky. 624; 50 Am. Rep. 186.

23 Cassady v. Magher, 85 Ind. 228.

24 Weymire v. Wolfe, 52 Iowa, 533.

25 McCue v. Klein, 60 Tex. 168; 48 Am. Rep. 260.

26 People v. Eastwood, 14 N. Y. 562; McKee v. Nelson, 4 Cowen, 355; Woolheather v. Risley, 38 Iowa, 486; Brannon v. Adams, 76 Ill. 331; Thompson on Negligence, 779, § 2, and the cases there collected.

27 Wynn v. Allard, 5 Watts & S. 524; Illinois, &c., R. Co. v. Cragin, 71 Ill. 177. See, also, Cassedy v. Stockbridge, 21 Vt. 391; Wood v. Andes, 11 Hun, 543; Rock Island

of law—the question, whether or not there was intoxication, belongs to the jury as an issue of fact.

§ 396. Deafness, blindness, or other physical infirmity as a defense.— As a general rule of law, it may be said that physical infirmities, of themselves, do not constitute a defense for a failure to exercise ordinary care under given circumstances. The bluntness of one faculty will not excuse a failure to use the other—as, for an example, deafness will not operate to palliate a failure to use the sense of sight. When one is conscious that his hearing is defective, instead of exercising less, he should, rather, exercise greater care in other respects. What is lacking in the sense of hearing must, if possible, be made up by increased vigilance in looking out for danger with the eye.[28] And so, also, in case of blindness, common prudence requires that the blind should exercise far greater care in proportion to the danger to which men, in general, are constantly exposed, than is required of those in full possession of the faculty of sight.[29] The old and the infirm, however, not less than the young and the agile, have a right to move about and attend to their business, and are entitled to the protection of the law in so doing.[30] Said Chief Justice Hunt, in the opinion in the case of O'Mara v. Hudson, &c., R. Co.:[31]—" The old, the lame, and the infirm, are entitled to the use of the street, and more care must be exercised toward them by engineers than toward those who have better powers of motion. The young are entitled to the same rights, and cannot be expected to exercise as good foresight and vigilance as

v. Vanlandschoot, 58 Ill. 485; Hubbard v. Mason City, 60 Iowa, 400.

[28] Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570; Central, &c., R. Co. v. Feller, 84 Penn. St. 226; Morris, &c., R. Co. v. Haslan, 38 N. J. Law, 147. (*Cf.* with this case, New Jersey, &c., Trans. Co. v. West, 32 N. J. Law, 91); Steves v. Oswego, &c., R. Co., 18 N. Y. 422; Butterfield v. Western, &c., R. Co., 10 Allen, 532; Chicago, &c., R. Co. v. Still, 19 Ill. 508; Illinois, &c., R. Co. v. Ebert, 74 Ill. 399; Hanover, &c., R. Co. v. Coyle, 54 Penn. St. 396; Elkins v. Boston, &c., R. Co., 115 Mass. 190.

[29] Oyshterbank v. Gardner, 49 N. Y. Super. Ct. 263; Winn v. Lowell, 1 Allen, 177; Sleeper v. Sandown, 52 N. H. 244; Peach v. Utica, 10 Hun, 477. *Cf.* City of Centralia v. Krouse, 64 Ill. 19; Davenport v. Ruckman, 37 N. Y. 568; Thompson on Negligence, 431, § 9, 1203, § 51.

[30] Stewart v. Ripon, 38 Wis. 584; Davenport v. Ruckman, 37 N. Y. 568. *Cf.* Phillips v. Dickerson, 85 Ill. 11.

[31] 38 N. Y. 445.

those of maturer years." Physical disabilities of the character considered in this section, which may be designated as natural or providential disabilities, are to be conceded a far higher indulgence in the law than the self-inflicted disability of drunkenness. It may be said that men make themselves drunk at their own proper peril, but men are not to be held blind, or deaf, or lame, or aged, in any such sense.

§ 397. The rule as to physical disabilities further considered.— "A blind man is not required to see at his peril," said Judge Holmes, in his entertaining work entitled "The Common Law."[32] Toward these classes of persons, it is a well-settled rule that there is required to be exercised by the public generally especial care and prudence, while, perhaps, all that can be said of a drunken man in this respect, is that he is not to be wantonly injured.[33] But even in the case of a deaf person, the infirmity, if unknown to others, does not impose upon the latter any higher degree of care not to inflict an injury than they would be required to exercise toward a person in full possession of the faculty of hearing. Thus, the engineer of a railway train is justified in assuming that a person on the track at a crossing is not deficient in the sense of hearing, and he is not bound to take any precautions upon a contrary hypothesis.[34] It is plainly the law that negligence will never be imputed to the halt, or the blind, or the deaf, simply and solely because they go about their business, as other men do, in as careful a way as their faculties permit. Such conduct upon the part of such person is never, *in se*, contributory negligence. They must exercise what care they can—up to the measure of ordinary care, under the circumstances, and if they do, there is no room to impute negligence. "A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages. So one whose sight is dimmed by age, or a near-sighted person whose range of vision

[32] Holmes' Common Law, 109.

[33] Illinois, &c., R. Co. v. Hutchinson, 47 Ill. 408; Field on Damages, §§ 198, 199; Wharton on Negligence, §§ 306, 307, 332, 389, *a*; Shearman & Redfield on Negligence (5th ed.), § 93.

[34] Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 570. See, also, §§ 203, 393, *supra*.

was always imperfect, or one whose sight has been injured by disease" [and it might have been added, in view of the caution in succeeding sentence, one wholly blind, or deaf, or otherwise a victim of some disabling physical infirmity], "is each entitled to the same rights, and may act upon the same assumption. Each is, however, bound to know that prudence and care are in turn required of him, and that if he fails in this respect, any injury he may suffer is without redress."[35]

§ 398. Negligence as a defense in actions upon policies of insurance.— The negligence of the assured, his agents or servants, in the absence of fraud or wilfulness, occasioning a loss by a peril insured against, is no defense to an action, either on a fire or marine policy.[36] As it is often expressed, loss occasioned by negligence is one of the principal risks against which men insure. So the insurance company has been held liable where the accident arose from the careless use of fire in drying the plastering of a room,[37] or from the negligent use of fire in compounding chemicals in a drug store.[38] Neither will the use of the premises as a house of prostitution avoid the policy if there

[35] Davenport v. Ruckman, 37 N. Y. 568 (Hunt, C. J.); affirming 10 Bosw. 20. See, also, Cox v. Westchester Turnpike Co., 33 Barb. 413; Frost v. Waltham, 12 Allen, 85; Thompson v. Bridgewater, 7 Pick. 188; Renwick v. New York, &c., R. Co., 36 N. Y. 133; Holmes' Common Law, 109; Thompson on Negligence, 1203, § 51.

[36] American Insurance Co. v. Insley, 7 Penn. St. 223; 47 Am. Dec. 509; Hillier v. Allegheny, &c., Ins. Co., 3 Penn. St. 470; 45 Am. Dec. 656, and note; Cumberland, &c., Ins. Co. v. Douglas, 58 Penn. St. 419; Nelson v. Suffolk Ins. Co., 8 Cush. 497; Gates v. Madison, &c., Ins. Co., 5 N. Y. 469; 55 Am. Dec. 360; Tilton v. Hamilton Ins. Co., 1 Bosw. 392; O'Brien v. Commercial Ins. Co., 6 Jones & S. 526; Brown v. Kings Co., &c., Ins. Co., 31 How. Pr. 512; Bulman v. Monmouth Ins. Co., 35 Me. 227. Nor will gross negligence release the insurers; for "the law makes a clear distinction between even gross negligence and fraud, and although the former may be evidence tending to show *mala fides*, it is not in fact the same thing." Jonhson v. Berkshire Ins. Co., 4 Allen, 388, 390; Columbia Ins. Co. v. Lawrence, 10 Peters, 517; Waters v. Merchants' Ins. Co., 11 Peters, 213; Henderson v. Western, &c., Ins. Co., 10 Rob. (La.) 164; 43 Am. Dec. 179; Sherwood v. General Ins. Co., 1 Blatchf. 255; Shaw v. Robberds, 6 Ad. & El. 75; May on Insurance, §§ 407-411.

[37] Troy, &c., Ins. Co. v. Carpenter, 4 Wis. 29.

[38] Brown v. Kings Co., &c., Ins. Co., 31 How. 512.

is nothing in the policy forbidding it.[39] But where the negligence is so gross as to squint at fraud, or to amount to positive misconduct and wrong-doing, as where a steamboat captain, in order to increase the speed of his boat for the purpose of winning a race, makes use of turpentine for fuel, and in consequence the boat takes fire and burns up, the insurer is not liable.[40]

§ 399. The same subject continued.— So, also, in respect of policies of life insurance, it is the rule that accidental or unintentional self-destruction is not within a condition forfeiting a policy for suicide.[41] This is equally the rule "whether death result from taking poison by mistake, supposing it a wholesome medicine, or taking an overdose of a dangerous medicine; or from an act done in frenzy or delirium, as by leaping from a window; tearing off a bandage from an artery; or from an act done under the stress of an overpowering force,"[42] as, for an example, where one, being intoxicated, took poison by mistake without intent to destroy his life,[43] or where one holding an accident policy, was injured in carelessly attempting to jump on to the step of an omnibus while in motion.[44] But, in Iowa, it was held, where one was insured against accident while traveling on the conveyances of any common carrier, provided he complied with the rules and regulations of the carrier and exercised due diligence looking to his self-protection, and while riding on a railway train, stood upon the step of the car, upon approaching a station, in violation of the carrier's rules, which were known to him, and was in consequence thrown from the train and injured, that there could be no recovery on the policy.[45]

[39] Behler v. German, &c., Ins. Co., 68 Ind. 353.

[40] Citizens', &c., Ins. Co. v. Marsh, 55 Penn. St. 387.

[41] Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299; 59 Am. Dec. 482; Dean v. American Mutual Life Ins. Co., 4 Allen, 102; 1 Bigelow's Life & Acc. Ins. Cas. 195; Cooper v. Massachusetts, &c., Ins. Co., 102 Mass. 227; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Penfold v. Universal Life Ins. Co., 85 N. Y. 317; 39 Am. Rep. 660; May on Insurance, § 307.

[42] Mr. Freeman's note, 59 Am. Dec. 489, § 3.

[43] Equitable Life Ass. Soc. v. Paterson, 41 Ga. 338; 5 Am. Rep. 535; 3 Bigelow's Life & Acc. Ins. Cas. 534.

[44] Champlin v. Railway Passenger Ins. Co., 6 Lans. 71.

[45] Bon v. Railway Passenger Assurance Co., 56 Iowa, 664; 41 Am. Rep. 127. See, also, as in point upon the general question of

§ 400. In actions for failure to transmit or deliver telegraphic dispatches.— In Koons v. Western Union Telegraph Co.,[46] it was held that where the sender of a telegraphic dispatch, intending to write a certain word, negligently writes what more resembles another word—" two " being so written as to appear to be " ten "—the telegraph company is not liable for damages caused by transmitting the word as it appeared to be written, which is perhaps equivalent to a rule that, in dealing with a telegraph company, illegible chirography will be held, if it occasion any trouble or injury, such negligence or default on the part of the sender of the dispatch as will prevent his recovery of damages from the company. A person who addressed his telegram to " Mrs. La Fountain, Kankakee," a city of twelve thousand inhabitants, and failed to make the address more definite when the company called his attention to it, was held guilty of contributory negligence barring recovery of a statutory penalty for negligence in transmission. The court said:—" The appellee was guilty of negligence. His attention was called to the fact that the name of the person to whom the message was addressed should be given, and that the street and number should be given. He failed to give either and rested upon the supposition that she was well known. This was not such prudence and care as the law requires. If a man addresses a message to Mrs. Jones, or Mrs. Smith, in a city of twelve or fifteen thousand inhabitants, he exercises a degree of care much below the legal standard. It may possibly be, that if the telegraph company had accepted the message without calling the sender's attention to the insufficiency of the address, it could not be held that there was contributory negligence, but here the sender of the message had his attention directed to the insufficiency of the address, and instead of endeavoring to remedy the defect, elected to incur the hazard of its safe transmission. He was in fault, he assumed the risk, and he cannot make another suffer for the consequences of his own negligence. Slight care on his part would have provided the means of identifying the person to whom the message was sent, and having after due warning failed to exercise this care,

accidental self-destruction as a defense as distinguished from suicide, Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299; 59 Am. Dec. 482, and the learned annotation at pp. 487-497; Bliss on Life Insurance, § 228; Bunyon on Life Assurance (2d ed.), 71; May on Insurance, § 308; Reynolds on Life Insurance, 105, 107.

[46] 102 Penn. St. 164.

he is in no situation to demand a penalty."[47] And where a dispatch was addressed to "291 Rampart street," and it appeared that the street was divided into North and South Rampart streets, each having a number 291, and the person to whom the dispatch was delivered receipted for it and said the one to whom it was addressed lived there, the company was held not liable.[48] A regulation of a telegraph company, printed on blanks, prescribing limits within which a message will be delivered free, and requiring a deposit to cover delivery charges if the message is to be delivered outside of the limits, is reasonable; and where the person to whom a message is addressed lives outside the prescribed limits, it is incumbent on the sender of the message, who knows of the regulations, to ascertain the fact, and make the required deposit, and the illiteracy of the sender is no excuse for his failure to comply with such regulation.[49]

§ 401. The same subject continued.— In Given v. Western Union Telegraph Co.,[50] it was held, by Mr. Justice Miller, at circuit, that when a message is sent to one who is at the time of its receipt out of town, and consequently not at his usual place of business, and the company delivers the message to his wife at his house who does not know where her husband is, and

[47] Western Union Tel. Co. v. McDaniel, 103 Ind. 294. One to whom a telegram is sent may maintain an action against the company for its negligence in the delivery of the message. Western Union Tel. Co. v. Longwell (N. M.), 21 Pac. Rep. 339. But the action must be in tort, not *ex contractu*. Western Union Tel. Co. v. Dubois, 128 Ill. 248; 21 N. E. Rep. 4. The negligence of the sender will not relieve the company from liability to the person to whom the message is sent, for actual negligence in failing to find him. Western Union Tel. Co. v. McKibben, 114 Ind. 511; 14 N. E. Rep. 894.

[48] Deslottes v. Baltimore, &c., Tel. Co., 40 La. Ann. 183; 3 So. Rep. 566. The company cannot avoid liability on the ground that compensation was not paid at the time the message was delivered by the sender, where the agent declined to receive the compensation at the time, and requested that the person to whom the message was sent be allowed to pay. Western Union Tel. Co. v. Yopst, 118 Ind. 248; 20 N. E. Rep. 222.

[49] Western Union Tel. Co. v. Harderson, 89 Ala. 510; 7 So. Rep. 419. Where a message was written on an ordinary piece of paper, it was held that the plaintiff was not chargeable with knowledge of regulations printed on the company's blanks, even though he was in the habit of using them. Pearsall v. Western Union Tel. Co., 44 Hun, 532.

[50] 24 Fed. Rep. 119.

cannot, therefore, forward the dispatch to him promptly, the failure of the husband to inform his wife of his whereabouts for the day, or his failure to notify the telegraph company in advance where he may be reached, or the failure of the wife to act promptly to the end of getting the dispatch into her husband's hands, amounts to such contributory negligence upon the part of the plaintiff as will defeat a recovery of damages for any injury resulting from the failure to receive the dispatch promptly.[51]

§ 402. The rule in the Admiralty.— In Admiralty the matter of negligence and contributory negligence is dealt with in a peculiar way. When one brings his action in the Court of Admiralty for damages for an injury he has sustained in collision by reason of the culpable negligence of another, the plaintiff's own contributory negligence is not a defense as in a court of English common law, neither is there a comparison instituted between the negligence of plaintiff and defendant, to the end that a judicial balance may be struck as is the rule in Illinois, nor does the plaintiff's negligence, as in Georgia and Tennessee, go in mitigation of damages. "The rule of admiralty in collisions, apportioning the loss in case of mutual fault, is peculiar to the maritime law. It is not derived from the civil law, which agrees with the common law in not allowing a party to recover for the negligence of another where his own fault has contributed to the injury. It emanated from the ancient maritime codes, and the reasons which are assigned by commentators as commending it are various and divergent."[52] The general principles of the law maritime on which depends the right to recover in the Court of Admiralty for damage arising by collision, were thus stated by Lord Stowell:[53]—"There are four possibilities

[51] *Haec fabula docet* that, when a man goes away from home, if only for a day, he must, in order to render the Western Union Telegraph Company liable for a failure to deliver his dispatches promptly, tell his wife where he is going, or at the very least, notify the company before he leaves, where he may be reached during that day. See, also, Western Union Telegraph Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480, and Mr. Browne's note, wherein the liability of telegraph companies is considered at length, and many cases are collected. Western Union Telegraph Co. v. Reynolds, 77 Va. 173; 46 Am. Rep. 715.

[52] Wallace, J., in The Max Morris, 28 Fed. Rep. 881.

[53] "The Wardrop-Sims v. Jones, 2 Dods. 83, 85, cited by Lord Gifford

under which a loss of this sort may occur. 1st. It may happen without blame being imputed to either party; as, where a loss is occasioned by a storm, or by any other *vis major;* in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. 2dly. A misfortune of this kind may arise where both parties are to blame, where there has been a want of skill and due diligence on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both. 3dly. It may happen by the misconduct of the suffering party alone; and then the rule is that the suffering party must bear his own burthen. 4thly. It may have been the fault of the ship which ran the other down; and in this case, the injured party would be entitled to an entire compensation from the other." Upon these four famous propositions, formulated and declared by the foremost of English admiralty judges, hangs all the law in the Admiralty upon the matter of the recovery of damages in collision.

§ 403. **Lord Stowell's rules considered.**— "These rules," says Mr. Maclachlan,[54] "with a difference to be immediately pointed out, are also the law of the French Code,[55] which differs from the French Ordinance of 1681[56] only in this, that the modern law, improved by the clear expositions of Emerigon,[57] and Valin,[58] provides for the case of accidental collision.[59] The defect, so remedied in the French law, exists in the laws of Oleron[60] and of Wisby,[61] from which the ordinance of Louis XIV. borrowed extensively; and yet the principle overlooked in these earlier and later codes is obviously accepted by the Di-

in the House of Lords; Hay v. Le Neve, 2 Shaw's Appl. Cases, 395; who also cited a similar statement of the law by the same learned judge, from a *MS.* note of the case of The Lord Melville, 1816, ibid. See The Catherine of Dover, Dawson, 2 Hagg. Ad. 145, 154." I have taken this citation and note bodily from Maclachlan's "Law of Merchant Shipping" (3d London ed., 1880), 304.

54 Maclachlan's "Law of Merchant Shipping," 305.

55 Code de Com., art. 407, which reduces the third and fourth rules into one.

56 Liv. 2, tit. 7, art. 10, 11.

57 Emerigon des Assur., vol. I, p. 408, chap. 12, § 14.

58 2 Valin, 178, 179, 180.

59 Boulay-Paty, Droit Marit., vol. IV, p. 492, tit. 12, § 6.

60 Oleron, art. 15 — 1 Pardess, 334.

61 Wisby, art. 29, 30, 49, 50, 51, 65 — 1 Pardess, 481 *et seq.*

gest,[62] the common source of much of the legislation of those times." "It has been," the same writer continues, "the custom of writers upon jurisprudence, to bestow much attention and but little praise on a rule somewhat resembling the second of these,[63] in consequence of its dividing the loss between the parties for a reason quite unknown to English law, which the jurists of Cleirac's time called *judicium rusticorum*, the rule of arbitrators who compromise where they cannot decide." It is with the second of Lord Stowell's rules that, for the purposes of this treatise, we have to do. Where both parties are in fault, it is, in accordance with this rule, settled law in courts of admiralty, that the loss shall be equally divided between them. This rule is universally declared by all the foreign ordinances and jurists, and is universally applied both here and in England in Admiralty.[64]

§ 404. Lord Stowell's second rule defined.— I have found no better elucidation of the rule in question than that contained in the letter of the Registrar of the Admiralty Court in London to Lord Chancellor Selborne, written in 1873, when the Lord Chancellor moved his bill in the House of Lords, which afterward became law as the Supreme Judicature Act,[65] in which it was proposed to abolish the difference between the common law courts and the Court of Admiralty in damage causes at sea, by extinguishing with a stroke of the pen this ancient rule Mr. Rothery, the Registrar, comes to the defense of the rule in a letter addressed to the Lord Chancellor, an extract from which I have set out in the note,[66] in which, assuming that the rule is misunderstood and, taking his cue from the argument against it

62 Dig. 9, 2, 29, §§ 2 and 4.

63 Lord Stowell's Rules, *supra*.

64 The Baltimore, 8 Wall. 377; The Catherine, 17 How. (U. S.) 170; The Continental, 14 Wall. 345; The Constitution, Gilp. 579; Boggs v. Parr, 3 Hughes, 504; Vaux v. Sheffer, 8 Moo. P. C. 75; The Sappho, 9 Jur. 560; 1 Parsons' Mar. Law, 189; Lees' L. Brit. Sh. 255; 3 Kent's Commentaries, 231; Maclachlan's Law of Merchant Shipping (3d London ed.), chap. IV, pp. 304-321.

65 36 and 37 Vict., chap. 66 (1873).

66 The learned registrar said, omitting such part of the letter as is prefatory and complimentary: — "I will take your Lordship's figures, and will assume that A. and B. are the owners of two vessels, worth respectively ten thousand pounds and fifty thousand pounds; that they come into collision, and that both alike are to blame for the collision, that being a condition precedent to the equal

in the House of Lords, he argues with such force and cogency of logic in its favor that, in the Judicature Act as finally adopted, the rule is not only preserved as to the Courts of Admiralty, but is made the rule of the other courts in like case, where it

division of the damages. And, first, I will assume that A.'s vessel goes to the bottom, and that B.'s is uninjured, a not very unusual occurrence in collision at sea. Then A., who has lost ten thousand pounds by the sinking of his vessel, would, under the Admiralty rule, both being to blame, be entitled to recover one-half of his loss, or five thousand pounds from B. Secondly. Let us assume that B.'s vessel goes to the bottom, and that A.'s is uninjured; then B., who has lost fifty thousand pounds by the sinking of his vessel, will be entitled to recover one moiety of his loss, or twenty-five thousand pounds, from A. Thirdly. I will suppose that both go to the bottom, both being alike to blame for the collision. Then A., having lost ten thousand pounds by the sinking of his vessel, is entitled to recover five thousand pounds from B., for a moiety of his damage; while B. is entitled to recover twenty-five thousand pounds from A. for the moiety of his damage. Each loses thirty thousand pounds; A., by having to bear the loss of one molety of his own vessel, or five thousand pounds, and by having to pay to B. twenty-five thousand pounds for the molety of his, B.'s loss; and B., by having to bear the loss of one moiety of his own vessel, or twenty-five thousand pounds, and by having to pay to A. five thousand pounds for a molety of his, A.'s loss. The mistake of those who think that the owner of a vessel worth ten thousand pounds might, by a collision with a vessel worth fifty thousand pounds, recover, under the Admiralty Law, no less a sum than thirty thousand pounds as a compensation, arises from their supposing that the amount at stake is a common fund, to be divided between two claimants, not a joint loss which has to be apportioned between them. Let us now see what the result would be under the common-law rule, where, if both are to blame, neither can recover anything. In the first of the three cases cited above, the whole loss of ten thousand pounds would fall upon A.; in the second, the whole loss of fifty thousand would fall upon B.; and in the third case, B.'s loss would be fifty thousand pounds, while A.'s loss would be only ten thousand pounds, or one-fifth part that of B. And this, too, be it observed, although both may have been equally to blame for the collision, and although the fact whether one or both went to the bottom would depend very much upon the accident, of which parts of the two vessels came into collision. A rule which depends upon so mere an accident can, I venture to submit, hardly be so equitable as the rule which directs that a loss, resulting from the common fault of two parties, shall be equally divided between them." "A defense of the Rule of the Admiralty Court, etc., in a letter to the Right Hon. Lord Selborne, etc., by H. C. Rothery, M. A., Registrar, etc., 1873."

used not to be.[67] In this country, however, as in England prior to the passage of the Supreme Judicature Act,[68] when an action for collision is brought in a court of common law, the admiralty rule is disregarded, and if the plaintiff, by his own negligence, contributed in any degree to occasion the collision, he has no remedy.[69] The rule for dividing damage, in case of collision, applies to all cases of marine tort founded upon negligence.[70] Ordinarily to determine the right and remedies of parties for marine torts the courts recur to the rules of the common law to ascertain what acts are torts.[71] Where a seaman is injured in the service of a vessel, his own negligence contributing to the injury, it seems that the rule of apportionment is applied by awarding him indemnity for the wages he would have earned but for the accident, and denying him damages for pain and suffering.[72]

§ 405. Contributory negligence in actions between attorney and client.— We find very few reported cases of actions brought against attorneys for negligence,[73] and, therefore, few cases in which the contributory negligence of the client is pleaded as a defense. In such decisions as there are, we find the case

67 36 and 37 Vict., chap. 66, § 25, subd. 9.

68 36 and 37 Vict., chap. 66.

69 Broadwell v. Swigert, 7 Ben. M. 39; 45 Am. Dec. 47, and the note; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; Owners of the Steamboat Farmer v. McCraw, 26 Ala. 189; 62 Am. Dec. 718; Vanderplank v. Miller, 1 Moody & M. 169 (by Lord Tenterden). See, also, The Clara, 102 U. S. 200; The Morgan v. The Zebra, 2 Hughes, 64; The R. L. Maybey, 4 Blatchf. 88; The Scranton and The Emerald Isle, 2 Ben. 25; The Morning Light, 2 Wall. 550; Union S. S. Co. v. New York, 24 How. (U. S.) 307; 1 Parsons' Shipping and Admiralty, 525; Abbott's Shipping, 230; 2 Sedgwick on Damages (7th ed.), 351, note; Cohen's Admiralty, 215, 224.

70 The Max Morris, 28 Fed. Rep. 881.

71 The Max Morris, 28 Fed. Rep. 881.

72 The Truro, 31 Fed. Rep. 158. It is the right of a seaman injured in the service of a vessel to be cared for at least to the end of the voyage, and nothing short of gross negligence, or wilful misconduct causing or concurring to cause the injury, will forfeit such right. The City of Carlisle, 39 Fed. Rep. 807.

73 In Sedgwick on Damages (6th ed.), 635, in the note, it is suggested that the reason for the paucity of authorities upon this point is, either that "attorneys are a very skillful class," or "very skillful in covering the tracks of any devious steps."

turning rather on the right than the measure of the recovery.[74] In the recent case of Read v. Patterson,[75] the contributory negligence of the client is expressly held a bar to an action upon his part, for damages sustained by reason of the negligence of his attorney, and aside from this single adjudication, I have not found any case in point. It appears that, in 1860, Patterson placed in the hands of his attorney, Read, some notes for collection; that Read obtained a judgment upon each of the notes, and that executions were issued in due time and severally returned unsatisfied. Then came the war; *inter arma silent leges;* which is to say, returning to the vernacular, that nothing further was done, toward collecting these notes, until 1866, when Read had *alias* executions issued, upon which returns were not made up to the time when this suit was brought, in 1871. The plaintiff had judgment against his attorney in the court below for the whole amount of the judgments remaining unpaid, but upon appeal, the court held that, although the defendant was negligent in not collecting the money, inasmuch as the judgment debtor was perfectly solvent during all the years which had elapsed since the issuing of the *alias* executions, yet that negligence not being the proximate or natural occasion of the loss, the plaintiff ought not to recover, for the plain reason that he himself, at any time, without reference to what his attorney did, or omitted to do, might have had executions issued upon the judgments, which could have been collected; that this failure upon the part of the plaintiff to proceed as he might have done, was the true proximate cause of his failure to get his money, and that, having employed other counsel to assist in enforcing the claim, which, in fact, as it appears, was practically a repudiation of the defendant as his attorney in the premises, which counsel also failed to take the proper steps to collect the judgments, he was guilty of such con-

[74] Godefroy v. Jay, 7 Bing. 413; Hoby v. Built, 3 Barn. & Ad. 350; Langdon v. Godfrey, 4 Fost. & Fin. 445. "In other cases where their negligence has been such as to furnish a right of action against them (*i. e.*, actions of negligence by clients against their attorneys), the rule of damages is the same with that in like case against sheriffs. The plaintiff is entitled to be in the same position as if the attorney had done his duty." Sedgwick on Damages (6th ed.), 635, citing Tatham v. Lewis, 65 Penn. St. 65. See, also, 2 Sedgwick on Damages (7th ed.), 447, note; and Weeks on Attorneys-at-Law, chap. XII, 470, in which the liability of attorneys to their clients, with respect of negligence generally, is very fully considered, and a great number of cases are cited.

[75] 11 Lea (Tenn.) 430.

tributory default as would prevent a recovery from the defendant. This decision, reversing the judgment of the court below, was rendered at the April term, 1883 — more than twenty-three years after Read obtained the original judgments — and granted a new trial.

§ 406. In actions between physician and patient.— It is a well settled rule of law that when a patient has, by his own imprudence, negligence, or disregard of the directions of his physician, directly contributed to the aggravation of his disease or disorder, he cannot recover damages for anything which is the result of mere negligence or unsuccessful treatment by the physician. Contributory negligence here, as in any other case, is a bar to the action. Many cases in all the courts enforce this rule.[76] "Nothing can be more clear," said Judge Woodward,[77] "than that it is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or, under the pressure of pain, cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible. No man may take advantage of his own wrong, or charge his misfortune to the account of another." If the patient is insane, and so incapable of exercising proper care, or of co-operating with his physician, contributory negligence is not to be imputed to him, and the physician is bound to take a just account of this incapacity on the part of his patient, and act accordingly.[78] In Hibbard v. Thompson,[79] it was held that, in an action of negligence brought by a patient against his physician, in which it appears that, although the plaintiff, while under treatment, had injured himself by his own carelessness, the physician had also inflicted a distinct and separate injury by careless and unskillful treatment, the plaintiff may have his action, provided that the injurious results

[76] Potter v. Warner, 91 Penn. St. 362; 36 Am. Rep. 668; Gwynn v. Duffield, 61 Iowa, 64; 47 Am. Rep. 802; Hibbard v. Thompson, 109 Mass. 286; McCandless v. McWha, 22 Penn. St. 261; 25 Penn. St. 95; Haire v. Reese, 7 Phila. 138; Chamberlin v. Morgan, 68 Penn. St. 168; Bogle v. Winslow, 5 Phila. 136; Geiselman v. Scott, 25 Ohio St. 86; Wohlfahrt v. Beckert, 92 N. Y. 490; 44 Am. Rep. 406; Thompson on Negligence, 1215, § 63; Wharton on Negligence, § 737; Shearman & Redfield on Negligence (5th ed.), § 615.

[77] McCandless v. McWha, 22 Penn. St. 261.

[78] People v. New York Hospital (by Ordronaux, C.), 3 Abb. N. C. 229.

[79] 109 Mass. 286.

of the patient's negligence can be distinctly and clearly separated and distinguished from those which flowed from the malpractice of the physician; or, in other words, that when in actions of this nature the damages are capable of apportionment, so that it can be made to appear with reasonable distinctness what part is due to the plaintiff's neglect and what to the wrong-doing of the defendant, then an action may be maintained by the plaintiff for the injury resulting from the defendant's separate default.[80]

§ 407. The same subject continued.— It is not, however, contributory negligence for a patient, after one physician has injured him by negligent treatment, to refuse to allow another physician to make a somewhat dangerous experiment upon him for the purpose of repairing the injury, unless there be reasonable assurance of the success of the experiment.[81] In the case in which this doctrine is declared, the court said:— "Is it the duty of a person who has been injured by the malpractice of a physician or surgeon, to make any experiment which may be suggested to him, however plausible it may appear? A man who is not himself a physician, and cannot be expected to know anything upon the subject, cannot be himself a judge of such matters. It was very reasonable for the father of Hattie Morgan to say, when Dr. Richardson proposed to put her under the influence of an anaesthetic and attempt to reduce the limb, 'that, so long as she was improving so fast as she had done since he came home, he should not have it disturbed.' Had Dr. Chamberlin proposed this experiment, there might be some reason to hold that he should have the opportunity of redeeming his mistake; or even if he had called in Dr. Richardson to act on his behalf. Mr. Morgan merely requested Dr. Richardson to examine his daughter's arm and give his opinion about it. That did not oblige him to adopt his advice, or to incur the hazard and expense of another operation. He owed no such duty to Dr. Chamberlin. It was offered to prove that the injury could then have been reduced. But how was Mr. Morgan or Hattie to have known this? Had the experiment failed it might well have been urged that, as she was improving, she ought to have been let alone, and that Dr. Chamberlin was relieved from all responsibility by the case having been taken out

[80] See, also, § 69, *supra*.

[81] Chamberlin v. Morgan, 68 Penn. St. 168.

of his hands."[82] Where an action is brought against a person for injuries inflicted by him, the negligence of the physician employed by the person injured is not imputable to the latter, if he have used due care in procuring professional treatment.[83] In Pullman Palace Car Co. v. Bluhm,[84] the court said:— "The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer in such case that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment, or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm."

§ 408. In actions between innkeeper and guest.— The innkeeper, like the common carrier, is an insurer, and responsible to his guests, for losses and damage of every character, except such as are occasioned by the act of God, the king's enemy, or the party complaining.[85] Another view of the innkeeper's liability is that he is excused for losses occasioned by *vis major*, or irresistible force, such as robbery and fire.[86] But whether the

[82] Chamberlin v. Morgan, 68 Penn. St. 168. Upon the question of the liability of the physician in general for negligence or ignorance, see State v. Hardister, 38 Ark. 605; 42 Am. Rep. 5; and *contra*, State v. Schultz, 55 Iowa, 698; 39 Am. Rep. 187.

[83] "It is not incumbent upon him to incur the greatest expense, and call in the most eminent physician or surgeon of the highest professional skill and most infallible judgment, before he could hold the defendants answerable for the condition in which he was left at the end of his medical treatment." Loeser v. Humphrey, 41 Ohio St. 378; Stover v. Bluehill, 51 Me. 439.

[84] 109 Ill. 20.

[85] Chitty on Contracts, 675; 2 Parsons on Contracts, 146; 2 Story on Contracts, § 909; Saunders on Negligence, 212; Lusk v. Belot, 22 Minn. 468; Olson v. Crossman, 31 Minn. 222; Batterson v. Vogel, 10 Mo. App. 235.

[86] Story on Bailments, § 472; Redfield on Carriers, § 596; Wharton on Negligence, § 678; 2 Kent's Commentaries, 593; Thompson on Negligence, 1215, § 62; Schultz v. Wall (Penn.), 10 Atl. Rep. 742.

innkeeper is to be held to the one degree of liability or the other, it is plain that he is liable for losses occasioned by theft, unless the contributory negligence of the guest is the proper proximate cause of the loss.[87] It is not contributory negligence, as a matter of law, in the guest not to lock or bolt his door. At most, it is only a circumstance to go to the jury upon the question of the guest's negligence.[88]

§ 409. **Cayle's Case.**— This is the ancient learning in Cayle's Case:[89] — " The innkeeper in that case," saith Lord Coke, " is bound in law to keep them " [the goods of his guest] " safe without any stealing or purloining, and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber door in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest

87 Mason v. Thompson, 9 Pick. 280; 20 Am. Dec. 471; Dickinson v. Winchester, 4 Cush. 121; Houser v. Tully, 62 Penn. St. 92; 1 Am. Rep. 390; Clute v. Wiggins, 14 Johns. (N. Y.) 175; 7 Am. Dec. 449, and note; Dunbier v. Day, 12 Neb. 596; 41 Am. Rep. 772; Murchison v. Sergent, 69 Ga. 206; 47 Am. Rep. 754. Where the lock on the door furnished the guest was out of repair, and the guest failed to notify the host, but slept in the room with the door unlocked, he still cannot be said to have been guilty of contributory negligence. Lanier v. Youngblood, 73 Ala. 587; Addison on Torts, 612, 613, 614; Story on Contracts, § 748; 2 Kent's Commentaries, 592; Herbert v. Markwell, Q. B. Div., 1881 (unreported); Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515; Spice v. Bacon, L. R. 2 Exch. Div. 463; Cashill v. Wright, 6 El. & Bl. 891; Armistead v. Wilde, 17 Q. B. 261. It is not within the scope of this treatise to consider the liability of innkeepers in detail under the various statutes which affect that liability in England and in every State in the Union. The careful practitioner need not be reminded, however, that such a statute will almost certainly, in any jurisdiction, need to be consulted when a case of this nature is in hand.

88 Batterson v. Vogel, 10 Mo. App. 235; Spring v. Hager, 145 Mass. 186; 13 N. E. Rep. 479. It is not imputable as negligence in the guest that he consented to be placed to sleep in a room with another guest with whom he did not come to the inn, and who was a stranger to him, by whom his goods were stolen. Statutory notice if not complied with does not release the landlord unless brought to the knowledge of the guest. Olson v. Crossman, 31 Minn. 222; Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515; Spice v. Bacon, L. R. 2 Exch. Div. 463; Bohler v. Owens, 60 Ga. 185; Classen v. Leopold, 2 Sweeney, 705; Cayle's Case, 8 Coke's Rep. 32.

89 8 Co. 32; 26 Eliz.; 1 Smith's Leading Cases (8th ed.) (1885), 249, and the note.

there in safety. And, although the guest doth not deliver his goods to the innkeeper to keep, nor acquaint him with them, yet, if they be carried away or stolen, the innkeeper shall be charged. And, although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for then the fault is in the guest to have such companion or servant. But if the innkeeper appoint one to lodge with him, he shall answer for him." [If] "The innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not," [and] "the guest lets them lie in an outward court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. The words are *hospitibus damnum non eveniat.*" Such was the early strictness of the common law, which, indeed, has been only somewhat modified in modern times by statute. It is still the law, in the quaint language of Lord Coke, that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber door in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety."[90]

§ 410. The key of the guest's room.— "I agree," said Lord Ellenborough, "in what is stated in Cayle's Case, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but, if the guest takes the key, it is a very proper question for a jury whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons

[90] Cayle's Case, 8 Co. 32, 33. See, also, to the point that it is not negligence in law for the guest to leave his door unlocked or unbolted. Murchison v. Sergent, 69 Ga. 206; 47 Am. Rep. 754; Buddenburgh v. Benner, 1 Hilt. 84; Gill v. Libby, 36 Barb. 70; Classen v. Leopold, 2 Sweeney, 707; Lanier v. Youngblood, 73 Ala. 587; Hadley v. Upshaw, 27 Tex. 547; Addison on Torts, 612; 1 Smith's Leading Cases (8th ed.) (1885), 249, 253.

from intruding themselves into his room."[91] And Mr. Addison says:—"Where a guest, having the key delivered to him, omits to use it, and a thief comes into his room by the door, and steals his goods, that is, or may be, evidence for the jury of contributory negligence, which will disentitle him to recover against the innkeeper."[92] One may also, without necessarily exposing himself to the imputation of negligence, accept and occupy a room in a hotel, the door of which has no lock or no bolt, or is otherwise incapable of being securely fastened. In such a case the proper question is not whether the door was actually locked or not, or whether the room was occupied when the door could not be locked, but whether the loss would or would not have happened had the guest exercised the ordinary care of a prudent man under the circumstances.[93]

§ 411. Duty of the guest to exercise care.— "The fact of the guest having the means of securing himself, and choosing not to use them, is one which, with the other circumstances of the case, should be left to the jury. The weight of it must of course depend upon the state of society at the time and place. What would be prudent in a small hotel in a small town, might be the extreme of imprudence in a large hotel in a city like Bristol, where probably three hundred bed-rooms are occupied by people of all sorts."[94] It is not correct, however, to say that there is no duty on the part of the guest to lock his door, and consequently, that there is no negligence involved in leaving it unlocked.[95] A jury of prudent men, it is believed, would more frequently regard such a failure, if the guest had anything valuable in his possession, a grossly negligent omission of a plain duty, than a proper and prudent thing to do. So, where a guest makes an ostentatious display of his money in the presence of strangers in the public rooms of the hotel, and then leaves it in his room, with the door ajar or unlocked, a charge that gross

91 Burgess v. Clements, 4 Maule & Sel. 306.

92 Addison on Torts, 612.

93 Lanier v. Youngblood, 73 Ala. 587; Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515.

94 Montague Smith, J., in Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515.

95 Spice v. Bacon, L. R. 2 Exch. Div. 463 (overruling Mitchell v. Woods, 16 L. T. (N. S.) 676, a case at *nisi prius* in which, upon that theory, the judge had directed a verdict for the plaintiff).

negligence on the part of the guest would relieve the landlord, and that it was for the jury to say whether or not such conduct was gross negligence was, upon appeal, declared correct.[96] It is never necessary to show gross negligence on the part of a landlord in order to maintain an action against him for loss of goods. Any want of ordinary care contributing to the loss is sufficient.[97] Where a traveler upon arriving at a depot delivered his valise to the porter of an inn he was not negligent in failing to call the porter's attention to the fact that it contained valuable jewelry and clothing.[98] If an innkeeer, for the purpose of securing the safety of the goods of his guests, makes a reasonable and proper rule or requirement to be observed by them, or he will not be responsible therefor, and the goods of a guest having knowledge of the rule are lost from the inn solely by reason of his neglect to comply therewith, the innkeeper is not liable for the loss thus occasioned by the negligence of the guest.[99]

§ 412. The rule illustrated.— In the case of Hayward v. Miller[1] it appears that the plaintiff, who was a guest in the defendant's hotel, in searching for his room in the night, along a hall dimly lighted, opened a door which he supposed to be the door of his room and stepped in, but which was in reality the door to the elevator, and next to his own door. In consequence of this mistake he fell from the second floor to the cellar, and

96 Armistead v. Wilde, 17 C. B. 261. *Cf.* Cashill v. Wright, 6 El. & Bl. 891.

97 Jalie v. Cardinal, 35 Wis. 118. An inmate of a lodging-house who leaves the door of his room unlocked, knowing that persons may enter the house and go to his room unnoticed, cannot recover from the keeper of the house for property stolen from his room, being himself lacking in ordinary care. Swann v. Smith, 14 Daly, 114. Independent of the statute the leaving by the guest of $2,000 in gold coin in his trunk in a room with no person therein, in the city of New York, after personal notice that a safe was provided, was held contributory negligence barring recovery. Purvis v. Coleman, 21 N. Y. 111; Smith v. Wilson, 36 Minn. 334; 31 N. W. Rep. 176.

98 Coskery v. Nagle, 83 Ga. 696. See, also, Rubenstein v. Cruikshanks, 54 Mich. 199. A customer on his first visit to a store, who is unfamiliar with the surroundings, may, without imputation of negligence, rely upon the safety thereof. Rosenbaum v. Shoffner, 98 Tenn. 624; 40 S. W. Rep. 1086.

99 Fuller v. Coats, 18 Ohio St. 343. The innkeeper is not liable for the loss of money entrusted by a guest to another guest or inmate in whom he reposes confidence. Houser v. Fully, 62 Penn. St. 92.

1 94 Ill. 349; 34 Am. Rep. 229.

suffered serious injuries. The court held that the defendant was grossly negligent in leaving the elevator door in such a condition that it could be opened from the outside, and that the plaintiff's attempt to find his room, without the guidance of a servant, inasmuch as he had been a guest of the hotel before, and was somewhat familiar with the hallways in that part of the house, was not such contributory negligence as would prevent a recovery of damages from the innkeeper.[2] It is not negligence, as the law is declared in the Common Pleas in Philadelphia,[3] for one who is being fitted with new clothing in a tailor's or clothier's store, to leave his coat and vest, with his watch and money, in a compartment behind a curtain, such as are common in such stores and into which he was shown by the salesman for the purpose of changing his clothes and trying on his new suit, while he walked to another part of the store to stand before a mirror. In the case cited, it appears that a customer who did so was robbed of his watch and money during an absence from the compartment of about four minutes. The plaintiff asked the court to extend the law governing innkeepers and apply it to clothing-house keepers. This the court declined to do, upon essentially the same grounds upon which it is refused to hold palace and sleeping-car companies either innkeepers or common carriers,[4] but held the defendants liable as bailees for hire, and as such bound to exercise a high degree of care and diligence,[5] and that the plaintiff was guilty of no negligence in leaving his clothing in the defendant's care as he did.

§ 413. Accidents in discharge of fireworks.— When a city undertakes to celebrate a holiday, and the municipal authorities have licensed an exhibition of fireworks, it is held that there can

[2] See, also, to the same point, and to the point of the liability in general of one who invites others to come upon his premises. Camp v. Wood, 76 N. Y. 92; 32 Am. Rep. 282; Southcote v. Stanley, 1 Hurl. & N. 250; Pickard v. Smith, 10 C. B. (N. S.) 470; Axford v. Pryor, 4 Week. Rep. 611; Bolch v. Smith, 7 Hurl. & N. 736; McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 555, and the note. *Cf.* Larue v. Farren Hotel Co., 116 Mass. 67; Bennett v. Louisville, &c., R. Co. (by Harlan, J.), 102 U. S. 577.

[3] McCollin v. Reed, 16 Week. Notes Cas. 287.

[4] Welch v. Pullman Palace Car Co., 16 Abb. (N. S.) 352; Jeffords v. Crump, 5 Week. Notes Cas. 10.

[5] Citing Pullman Palace Car Co. v. Gardner, 14 Week. Notes Cas. 17.

be no action against the city on behalf of one who sustains personal injuries through the negligence of the servants of the city in discharging the fireworks, for the purpose of the celebration,[6] neither can an action be maintained against the municipality because one's house is set on fire, and burned by squibs or firecrackers set off upon a holiday by a crowd of men and boys collected in the street, if the city ordinances have made such fireworks lawful;[7] nor even is the town chargeable for resulting damages when the fireworks are discharged by citizens in violation of an ordinance, and although the council and officers, and a majority of the citizens, actively participated in the pyrotechnics, and the town officers made no attempt to stop the demonstration.[8] But it is not such contributory negligence as will bar a recovery, to stand in the street and look at fireworks, and one who is injured while so doing, by the negligence of another in shooting Roman candles may have his action.[9]

§ 414. Injury to one walking on the sea-shore.— In the case of Murphy v. The City of Brooklyn,[10] it was held that the sea-shore is not a highway for public travel, either on foot or in vehicles; and that, while any one may, unless the public authorities by lawful action interfere, go thereon between high and low-water mark, for any lawful purpose, he must use it as he finds it, and can look to no one for damages sustained from any defect therein. When, therefore, one who walks upon the sea-shore falls into an excavation on private property near high-

[6] Tindley v. City of Salem, 137 Mass. 171; Morrison v. Lawrence, 98 Mass. 219.

[7] Hill v. Board of Aldermen of Charlotte, 72 N. C. 55.

[8] Ball v. Town of Woodbine, 61 Iowa, 83; 47 Am. Rep. 805.

[9] The mere presence of plaintiff at a display of fireworks as a spectator, it appearing that he had nothing whatever to do with the discharge of the fireworks by which he was injured, does not make him a joint wrong-doer, or render him guilty of contributory negligence. Dowell v. Guthrie, 99 Mo. 653; 12 S. W. Rep. 900; Bradley v. Andrews, 51 Vt. 530. *Cf.* Moebus v. Becker, 46 N. J. Law, 41; Fairbanks v. Kerr, 70 Penn. St. 86; 10 Am. Rep. 654; Morgan v. Cox, 22 Mo. 373, and the annotation in Thompson on Negligence, 238. A child of thirteen was held not negligent in stopping on the sidewalk to look at something across the street, so as to bar a recovery for injuries by the fall of a fence next to the sidewalk. Hussey v. Ryan, 64 Md. 426.

[10] 98 N. Y. 642.

water mark, and suffers injury thereby, the rule of law that one who causes an excavation to be made on his own land so near a highway that a traveler thereon without fault falls into the hole and is injured may be held liable for the damages, does not apply.

§ 415. Where the plaintiff's property is a nuisance.— It seems that, while the contributory negligence of a plaintiff will prevent a recovery in an action for damages for a personal injury occasioned by the negligence of the defendant, the fact that the plaintiff's property is a nuisance is not a defense to an action for negligently injuring it. This is the inference from the case of The Mayor of Colchester v. Brooke,[11] a much bequoted authority. This was the case of a man who planted an oyster-bed in a public river, in such a way and at such a place as to constitute it a nuisance, and the defendant passing carelessly over it with boats, was held liable for the damage, notwithstanding the fact that the oyster-bed was an obstruction and a nuisance. It does not appear from the opinion, whether this conclusion was reached because the court regarded the commission of a nuisance as an offense of a lower grade than an act of contributory negligence, or because it is the policy of the law to protect property more scrupulously than life and limb, or because collateral violations of law are not a defense in actions of negligence; but upon whatever theory the conclusion was reached, the doctrine of the case is often criticised. It is usual to contrast it with the cases of Davies v. Mann,[12] and Hartfield v. Roper,[13] to the end of pointing the moral that the law has more regard for the safety of oysters and asses than it has for little children.[14] The joke is "something musty," at the best, and appears hardly to have a sound basis, inasmuch as the case decides nothing more than that a collateral violation of law on the part of the plaintiff is

[11] 7 Q. B. 339, decided by Lord Denham in the Queen's Bench in 1845. Under section 1845 of the Iowa Code, making the owner of a dog liable to a person injured, for all damage done by it, except when such person is doing an unlawful act, negligence of the person injured does not exempt the owner from liability, unless the negligence amounts to an unlawful act. Schultz v. Griffith, 103 Iowa, 150; 72 N. W. Rep. 445.

[12] 10 M. & W. 546.

[13] 21 Wend. 615; 34 Am. Dec. 273.

[14] See §§ 26 *et seq.*, 127, *supra.*

not a defense to an action of negligence; while the cases just referred to, of which Hartfield v. Roper,[15] is a type, hold that a parent's negligence may sometimes properly be imputed to an infant child in bar of an action by it for an injury sustained by the negligence of another, and of Davies v. Mann[16] it may be said that it is aptly designated "the donkey case," and does not decide anything.[17]

§ 416. Miscellaneous.— In King v. American Transportation Co.[18] it is held that it is not an act of contributory negligence to put up a wooden building upon your own property, although that property is situated near a dock upon a navigable river, and the house is consequently exposed to the sparks and fire from steamers touching at that dock. When such a house, so built, is set on fire by sparks from a steamer and burned, the owner may have his action against the steamboat company, although he put his house there in the face of the risk. Dr. Wharton has set out the law upon injuries to contestants at games in his treatise on Negligence.[19] It appears from his exposition that under the Roman law, which is full and explicit upon this question, there is, in general, no liability on either side when one or the other contestant suffers an injury during the progress of a game involving violent exercise, or contest of strength or dexterity, unless there be malice or an intentional infliction of harm.[20] In Marks v. Borum,[21] the Supreme Court of Tennessee has decided that the act of a negro in coming upon the defendant's premises stealthily, in the darkness of the night, with the plain intent to steal his chickens, did not constitute such contributory wrong-doing as would defeat a recovery of damages for injuries sustained by reason of the defendant's shooting buck shot at him. This settles the law, it may be

15 21 Wend. 615; 34 Am. Dec. 273.

16 10 M. & W. 546.

17 See §§ 26 *et seq.*, 127, *supra;* 1 Sedgwick on Damages, 293; 2 Thompson on Negligence, 1170.

18 1 Flippin, 1.

19 § 406.

20 Wharton on Negligence, § 406, and the citations; Wharton's Crim. inal Law (7th ed.), § 1012; Penn. v. Lewis, Addison, 279; Fenton's Case, 1 Lewis, 179; Addison on Torts, 494.

21 1 Baxt. 87; 25 Am. Rep. 764.

divined, at least in Tennessee, to the point that stealing chickens by the darkies is not contributory negligence,[22] which, it is submitted, is a wholesome doctrine.

[22] In the following cases the general principles of the law of contributory negligence are applied in actions involving the rights of owners of animals, for injuries by or to them. Mareau v. Vanatta, 88 Ill. 132; Williams v. Moray, 74 Ind. 25; Houghey v. Hart, 62 Iowa, 96; 49 Am. Rep. 138; Young v. Harvey, 16 Ind. 314; Conradt v. Clauve, 93 Ind. 476: Green, &c., St. Ry. Co. v. Bresmer, 97 Penn. St. 103. See, also, Wharton on Negligence, § 926; Shearman & Redfield on Negligence (5th ed.), § 639; Thompson on Negligence, 222. Inasmuch as there is nothing pertinent to my treatise, which is peculiar or noteworthy in actions of this character, nothing more is necessary than to cite some late or leading cases — which I have done — thereby referring the practitioner to the sources of information.

CHAPTER XV.

THE BURDEN OF PROOF.

§ 417. The question stated.
418. The rule in Butterfield v. Forrester.
419. Whether the presumption should be against the plaintiff.
420. The plaintiff in this class of cases generally at fault.
421. The presumption sometimes in favor of the plaintiff.
422. The burden upon the plaintiff.
423. This rule defended.
424. Mr. Freeman's criticism of the rule.
425. His position untenable.
426. The burden upon the defendant.
427. Where plaintiff's own case raises presumption of contributory negligence.
428. The rule in Connecticut.
429. Judge Redfield's statement of the rule.
§ 430. The rule in Kansas.
431. This rule criticised.
432. The rule distinguished.
433. The rule in New York.
434. The rule in New York further stated.
435. The development of the rule in New York.
436. This development further considered.
437. The position of the New York court stated.
438. The New York cases further considered.
439. The New York rule summarized.
440. The disagreement of the courts upon this question.
441. No possible middle ground.
442. Tendency toward the better rule.
443. Pleading contributory negligence.

§ 417. The question stated.— The question whether the burden of proof, where contributory negligence is the issue, is upon plaintiff or defendant, resolves itself, in the last analysis, into a matter of legal presumptions. If the plaintiff may be presumed to have been in the exercise of ordinary care, then the burden of showing his contributory negligence will plainly be upon the defendant. If ordinary care on the part of the plaintiff is not to be presumed, then it will devolve upon him to disprove contributory negligence. If neither ordinary care, nor the want of it, are to be presumed in the absence of evidence, then, if the facts show a duty of care, the plaintiff must furnish some evidence that he exercised it, but otherwise he need not, which is something near to saying that in this condition of the presumptions,

there is no rule as to the *onus probandi* in these cases. It is a general rule of law that the burden of proof is upon him who maintains the affirmative of the issue — that he who asserts a fact material to the issue, must prove it. But when this general rule is to be applied in actions where it is sought to recover for an injury from the negligence of another, the courts have found very considerable difficulty. There is the elementary rule that contributory negligence on the part of the plaintiff is sufficient to defeat his action, and, when attention is directed to this rule stated in this usual way, it seems clear that such negligence is a matter of defense, and that it should devolve upon the defendant to prove it. This view assumes the ordinary care of the plaintiff, and that he has fully made out his *prima facie* case when the negligence of the defendant is shown. It throws the burden of proof, as to contributory negligence, upon the defendant, if the plaintiff can prove his case without showing it, which is the same thing as to proceed upon the assumption that the plaintiff is not bound to prove affirmatively that he was free from negligence.

§ 418. The rule in Butterfield v. Forrester.— In the earliest reported case, however, in which contributory negligence appears to have been passed upon as a defense in an action of negligence, there is, it may be, an intimation that an essential element of the plaintiff's case is that he appear free from contributory neglect. "Two things," said Lord Ellenborough in that early case,[1] "must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." From which it has been inferred that, in his lordship's view, freedom from contributory negligence as a part of the plaintiff's cause of action, is an affirmative issue, to be alleged and proved equally with the other necessary element in the case — *i. e.*, the defendant's culpable negligence contributing to the injury. He said, indeed, "two things must concur," the fault of the defendant and the freedom from fault of the plaintiff, but this, as the law stands, is not disputed, and in my opinion, inasmuch as that case contains no more explicit statement upon the question than this, we are not justified in citing Butterfield v. Forrester as authority for the proposition that the burden is upon the plaintiff when contributory negligence is an issue.

[1] Butterfield v. Forrester, 11 East, 60.

§ 419. Whether the presumption should be against the plaintiff.— Those who object to casting this burden upon the plaintiff urge that it is equivalent to a presumption of law that the plaintiff was negligent, and that this the law ought not to presume against the plaintiff any more than against the defendant. But this is nothing more than a play upon the word presumption, and, as a bit of legal ratiocination, is scarcely better than to say that the law presumes that the witness will lie, and, therefore, imposes the obligation of an oath, or, in an action upon a note, presumes it a forgery until the signature is proven. There is, indeed, in every action at law, this sort of a presumption against the plaintiff upon every fact essential to his cause of action. The *onus* is upon him to establish his facts, and, *quoad hoc*, the presumption, if you please to say so, is against him. This sort of a presumption is an incident of every possible action, and, while justice is administered as it now is, it cannot be changed. It involves no more of an injustice, nor of unfairness in respect to the legal presumption, to require the plaintiff to show, or to have it sufficiently appear, that his own negligence did not contribute to occasion the injury for which the suit is brought, than to require him to prove the signature on the note upon which he sues, or to prove that conditions precedent have been duly performed when he brings an action on a contract which involves that question. When one comes into court, and claims damages for an injury to his person, or his property, by reason of the negligence of another, it is not clear why it is unfair to presume that his own carelessness contributed to the resulting injury.

§ 420. The plaintiff in this class of cases generally at fault. — In more than ninety per centum of all the actions of negligence that are brought in courts of justice, it appears that the plaintiff's own negligence did, of a verity, help to cause the injury. Is it then, indeed, so violent a presumption that the plaintiff in any individual case was careless? If, in very deed, he is proved to be careless, nine times out of ten — or, for the matter of that, fifty-one times in a hundred — may we not reasonably presume in any given case that he was careless? Where is the injustice? Moreover, is there not another presumption that every man is able to take care of himself and his property, and, by the exercise of ordinary care, can keep out of mischief? If so, where is the wrong, when he brings his action of negligence, in assuming that he has failed to exercise his capacity to

take care of himself? What is casting upon the plaintiff the burden of showing himself to have exercised due care, more than to require him to prove that he performed his legal duty — a thing required to be proved very frequently in simple actions upon a contract? Without reference to the reported cases, and upon general principles, it may be said that there ought to be no inflexible rule as to the *onus probandi* in these cases — but that in some sort, each case, or each class of cases, should be a rule unto itself. It must in fairness depend upon the presumption of care in any given case. If the circumstances of the case are such as to make it a reasonable presumption that the plaintiff was careless, then it should be a part of his case, and an essential part, to allege and prove his freedom from contributory negligence. In such a case the burden of proof is very properly upon him, and such cases very frequently arise. Perhaps that is the just presumption in a majority of instances.

§ 421. The presumption sometimes in favor of the plaintiff. — But in another class of cases the reasonable presumption is exactly the other way, and when such a case arises, the presumption being that the plaintiff, at the time of the happening of the injury, was in the exercise of due and ordinary care, the burden of proof should be upon the defendant. He should, as a necessary element of his defense, allege and prove the concurrent wrong-doing or negligence of the plaintiff. When the peculiar circumstances of the case raise the presumption of care on the part of the plaintiff, it is an injustice, or at least an inequality, to impose upon him the burden of proving his own freedom from fault, but when the peculiar circumstances of the case raise the contrary presumption, it is a plain injustice not to impose upon the plaintiff the burden of showing that his own conduct was what it should have been. When the circumstances of any case are such as not to raise any presumption either way, which, in practice, it is believed, is a case not likely to arise frequently, then let the court apply its arbitrary rule, and place the burden upon either plaintiff or defendant, as the rule may be. The burden of proof in actions of negligence, when contributory negligence is an issue, is no nearer an exact science than that, and, in the nature of the case, can never be reduced to any exacter certitude. Until all the accidents from which men suffer can be made to fall into assigned categories, and until men, by common consent, will expose themselves and

their property to danger, and expose others and the property of others to danger, only under defined conditions, and expressed and agreed limitations, that is to say, until men get hurt and hurt other people only by rule, there can be no rule as to the burden of proof in these cases, at once inflexible and just.

§ 422. The burden upon the plaintiff.— Upon turning to the decisions we shall find that the decided weight of authority is in favor of the rule that the burden is upon the plaintiff in these actions to show his own freedom from contributory negligence; that as part of his case, to be affirmatively established, he must make it appear that he himself was not in fault; that until he has shown the absence of contributory negligence, and the presence of ordinary care in himself, his case is not duly presented. This is the rule in Maine,[2] Mississippi,[3] Louisiana,[4] Georgia,[5] Massachusetts,[6] North Carolina,[7] Michigan,[8] Oregon,[9] Illinois,[10] Connecticut,[11] Iowa, [12] and Indiana.[13]

2 Foster v. Dixfield, 18 Me. 380; French v. Brunswick, 21 Me. 29; 38 Am. Dec. 250; Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Merrill v. Hampden, 26 Me. 234; Perkins v. Eastern, &c., R. Co., 29 Me. 307; Dickey v. Maine Telegraph Co., 46 Me. 483; Buzzell v. Laconia Manfg. Co., 48 Me. 113; Gleason v. Bremen, 50 Me. 222; Benson v. Titcomb, 72 Me. 31; Chase v. Maine, &c., R. Co., 77 Me. 62; 1 E. Rep. 96; Leasan v. Maine, &c., R. Co., 77 Me. 85; 1 E. Rep. 100.

3 Central, &c., R. Co. v. Mason, 51 Miss. 234; City of Vicksburg v. Hennessy, 54 Miss. 391.

4 Moore v. City of Shreveport, 3 La. Ann. 645.

5 Prather v. Richmond, &c., R. Co., 80 Ga. 427; 9 S. E. Rep. 530.

6 Where the statute does not otherwise provide, the rule requiring the plaintiff, in an action for negligence, to show due care on his own part, is the same in actions brought under a statute and at common law. Taylor v. Carew Manuf'g Co., 143 Mass. 470; 10 N. E. Rep. 308. But in actions against a railroad company for the death of a passenger, due care need not be proved, as contributory negligence is no defense by statute. McKimble v. Boston, &c., R. Co., 139 Mass. 542; Lane v. Crombie, 12 Pick. 177; Adams v. Carlisle, 21 Pick. 146; Bigelow v. Rutland, 4 Cush. 247; Bosworth v. Inhabitants of Swansey, 10 Metc. 363; 43 Am. Dec. 441; Parker v. Adams, 12 Metc. 415; 46 Am. Dec. 694; Lucas v. New Bedford R. Co., 6 Gray, 64; Robinson v. Fitchburg R. Co., 7 Gray, 92; Callahan v. Bean, 9 Allen, 401; Hickey v. Boston, &c., R. Co., 14 Allen, 429; Gaynor v. Old Colony R. Co., 100 Mass. 208; Murphy v. Deane, 101 Mass. 455; Allyn v. Boston, &c., R. Co., 105 Mass. 77; Lane v. Atlantic Works, 107 Mass. 104; Crafts v. Boston, 109 Mass. 519; Prentiss v. Boston, 112 Mass. 43; Hinckley v. Cape Cod R. Co.,

§ 423. **This rule defended.**— Although this rule has not in general found favor with the text-writers and the theorists and critics, it is submitted that, if there is to be any inflexible rule, this is the one which will most often subserve the ends of sub-

120 Mass. 257; Corcoran v. Boston, &c., R. Co., 133 Mass. 507; Riley v. Conn. River R. Co., 135 Mass. 292; Wheelwright v. Boston, &c., R. Co., 135 Mass. 225; Stock v. Wood, 136 Mass. 353. But the burden of proof is upon the defendant to show gross or wilful negligence upon the part of the plaintiff. Copley v. New Haven, &c., R. Co., 136 Mass. 6. This case is miscited by Mr. Freeman in 62 Am. Dec. 666, 687, in his note to the case of Farish v. Reigle, 11 Gratt. 697, in support of the general proposition that in Massachusetts "contributory negligence is a matter of defense, and the burden of establishing it is upon the defendant," whereas, in fact, the rule in that State is exactly the contrary. In an action under Stat. 1887, chap. 270, §§ 1, 2, and amendments thereof, brought by the administrator or next of kin of a person who was killed while in the performance of his duties as a switchman for defendant, it is necessary for plaintiff to show by affirmative proof, that the deceased, when killed, was in the exercise of due care, and where the evidence leaves the manner in which the death occurred merely to conjecture, such action cannot be maintained. Dacey v. N. Y., N. H. & H. R. Co., 168 Mass. 479. In an action against a railroad corporation, under the General Statutes of Connecticut of 1888, sections 1008, 1009 (providing that "all actions for injury to the person, whether the same do or do not instanteously or otherwise result in death * * * shall survive his executor or administrator," and that "in all actions by an executor or administrator for injuries resulting in death from negligence, such executor or administrator may recover from the party legally in fault for such injuries," certain damages), for causing the death, in Connecticut, of plaintiff's intestate, who was a brakeman in the employ of the corporation, and had his domicile in Massachusetts, it is incumbent on the plaintiff to show that his intestate was in the exercise of due care at the time of the injury causing the death. Chandler v. New York, New Haven & Hartford R. Co., 159 Mass. 589; 35 N. E. Rep. 89. But when the injured party is dead, less evidence is required of his representatives. Schafer v. The Mayor, 154 N. Y. 466, 472; Rodrian v. N. Y. C. & H. R. R. Co., 125 N. Y. 526.

[7] Manly v. Wilmington, &c., R. Co., 74 N. C. 655; Doggett v. Richmond, &c., R. Co., 78 N. C. 305; Owens v. Richmond, &c., R. Co., 88 N. C. 502.

[8] Detroit, &c., R. Co. v. Van Steinburg, 17 Mich. 99; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 273; Le Baron v. Joslin, 41 Mich. 313; Mynning v. Detroit, &c., R. Co., 67 Mich. 677. But it is enough if the plaintiff merely puts in evidence the facts and circumstances attending the injury; and if these show negligent conduct in the defendant from which

stantial justice. If men who appear as plaintiffs in actions of negligence were, as matter of fact, careful more often than careless; if, in practice, it were found that the defense of contributory negligence only now and then availed the defendant

the injury followed as a proximate consequence, and do not show contributory negligence, a *prima facie* case is established. Teipel v. Hilsendegen, 44 Mich. 461 (by Cooley, J.); Mitchell v. Chicago, &c., R. Co., 51 Mich. 236; 47 Am. Rep. 566.

[9] Kahn v. Love, 3 Or. 206; Walsh v. Oregon, &c., R. Co., 10 Or. 250. *Cf.* Conroy v. Oregon Construction Co., 23 Fed. Rep. 71.

[10] Aurora, &c., R. Co. v. Grimes, 13 Ill. 585; Dyer v. Talcott, 16 Ill. 300; Galena, &c., R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Chicago, &c., R. Co. v. Major, 18 Ill. 349; Galena, &c., R. Co. v. Jacobs, 20 Ill. 478; Chicago, &c., R. Co. v. Hazzard, 26 Ill. 373; Chicago, &c., R. Co. v. Gregory, 58 Ill. 272; Kepperly v. Ramsden, 83 Ill. 354; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. Rep. 425; North Chicago Street R. Co. v. Eldridge, 151 Ill. 542; 38 N. E. Rep. 246.

[11] Park v. O'Brien, 23 Conn. 339; Button v. Frink, 51 Conn. 342; 50 Am. Rep. 24.

[12] Rusch v. Davenport, 6 Iowa, 443; Raymond v. Burlington, &c., R. Co., 65 Iowa, 152; Hawes v. Burlington, &c., Ry. Co., 64 Iowa, 315; Reynolds v. Hindman, 32 Iowa, 148; Plaster v. Ill., &c., R. Co., 35 Iowa, 449; Carlin v. Chicago, &c., R. Co., 37 Iowa, 316; Muldowney v. Ill., &c., R. Co., 39 Iowa, 615; 36 Iowa, 462; 32 Iowa, 176; Patterson v. Burlington, &c., R. Co., 38 Iowa, 279; Way v. Ill., &c., R. Co., 40 Iowa, 341; Nelson v. Chicago, &c., R. Co., 38 Iowa, 564; Murphy v. Chicago, &c., R. Co., 38 Iowa, 539; 45 Iowa, 661; Greenleaf v. Ill., &c., R. Co., 29 Iowa, 14; 4 Am. Rep. 181; Bonce v. Dubuque, &c., R. Co., 53 Iowa, 278; Slosson v. Burlington, &c., R. Co., 55 Iowa, 294. See, also, Brentner v. Chicago, &c., R. Co., 68 Iowa, 530; 19 Am. Law Rev. 668.

[13] The burden of proof of negligence of defendant, and absence of contributory negligence of plaintiff, is on the latter, but it will be sufficient if these facts appear either directly or circumstantially. Cincinnati, &c., R. Co. v. McMullen, 117 Ind. 439; 20 N. E. Rep. 287; Mount Vernon v. Dusouchett, 2 Ind. 586; 54 Am. Dec. 467; Wayne Co. Turnpike Co. v. Berry, 5 Ind. 286; Wabash Canal Co. v. Mayor, 10 Ind. 400; Indianapolis, &c., R. Co. v. Keely, 23 Ind. 133; Evansville, &c., R. Co. v. Dexter, 24 Ind. 411; Evansville, &c., R. Co. v. Hiatt, 17 Ind. 102; Jeffersonville, &c., R. Co. v. Hendricks, 26 Ind. 228; Toledo, &c., R. Co. v. Bevin, 26 Ind. 443; Pittsburgh, &c., R. Co. v. Vining, 27 Ind. 513; Michigan, &c., R. Co. v. Lantz, 29 Ind. 528; Riest v. Goshen, 42 Ind. 339. The rule, though seemingly harsh, is nevertheless applied in the same way to an infant. Hathaway v. Toledo, &c., R. Co., 46 Ind. 25, 30; Jackson v. Indianapolis, &c., R. Co., 47 Ind. 454; City of Anderson v. Hervey, 67 Ind. 420; Gormley v. Ohio, &c., R. Co., 72 Ind. 31; Jeffersonville, &c., R. Co. v. Lyon, 72 Ind. 107; Williams v. Moray, 74 Ind. 25; Toledo, &c., R. Co. v. Brannagan, 75 Ind. 490;

anything, then the opposite rule would be the better rule; but in point of fact these men generally blunder, and are generally in fault. Contributory negligence is a good defense in a great majority of the cases. It follows then that, if we are to have an inflexible rule, it must, in order to do even justice as nearly as possible, take account of this element in these cases. It must be grounded and predicated upon the presumption of negligence rather than the presumption of care, for verily that is the presumption of fact in these cases. When the average plaintiff comes into court with his action of negligence, the mathematical chance is more than six to one, at the very lowest, that, when the evidence is all in, it will give the defendant a verdict, on the ground of the plaintiff's own participating and concurring default. It must appear, as the law stands, before a verdict for the plaintiff can be sustained, that the plaintiff was not guilty of contributory negligence. It is an essential element in the case upon which the issue depends, and, inasmuch as the chances are very largely in favor of the defendant when the question of contributory negligence is raised, it is difficult to see upon what ground it is unjust or unreasonable to put the burden of proof

Huntington v. Breen, 77 Ind. 29; Pittsburgh, &c., R. Co. v. Noel, 77 Ind. 110; Pennsylvania Co. v. Gallentine, 77 Ind. 322; Louisville, &c., R. Co. v. Head, 80 Ind. 117; Bloomington v. Rogers, 83 Ind. 261; Wilson v. Trafalgar Co., 83 Ind. 326; Louisville, &c., R. Co. v. Orr, 84 Ind. 50; Rushville v. Poe, 85 Ind. 83; Louisville, &c., R. Co. v. Krinuing, 87 Ind. 351; Louisville, &c., R. Co. v. Hagen, 87 Ind. 602; Gheens v. Golden, 90 Ind. 427; Louisville, &c., R. Co. v. Lockridge, 93 Ind. 191. In that State the declaration, or complaint, must aver or show the absence of negligence upon the part of the plaintiff. Board of Trustees, &c., v. Mayer, 10 Ind. 401; Evansville, &c., R. Co. v. Hiatt, 17 Ind. 102; Indianapolis, &c., R. Co. v. Keely's Adm'r, 23 Ind. 134; Jeffersonville, &c., R. Co. v. Hendrick's Adm'r, 26 Ind. 230; Williams v. Moray, 74 Ind. 27; Pennsylvania Co. v. Gallentine, 77 Ind. 329; Louisville, &c., R. Co. v. Boland, 53 Ind. 402; Rogers v. Overton, 87 Ind. 411. *Cf.* the note, in 54 Am. Dec. 467, 470, to the case of President and Trustees of the Town of Mount Vernon v. Dusouchett (the case in which this rule had its origin), 2 Ind. 586. In an action for personal injuries based upon the negligence of the defendant, an allegation in the complaint that such injuries were sustained without any fault or negligence of the defendant sufficiently negatives contributory negligence on the part of the plaintiff, unless it clearly appears from facts specifically alleged that the plaintiff was guilty of negligence which contributed to his injury. Citizens' St. R. Co. v. Sutton, 148 Ind. 169; 46 N. E. Rep. 462.

upon the plaintiff. The fact must be established in order to the plaintiff's success, and the chances are that it cannot be established. Where is the unfairness in requiring him to establish it as part of his case? or upon what ground shall it be held proper to impose upon the defendant the duty of establishing the want of care on the part of the plaintiff? In my judgment, no arbitrary and inflexible rule upon this matter is just; but, if there is to be such a rule, I am unable to understand how any other rule than that which puts the burden of proof upon the plaintiff can be in any wise defended.

§ 424. **Mr. Freeman's criticism of the rule.**— Mr. Freeman, the learned editor of the American Decisions, and of the American State Reports, has said in criticism of this view:[14] "It is certainly a presumption of fact or common sense that persons are ordinarily prudent. In fact the very phrases which obtain in legal terminology, 'ordinary prudence or care,' or 'the care ordinarily exhibited by persons reasonably prudent under the same circumstances,' convey with them, and are based upon the supposition that people as a general rule are ordinarily careful. Whereas, the authorities that render it necessary for the plaintiff to free himself from negligence in the first place, seem necessarily to assume that people are usually negligent. The anomaly of requiring the party holding the affirmative to negatively prove part of his case is apparent, while the necessarily attendant presumption of the negligence of mankind in general, requires for its support the mind of a cynic or a pessimist." It is upon this key that all the objections to the rule which puts the burden of proof upon the plaintiff in these cases, proceed.

§ 425. **His position untenable.**— But such an objection begs the question and is founded upon a wholly unwarranted assumption. The question of the carefulness and prudence of mankind in general is not involved. The question of contributory negligence affects only the few who get hurt in their persons or property by reason of some other person's neglect. Uncounted millions of the human family are born, and live out their allotted span, and die, and bring no single action of negligence in all the days of their life. With them and their care or carelessness we have nothing to do, except that from their

[14] 62 Am. Dec. 687, note.

conduct on the average, we get a meaning for those phrases that Mr. Freeman quotes. "Ordinary care," it seems hardly necessary to say, means the care of the average prudent man who does not get hurt in his person or property. By his supposed conduct under given circumstances we test the propriety and fitness of the conduct of a man who has suffered an injury and brings an action for redress. Now the precise question is, not whether the race is upon the whole a careful race, but whether the few out of the multitude, who suffer injuries, are upon the whole careful and prudent. Dividing the human family into the injured and the uninjured, and subdividing the first class into those who bring, and those who do not bring actions in courts of justice for the redress of their injuries, we inquire whether that class of the injured who bring civil suits for damages are, upon the average, careful and prudent men and women. Perhaps it may not seem to involve any revolting amount of cynicism to take the ground that this class of persons are not, upon the whole, or in a majority of cases, up to the average in point of carefulness and prudence; or were not, at the time of the happening of the injury of which they complain, in full exercise of that full *quantum* of care and prudence that passes among men as "ordinary care;" that it is a fair presumption in any given case, that the injured person was at fault, and that the rule that imposes upon such plaintiffs the burden of showing themselves free from contributory negligence is, in a vast majority of cases, shown to be a reasonable rule of law, by the fact that, in a vast majority of cases, it turns out that the plaintiff was in fault, and, in fact, a joint author of the injury of which he complains. It may even seem, after a full consideration, that the rule which would make contributory negligence a matter of defense, and something in every instance for the defendant to allege and prove, is grounded more in a sentiment than in right reason.

§ 426. **The burden upon the defendant.**— In many jurisdictions it is the rule that contributory negligence is matter of defense, and that the burden of establishing it is upon the defendant. Where this rule obtains, the plaintiff has made his case when he has shown injury to himself, and negligence on the part of the defendant which was a proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as matter of defense, the presumption being

in favor of the plaintiff, that he was, at the time of the accident, in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct. This is the doctrine of the Supreme Court of the United States,[15] and it is the rule in Alabama,[16] Kentucky,[17] California,[18] Colorado,[19] Georgia,[20] Kansas,[21] Maryland,[22] Minnesota,[23] Missouri,[24] New

[15] Washington, &c., R. Co. v. Harmon, 147 U. S. 571; Railroad Co. v. Gladmon, 15 Wall. 401; Indianapolis, &c., R. Co. v. Horst, 93 U. S. 291; Hough v. Railway Co., 100 U. S. 213; Hayes v. Northern Pacific R. Co., 46 U. S. App. 41, 49; 74 Fed. Rep. 279; Crew v. St. Louis, &c., R. Co., 20 Fed. Rep. 87; Tolson v. Inland, &c., Coasting Co., 6 Mackey, 39; Conroy v. Oregon Construction Co., 23 Fed. Rep. 71; Secord v. St. Paul, &c., R. Co., 5 McCrary, 515; Morgan v. Bridge Co., 5 Dillon, 96; Dillon v. Union Pac. Ry. Co., 3 Dillon, 325; Wabash, &c., R. Co. v. Central Trust Co., 23 Fed. Rep. 513; 32 Alb. Law Jour. 96. *Contra*, Beardsley v. Swann, 4 McLean, 333; Hull v. Richmond, 2 Woodb. & M. 337, 345; Dunmead v. Am., &c., Co., 4 McCrary, 244.

[16] Smoot v. The Mayor, 24 Ala. 112; Mobile, &c., R. Co. v. Crenshaw, 65 Ala. 566; Thompson v. Duncan, 76 Ala. 334; Montgomery Gas Light Co. v. Montgomery, &c., Ry. Co., 86 Ala. 372; Montgomery, &c., Ry. Co. v. Chambers, 79 Ala. 338.

[17] Paducah, &c., R. Co. v. Hoehl, 12 Bush, 41; Louisville Canal Co. v. Murphy, 9 Bush, 522. Contributory negligence is a defense that confesses and avoids the plaintiff's case, and must be made out by showing not only that plaintiff was guilty of negligence, but that it co-operated with defendant's negligence to produce the injury. Kentucky, &c., R. Co. v. Thomas, 79 Ky. 160; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; 42 Am. Rep. 227.

[18] Finn v. Vallejo St. Wharf Co., 7 Cal. 255; May v. Hanson, 5 Cal. 360; 63 Am. Dec. 135; Gay v. Winter, 34 Cal. 153; Robinson v. Western, &c., R. Co., 48 Cal. 426; McQuilken v. Central, &c., R. Co., 50 Cal. 7; Macdougall v. Central, &c., R. Co., 63 Cal. 431; Nehrbas v. Central, &c., R. Co., 62 Cal. 320.

[19] Sanderson v. Frazier, 8 Colo. 79.

[20] Thompson v. Central, &c., R. Co., 54 Ga. 509. *Contra*, Branan v. May, 17 Ga. 136; Campbell v. Atlanta, &c., R. Co., 53 Ga. 488.

[21] St. Louis, &c., Ry. Co. v. Weaver, 35 Kan. 412; 11 Pac. Rep. 408; Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639; 21 Pac. Rep. 574; Kansas, &c., R. Co. v. Pointer, 9 Kan. 620; 14 Kan. 38; Kansas, &c., R. Co. v. Phillibert, 25 Kan. 583.

[22] Irwin v. Sprigg, 6 Gill. 206; Baltimore v. Morriott, 9 Md. 160; Northern, &c., R. Co. v. State, 31 Md. 357; Frech v. Phila., &c., R. Co., 39 Md. 574; County Commissioners v. Burgess, 61 Md. 29. See, also, Twigg v. Ryland, 62 Md. 380; 19 Am. Law Rev. 319.

[23] Hocum v. Weitherick, 22 Minn. 152.

[24] Hudson v. Wabash W. Ry. Co., 32 Mo. App. 667; Mitchell v. City of Clinton, 99 Mo. 153; 12 S. W. Rep. 793; Thompson v. North Mo.

Hampshire,[25] New Jersey,[26] Oregon,[27] Arizona,[28] Idaho,[29] Washington,[30] Arkansas,[31] Nebraska,[32] Ohio,[33] Pennsylvania,[34] Rhode Island,[35] West Virginia,[36] South Carolina,[37] Texas,[38] Wisconsin,[39] Vermont,[40] Virginia,[41] as well as in England.[42]

R. Co., 51 Mo. 190; Hicks v. Pacific, &c., R. Co., 65 Mo. 34; 64 Mo. 430; Buesching v. St. Louis Gas Light Co., 73 Mo. 219; 39 Am. Rep. 503, and the note; Lane v. Missouri Pacific Ry. Co., 132 Mo. 4; 33 S. W. Rep. 645, 1128.

[25] White v. Concord, &c., R. Co., 30 N. H. 207; Smith v. Eastern, &c., R. Co., 35 N. H. 366.

[26] Moore v. Central, &c., R. Co., 24 N. J. Law, 268; Durant v. Palmer, 29 N. J. Law, 544; N. J. Express Co. v. Nichols, 32 N. J. Law, 166; 33 N. J. Law, 434.

[27] Grant v. Baker, 12 Or. 329.

[28] Hobson v. New Mexico, &c., R. Co. (Ariz.), 11 Pac. Rep. 54.

[29] Hopkins v. Utah Northern Ry. Co. (Idaho), 13 Pac. Rep. 343.

[30] Northern Pac. R. Co. v. O'Brien (Wash. T.), 21 Pac. Rep. 32.

[31] Texas, &c., Ry. Co. v. Orr, 46 Ark. 182; Little Rock, &c., Ry. Co. v. Atkins, 46 Ark. 423.

[32] City of Lincoln v. Walker, 18 Neb. 224; 19 Am. Law Rev. 162.

[33] Cleveland, &c., R. Co. v. Crawford, 24 Ohio St. 636; Balto., &c., R. Co. v. Whitacre, 35 Ohio St. 627. See, also, Little Miami, &c., R. Co. v. Stevens, 20 Ohio St. 415.

[34] Beatty v. Gilmore, 16 Penn. St. 463; Erie v. Schwingle, 22 Penn. St. 384; Bush v. Johnson, 23 Penn. St. 209; Penn. R. Co. v. McTighe, 46 Penn. St. 316; Allen v. Willard, 57 Penn. St. 374; Waters v. Wing, 59 Penn. St. 211; Penn. Canal Co. v. Bentley, 66 Penn. St. 30; Penn. R. Co. v. Weber, 72 Penn. St. 27; 76 Penn. St. 157; Hays v. Gallagher, 72 Penn. St. 136 (distinguishing 59 Penn. St. 211); Weiss v. Penn. R. Co., 79 Penn. St. 387; Mallory v. Griffey, 85 Penn. St. 275. *Contra*, Federal St. R. Co. v. Gibson, 96 Penn. St. 83; Baker v. Fehr, 97 Penn. St. 70; Phila, &c., R. Co. v. Boyer, 97 Penn. St. 91. In cases where the injury complained of results in the death of the injured person, the law presumes that such person exercised the measure of care that it was his duty to exercise. The presumption is *prima facie* only and may be rebutted by proof of acts of the injured person or of the circumstances surrounding the accident. Connerton v. Delaware & Hudson Canal Co., 169 Penn. St. 339, 341; 32 Atl. Rep. 416.

[35] Cassidy v. Angell, 12 R. I. 447; 34 Am. Rep. 690.

[36] Sheff v. City of Huntington, 16 W. Va. 317.

[37] Danner v. South Carolina R. Co., 4 Rich. (Law) 329; 55 Am. Dec. 678; Carter v. Columbia, &c., R. Co., 19 S. C. 20; 45 Am. Rep. 754; Roof v. Railroad Co., 4 S. C. 61.

[38] Texas, &c., R. Co. v. Murphy, 46 Tex. 356; Houston, &c., R. Co. v. Cowser, 57 Tex. 293; Dallas, &c., R. Co. v. Spicker, 61 Tex. 427; 48 Am. Rep. 297. "It is only when the averments of the petition show a *prima facie* case of negligence on the part of the injured party, that it becomes necessary that the plaintiff should negative by averment and proof the existence of such negligence." San Antonio, &c., Ry. Co. v. Ben-

§ 427. Where plaintiff's own case raises presumption of contributory negligence.— But, in all those jurisdictions, where contributory negligence is held a matter of defense, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and, where the circumstances attending the injury were such as to raise a presumption against him in respect of the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault.[43] And when the plaintiff's case, on the face of it, shows contributory negligence, there should be a nonsuit,[44] but

nett, 76 Tex. 151, 155. *Contra*, Walker v. Herron, 22 Tex. 55.

[39] Milwaukee, &c., R. Co. v. Hunter, 11 Wis. 160; Achtenhagen v. Watertown, 18 Wis. 331; Potter v. Chicago, &c., R. Co., 21 Wis. 372; 22 Wis. 615; Hoyt v. Hudson, 41 Wis. 105; Prideaux v. Mineral Point, 43 Wis. 513; 28 Am. Rep. 558, and the note; Hoth v. Peters, 55 Wis. 405. The older cases are overruled. Chamberlain v. Milwaukee, &c., R. Co., 7 Wis. 431; Dressler v. Davis, 7 Wis. 527.

[40] Barber v. Essex, 27 Vt. 62; Hill v. New Haven, 37 Vt. 501.

[41] Richmond Granite Co. v. Bailey, 92 Va. 554; 24 S. E. Rep. 232; Southern Ry. Co. v. Bryant's Admr., 95 Va. 219; 28 S. E. Rep. 183. The burden of proving contributory negligence on the part of the plaintiff is on the defendant, unless it is disclosed by the plaintiff's evidence, or can be fairly inferred from all the circumstances of the case. Kimball v. Friend's Admr., 95 Va. 125; 27 S. E. Rep. 901.

[42] Holden v. Liverpool Gas Co., 3 C. B. 1; Davey v. London, &c., Ry. Co., 11 L. R. (Q. B. Div.) 213; Bridge v. Grand Junction Ry. Co., 3 M. & W. 244; Martin v. Great Northern, &c., Ry. Co., 16 C. B. 179.

[43] Baltimore, &c., R. Co. v. Whitacre, 35 Ohio St. 627; Hays v. Gallagher, 72 Penn. St. 140; New Jersey Express Co. v. Nichols, 33 N. J. Law, 434; Dallas, &c., R. Co. v. Spicker, 61 Tex. 427; 48 Am. Rep. 297; Winship v. Enfield, 42 N. H. 197; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; 42 Am. Rep. 227; Miller v. St. Louis, &c., R. Co., 5 Mo. App. 471; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. Rep. 425; Prideaux v. City of Mineral Point, 43 Wis. 513; 28 Am. Rep. 558, and the note. If the plaintiff can prove his case without disclosing any negligence on his own part, his negligence then becomes a matter of defense, the burden of proving it being on the defendant. Omaha Street Ry. Co. v. Martin, 48 Neb. 65; 66 N. W. Rep. 1007; Union Stock Yards Co. v. Conoyer, 41 Neb. 617.

[44] Starry v. Dubuque, &c., Ry. Co., 51 Iowa, 419; Prideaux v. City of Mineral Point, 43 Wis. 513; 28 Am. Rep. 558; Baltimore, &c., R. Co. v. Whitacre, 35 Ohio St. 627; Cassidy v. Angell, 12 R. I. 447;

if there be any real question as to the plaintiff's negligence, he should not be nonsuited, but the question is for the jury.[45] In the early and leading case of Zemp v. Wilmington & Manchester R. Co.,[46] it was said that declarations of the plaintiff, in the nature of admissions, to the effect that the injury resulted from his own carelessness and that he alone was in fault, the admission having been made almost immediately after the accident in which the injury was received and before the plaintiff was fully informed of the causes of the accident, are not conclusive evidence of contributory negligence, but are to be left to the jury to receive their appropriate weight in connection with other evidence.

§ 428. **The rule in Connecticut.**— In Park v. O'Brien,[47] the Supreme Court of Errors of Connecticut set forth the rule that in these actions the burden is upon the plaintiff to establish that his own negligence did not concur in producing the mischief of which he complains, in the following luminous language: — "We accord entirely with the decision cited by the plaintiff in error, the defendant below, to show that, in this suit, the burden of showing that the injury was not attributable to the want of reasonable care on his part, rested on the plaintiff. The reason of this rule is that the plaintiff must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove; first, negligence on the part of the defendant in respect to the collision alleged, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter part, the plaintiff must show that such injury was not caused in whole or

34 Am. Rep. 690; Lee v. Woolsey, 109 Penn. St. 124; Schum v. Penn. R. Co., 107 Penn. St. 8; Longenecker v. Penn. R. Co., 105 Penn. St. 328. Where negligence is the ground of the action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if, from these circumstances, so proven by plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant. Butcher v. West Virginia & P. R. Co., 37 W. Va. 180; 16 S. E. Rep. 457.

[45] See generally the cases cited in the preceding notes.

[46] 9 Rich. (Law) 84; 64 Am. Dec. 763.

[47] 23 Conn. 339.

in part, by his own negligence, for although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. Therefore the plaintiff would not prove enough to entitle him to recover, by merely showing negligence on the part of the defendant, but he must go further, and also prove the injury to have been caused by such negligence, by showing a want of concurring negligence on his own part contributing materially to the injury. Hence, to say that the plaintiff must show the latter, is only saying that he must show that the injury was owing to the negligence of the defendant. And as the defendant had the right to have the jury informed as to what facts the plaintiff must prove, in order to recover, he had a right to require the court to instruct them that it was incumbent on the plaintiff to prove a want of such concurring negligence on his part."

§ 429. Judge Redfield's statement of the rule.— Perhaps there is no more explicit and satisfactory statement of the rule in the reports than this. It is not, however, a favorite rule with the text-writers and commentators, who almost universally incline to indorse the opposite doctrine, which makes contributory negligence a matter of defense, and puts the burden of proving it upon the defendant.[48] Judge Redfield to this point has said:[49]— "Although the majority of the American courts lay down the rule * * * that the burden of proof is upon the plaintiff to show that he was guilty of no negligence on his own part, we think the point is not well defined in these terms. All that is meant, we apprehend, is, that where there is any evidence tending to prove, either directly, or from the manner of the accident, that there might have been fault on the part of the plaintiff, he must assume the burden, upon the whole issue, of satisfying the jury that the injury occurred through the fault of the defendant, and that his own want of care at the time did not in any sense contribute directly to it. The result of the rule thus stated would be that, where there was no evidence of

[48] Shearman & Redfield on Negligence (5th ed.), § 109; Thompson on Negligence, 1176; Thompson on Carriers of Passengers, 257 *et seq.;* Wharton on Negligence, § 423; 2 Redfield on Railways (5th ed.), 253, notes; 28 Am. Rep. 563, Mr. Browne's note; 62 Am. Dec. 686, Mr. Freeman's note.

[49] 2 Redfield on Railways (5th ed.), 253.

any want of care on the part of the plaintiff, the law will presume none existed, as in regard to good character in a witness, or sanity in one where there is no proof. * * * It has sometimes been claimed, that the plaintiff must give affirmative evidence of his own exercise of due care and caution at the time the injury occurred. But this in principle is much like one giving evidence of the good character of his witness, before any impeachment, and we think should never be required."

§ 430. The rule in Kansas.— In Kansas Pacific R. Co. v. Pointer,[50] the court, arguing to the same effect, said:—"It seems to us also correct to hold that the *onus probandi* as to the negligence of the plaintiff is on the defendant, that, if the record shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery. We are aware of contrary decisions, and that in some States it is held that the burden is on the plaintiff to show affirmatively that he exercised due care, and was without fault. But if it is shown that a party has done wrong and caused injury thereby, is not a *prima facie* case for compensation made? Logically, the wrong-doer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice, the wrong-doer causing injury ought not to be released from making any compensation, simply because the injured party is also a wrong-doer, and helped produce the injury. But many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford any relief. But if the wrong-doer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent on him to show such wrong. It is a matter of defense to avoid the consequences of his own wrong."

§ 431. This rule criticised.— These arguments in favor of the rule which places the burden of proof as to the contributory

[50] 14 Kan. 37.

negligence of the plaintiff upon the defendant, proceed, it is suggested with deference, always upon the reasonableness, or justice, of the presumption of carefulness upon the part of the plaintiff. This presumption is after the analogy of the presumption of innocence in the criminal law, and is always defended upon the same grounds as that presumption. Judge Redfield, in the passage just quoted from his treatise upon the Law of Railways, says that the opposite rule is very much like requiring evidence of the good character of one's witnesses before their character is impeached, and assumes that the presumption in favor of the plaintiff's carefulness and prudence is like the presumption in favor of the sanity of plaintiff. Now, in point of fact, the character of most persons whose testimony is offered in evidence in courts of justice, is good, or good enough so that it cannot be successfully impeached, and it is beyond cavil that an overwhelming majority of those who bring actions in the courts are not crazy. Whereas, as I have endeavored to show,[51] it is not a fact that a majority of those persons who bring actions of negligence, were themselves free from the imputation of contributory negligence, but, on the contrary, it is a fact, that in a very large proportion of the cases it turns out that the plaintiff was himself at least partly to blame, and that his own negligence, concurring with that of the defendant, produced the mischief of which he complains. Inasmuch as that is true, the presumption of fact in any individual case is that the plaintiff was himself careless. The mathematical chance is largely against the plaintiff in these actions, taking account of all the actions that are brought. He succeeds not oftener than twice or three times in ten in actions of this nature. The presumption, therefore, that the plaintiff was careful is not in these actions a reasonable presumption. The chances are that he was careless, and the presumption accordingly should be that he was careless, to the extent of requiring him, as a material part of his case, to show his freedom from contributory fault. This, however, need not in every instance be proved by affirmative testimony, but it may be inferred from all the circumstances of the case.

§ 432. The rule distinguished.— This is well set forth by Wells, J., in Mayo v. Boston & Maine R. Co.,[52] in the following language:—"The burden rests upon the plaintiff" (to show his own freedom from negligence). "Although in form a proposi-

51 See § 423, *et seq.*, *supra*. 52 104 Mass. 137, 140.

tion to be established affirmatively, it is not necessarily to be proved by affirmative testimony addressed directly to its support. The burden is held to be upon the plaintiff for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to-wit, that the injury to the plaintiff was caused by the negligent or wrongful conduct of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as by affirmative testimony, all the circumstances under which the injury received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault."[53]

§ 433. The rule in New York.— The courts of New York seem to have dealt with this question, at least in the earlier cases, in a spirit of compromise. In the later volumes of the reports there is to be observed a decided tendency toward the rule that the plaintiff, as part of his case, must establish his freedom from contributory neglect, putting, accordingly, the burden of proof upon him; but in the earlier cases it appears that the court endeavored to avoid committing itself irrevocably to either of the two antagonistic rules, letting each case depend upon its own peculiar circumstances in the matter of the burden of proof as to contributory negligence. On the one hand they avoid giving the odds arbitrarily, in every case, to the plaintiff, by assuming his carefulness, as matter of law, at the start, and, on the other hand, the plaintiff is not handicapped with an obligation, in respect of the evidence, which assumes the contrary. Under this ruling each case may be said to be the rule unto itself. If the plaintiff's case, from the evidence, turns out to be of such a character as in any degree to implicate him in respect of negligence, then the burden of proof is upon him to clear himself of blame, and his freedom from fault must appear as a factor

[53] To the same effect, see Smith v. Boston Gas Light Co., 129 Mass. 318; Craig v. New York, &c., R. Co., 118 Mass. 437; Commonwealth v. Boston, &c., R. Co., 126 Mass. 61; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Way v. Ill., &c., R. Co., 40 Iowa, 345; Tolman v. Syracuse, &c., R. Co., 98 N. Y. 198, 202; 50 Am. Rep. 649; Railroad Company v. Gladmon, 15 Wall. 401, 407; Teipel v. Hilsendegen (by Cooley, J.), 44 Mich. 461.

of his *prima facie* case. But if, *per contra*, the plaintiff's case involves no such implication, he may rest when he has shown the injury sustained and the defendant's fault, and the burden of proof will then be upon the defendant, to go free if he may, because of the contributory fault of the plaintiff, which it is for him to establish. It is only upon such a theory as this that the decisions of the New York courts can be reconciled. An extended and somewhat careful reading of the cases seems to warrant this distinction. Judge Thompson says:—"In New York * * * the decisions are irreconcilable;"[54] but it is believed that hardly one in the long list can be found where this rule, fairly applied, will not appear to have controlled the ruling as to the burden of proof.

§ 434. The rule in New York further stated.— In Johnson v. Hudson River R. Co.,[55] which was referred to with approval in the Supreme Court of the United States by Mr. Justice Hunt[56] in Railroad Co. v. Gladmon,[57] the court said:—"I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no evidence would be required. * * * The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from

[54] Thompson on Negligence, 1117.

[55] 20 N. Y. 65.

[56] By a somewhat curious misarrangement of authorities this extract from the opinion of Denio, J., in the case of Johnson v. Hudson River R. Co., 20 N. Y. 65, is quoted in the case of Railroad Co. v. Gladmon, 15 Wall. 401, 406, by Mr. Justice Hunt, and cited as taken from the opinion in the case of Oldfield v. New York, &c., R. Co., 14 N. Y. 310; affirming 3 E. D. Smith, 103.

[57] 15 Wall. 401, 406.

circumstances, and the disposition of men to take care of themselves and keep out of difficulty may be properly taken into consideration." It is in this spirit that the New York cases proceed, and by way of summing up, in the same opinion, the learned judge said:—"The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry the case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove *prima facie* the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down." In a majority of cases, it has been already suggested, under the operation of this rule, the burden will fall upon the plaintiff, because it will most generally happen that something in the circumstances of the case puts the plaintiff in a position where it is necessary and proper for him to show not only that the defendant was wrong, but that he was right. Wherever this is the case, this rule very justly imposes the burden of proof upon him; but whenever it is not the case, as it will very occasionally happen, the burden of proof as to contributory negligence is upon the defendant. That this is exactly the New York rule as the older judges, at least, understood it, a long line of cases — otherwise irreconcilable — sufficiently demonstrates.[58]

[58] Spencer v. Utica, &c., R. Co., 5 Barb. 337; Hackford v. New York, &c., R. Co., 6 Lans. 381; 43 How. Pr. 222; Robinson v. N. Y., &c., R. Co., 65 Barb. 146; Suydam v. Grand St. R. Co., 41 Barb. 375; Bush v. Brainard, 1 Cowen, 78; Harlow v. Humiston, 6 Cowen, 189; Button v. Hudson River, &c., R. Co., 18 N. Y. 248; Wilds v. Hudson River, &c., R. Co., 24 N. Y. 430; Squire v. Central Park R. Co., 4 Jones & Sp. 436; Johnson v. Hudson River, &c., R. Co., 20 N. Y. 65; 6 Duer, 633; 5 Duer, 21; Ryan v. Hudson River, &c., R. Co., 1 Jones & Sp. 137; Holbrook v. Utica, &c., R. Co., 16 Barb. 113; 12 N. Y. 236; De Benedetti v. Mauchin, 1 Hilt. 213; Ernst v.

§ 435. The development of the rule in New York.— The development of the rule in New York upon this point is a curious, but very satisfactory demonstration, in my judgment, of the essential reasonableness and propriety of that rule of evidence which makes it incumbent upon the plaintiff, as part of his case, to show his own freedom from contributory fault when he brings an action of negligence. We find in the New York reports, as Judge Thompson suggests, a great number of wholly irreconcilable decisions upon the point in question. The Court of Appeals of that State has, in individual cases, taken now one position and now the other upon the matter of the burden of proof in actions of this nature. But, taken together, the reported cases seem to indicate that the court, after groping about, or perhaps beating about, for some middle ground, and after much reluctance and some plain mistakes, has finally come squarely to the position that the burden of proof is upon the plaintiff to show that his own conduct, *in faciendo* or in *non faciendo*, did not, in the legal intent, contribute to occasion the mischief of which he complains. Turning to the report books we find that, in the case of Spencer v. Utica, &c., R. Co., decided in 1849,[59] the Supreme Court declared it a "stern and unbending rule" that the plaintiff in these actions "must establish the proposition that he himself was without negligence and without fault."[60] This is the earliest case in which it is clear

Hudson River, &c., R. Co., 24 How. Pr. 97; 32 How. Pr. 262; 19 How. Pr. 205; 32 Barb. 159; 35 N. Y. 9; 39 N. Y. 61; Curran v. Warren Chemical Manfg. Co., 36 N. Y. 153; Burke v. Broadway, &c., R. Co., 34 How. Pr. 239; 49 Barb. 529; Beisiegel v. New York, &c., R. Co., 14 Abb. Pr. (N. S.) 29; Warner v. New York, &c., R. Co., 44 N. Y. 465; 45 Barb. 299; Gillispie v. Newburgh, 54 N. Y. 468; Reynolds v. New York, &c., R. Co., 58 N. Y. 248 (reversing 2 N. Y. Super. Ct. 644); Cordell v. New York, &c., R. Co., 6 Hun, 461; 64 N. Y. 535; 70 N. Y. 119; Hale v. Smith, 78 N. Y. 480; Hart v. Hudson River Bridge Co., 80 N. Y. 622; 84 N. Y. 56; Riceman v. Havemeyer, 84 N. Y. 647; Jones v. New York, &c., R. Co., 10 Abb. N. C. 200; 62 How. Pr. 450; Becht v. Corbin, 92 N. Y. 658; Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115; Tolman v. Syracuse, &c., R. Co., 98 N. Y. 198; 50 Am. Rep. 649; Debevoise v. New York, &c., R. Co., 98 N. Y. 377; 50 Am. Rep. 683; McDermott v. Third Avenue R. Co., 44 Hun, 107.

[59] 5 Barb. 337.

[60] "This is a stern and unbending rule which has been settled by a long series of adjudged cases, which we cannot overrule if we would," citing Bush v. Brainard, 1 Cowen, 78; Brown v. Maxwell,

that any New York court undertook to lay down a rule upon this point. The cases cited by the learned judge in support of his position, "which," he says, "has been settled by a long series of adjudged cases,"[61] do not, in my opinion, very clearly declare such a doctrine. No one of them is any stronger authority to this point than the case of Butterfield v. Forrester;[62] from which the rule is a mere inference. But, in 1849, we find the Supreme Court of New York committed to the position that the burden of proof is upon the plaintiff, and all the earlier cases, as far as they go, inclining, it may be said, to that rule.

§ **436. This development further considered.**— In 1873 this court took an opposite ground, declaring that "the concurring negligence of the plaintiff is matter of defense, and the plaintiff is under no obligation to prove anything to entitle him to recover but the injury, and that it was caused by defendant's negligence."[63] The question first came before the Court of Appeals in 1858, in the case of Button v. Hudson River R. Co.,[64] wherein a very singular position was taken. The reporter seems to have thought that the case declared the rule that the burden is upon the plaintiff, for in the head-note he said:—"In an action for negligence the burden is upon the plaintiff to prove affirmatively that he is guiltless of any negligence proximately contributing to the injury." If only the opinion were equal to the syllabus there would be no room for conjecture or dispute, and we might count this earliest utterance of the court of last resort in New York in favor of one rule. But in the opinion Strong, J., said:— "The other point" [for the appellant],[65] "presents the question upon whom was the burden of proof, in reference to negligence of the intestate, conducing to the injury — whether it belonged to the plaintiff to prove affirmatively the absence, or to the defendant to prove affirmatively the presence of such negligence. In regard to all the circumstances essential to the cause of action, the plaintiff held and was required to sustain the affirmative. Among those circumstances were that the defendants were negli-

6 Hill, 592; Rathbun v. Payne, 19 Wend. 399; Harlow v. Humiston, 6 Cowen, 189, 191; Corlies v. Cumming, 6 Cowen, 181, 184; Brownell v. Flagler, 5 Hill, 282.

61 Spencer v. Utica, &c., R. Co., 5 Barb. 337, 338.

62 11 East, 60.

63 Hackford v. New York, &c., R. Co., 6 Lans. 381. See, also, Robinson v. New York, &c., R. Co., 65 Barb. 146.

64 18 N. Y. 248.

65 Mr. Charles O'Conor was counsel for the appellant.

gent, and that the injury resulted from that negligence. If the intestate was negligent, and his negligence concurred with that of the defendants in producing the injury, the plaintiff had no cause of action. * * * In this view the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendants caused the injury."

§ 437. The position of the New York court stated.— This language is plain, and indicates clearly the mind of a court that would put the burden of proof upon the plaintiff in such an action. This utterance, moreover, is fortified by an imposing array of authorities, including Spencer v. Utica, &c., R. Co., to which I have already referred, and the cases cited by the Supreme Court judge in that case[66] as well as many other English and American decisions that require the plaintiff, as part of his case, to establish his own freedom from negligent default. This done, the court continued:—"It must not be understood that it was incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care by the intestate; it would be enough if the proof introduced of the negligence of the defendants and the circumstances of the injury, *prima facie* established that the injury was occasioned by the negligence of the defendants, as such evidence would exclude the idea of a want of due care by the intestate aiding to the result." This is not far from saying that the plaintiff must show himself free from fault, which he may do by showing the defendant in fault — no very luminous proposition. In the reporter's note it is said of Selden, J.:—"The latter objected to an implication which he conceived to lurk in the opinion of Strong, J. (*but which Strong, J., disclaimed*) that, in the absence of proof of any circumstances importing negligence on the part of the plaintiff, there might be a presumption thereof which he is required to repel, whereas, his negligence must be inferred from evidence and is not to be presumed." From which it is to be inferred that so much of Judge Strong's opinion as plainly imposes upon the plaintiff the burden of proof in these cases is to be ready as of some esoteric or acroamatical significance, being designed to be understood to announce something quite different from what it appears *prima facie* to announce.

[66] See § 436, n. 2, *supra*.

§ 438. The New York cases further considered.— Without any attempt to place this case as either for or against the rule which puts the burden of proof upon the plaintiff, we find in Johnson v. Hudson River R. Co.[67] that Judge Denio, after declaring that "the person injured must not by his own negligence have contributed to the injury," and insisting that "this is an element in the definition of the cause of action," defined the rule as follows:—"I am of opinion that it is not a rule of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent." This should seem to imply that such a rule obtained in the courts of New York at that period, generally, if not as "a rule of universal application." The influence of this decision, as I have already indicated,[68] is — so far as it may be regarded as authoritative at present, and not, by implication at least, overruled — in favor of allowing each case to be a rule unto itself on this point, requiring the plaintiff to show, or the defendant to show, contributory negligence as the circumstances of each particular case may warrant. Passing by the case of Wilds v. Hudson River R. Co.,[69] a landmark in the law on this point in New York, we come to the case of Ernst v. Hudson River R. Co.,[70] wherein the court for the first time was fully and plainly committed to the rule that requires the burden of proof to be upon the plaintiff. The language is unqualified:—"A party suing for negligence must come into court faultless. He must not present a mere balanced case. The burden of proof is upon him and he must satisfy the court, by the greater weight of testimony, that, without any carelessness or blame on his part, he has suffered an injury."

§ 439. The New York rule summarized.— This seems to have been the culmination of a long series of years of doubt and vacillation, and here the court has rested. The later cases, without exception I believe, impose upon the plaintiff the burden of proving, as an essential element of his case, that his own conduct did not contribute to occasion the injury.[71] It is some-

[67] 20 N. Y. 65.

[68] See § 434 *et seq.*, *supra*.

[69] 24 N. Y. 430.

[70] 24 How. Pr. 97.

[71] Warner v. New York, &c., R. Co., 44 N. Y. 465; Reynolds v. New York, &c., R. Co., 58 N. Y. 248; Cordell v. New York, &c., R. Co., 75 N. Y. 330; Hale v. Smith, 78 N. Y. 480; Hart v. Hudson River Bridge Co., 80 N. Y. 622; 84 N. Y. 56; Riceman v. Havemeyer, 84 N.

times said that the plaintiff must prove "affirmatively" that he was himself free from negligence, but by this it is believed nothing more is meant than that the fact of such freedom from negligence on the part of the plaintiff must be made to appear. It is a necessary element in the plaintiff's case, and something for him to show. In Tolman v. Syracuse, &c., R. Co.,[72] Finch, J., said:—"The burden was upon the plaintiff of showing affirmatively, either by direct evidence, or the drift of surrounding circumstances, that the deceased was himself without fault, and approached the crossing with prudence and care, and with sense alert to the possibility of approaching danger."[73] From which it may be inferred that when it is said that the plaintiff must "show affirmatively," etc., it is meant that the fact must appear, if not by the drift of surrounding circumstances, by direct evidence to the point. In Lee v. Troy Citizens' Gas Light Co.,[74] it was held that it is not essential that the complaint, in an action of negligence, shall specifically allege absence

Y. 647; Becht v. Corbin, 92 N. Y. 658; Jones v. New York, &c., R. Co., 10 Abb. N. C. 200; 62 How. Pr. 450; Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115; Tolman v. Syracuse, &c., R. Co., 98 N. Y. 198; 50 Am. Rep. 649; Debevoise v. New York, &c., R. Co., 98 N. Y. 377; 50 Am. Rep. 683; Whalen v. Citizens' Gas Light Co., 151 N. Y. 70; 45 N. E. Rep. 363; Weston v. City of Troy, 139 N. Y. 281, 282; 34 N. E. Rep. 780; Fejdowski v. D. & H. C. Co., 12 App. Div. 589, 590-591. When the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit should be granted. Wiwirowski v. L. S. & M. S. R. Co., 124 N. Y. 420; 26 N. E. Rep. 1020.

[72] 98 N. Y. 198, 202; 50 Am. Rep. 649.

[73] To the same effect see Hart v. Hudson River Bridge Co., 80 N. Y. 622; 84 N. Y. 56, in which the court says:—"It was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the death of the deceased. But it needs not that this be done by the positive and direct evidence of the negligence of the defendant and of the freedom from negligence of the deceased. The proofs may be indirect, and the evidence had by showing circumstances from which the inference is fairly to be drawn that these principal and essential facts existed." While, in an action for negligence, the absence of negligence on the part of the plaintiff, contributing to the injury, must be shown by him affirmatively, this may be done by circumstantial as well as direct evidence, and if different conclusions may be drawn from the circumstance proved, the question of negligence is one of fact for the jury or a trial court. Chisholm v. State, 141 N. Y. 246; 36 N. E. Rep. 184.

[74] 98 N. Y. 115.

of contributory negligence on the part of the plaintiff; that such an allegation is substantially involved in the averment that the injury complained of was occasioned by the negligence of the defendant, and that to prove this averment it is necessary, the burden being upon the plaintiff, for the plaintiff to establish the fact that his own negligence did not cause or contribute to cause the injury.[75] In Connecticut[76] and Vermont[77] there is to be observed, especially in the earlier decisions, some of which are cited in the notes, a tendency to the same incertitude upon this question that I have considered at length in the New York cases.[78]

[75] In 1872, Mr. Justice Hunt, who may be supposed to have been familiar with the trend of the New York decisions, said, in his opinion in the Supreme Court of the United States in the case of Railroad Company v. Gladmon, 15 Wall. 401, 407:— "The later cases in the New York Court of Appeals, I think, will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one. Generally, as here, the proof which shows the defendant's negligence shows also the negligence or caution of the plaintiff." While the latter remark is clearly true, and serves to emphasize what has already been said as to the requirement of affirmative proof of the plaintiff's freedom from negligence, it is obvious that the former part of the learned justice's *dictum* would not now be made by any informed lawyer or judge. The Court of Appeals is as clearly committed to the rule declared for the first time in Ernst v. Hudson River R. Co., 24 How. Pr. 97, as the Supreme Court of the United States can ever be to the opposite. Mr. Justice Hunt's *dictum* was hardly correct in 1872, and would not now be correct at all.

[76] Beers v. Housatonic, &c., R. Co., 19 Conn. 566; Park v. O'Brien, 23 Conn. 339; Fox v. Glastenbury, 29 Conn. 204; Bell v. Smith, 39 Conn. 211.

[77] Lester v. Pittsford, 7 Vt. 158; Barber v. Essex, 27 Vt. 62; Trow v. Vermont, &c., R. Co., 24 Vt. 487; Hyde v. Jamaica, 27 Vt. 443; Hill v. New Haven, 37 Vt. 501; Walker v. Westfield, 39 Vt. 246; Bovee v. Town of Danville, 53 Vt. 183.

[78] Consult upon the general question of the burden of proof as to contributory negligence, Abbott's Trial Evidence, 594, §§ 33-38, incl.; Shearman & Redfield on Negligence (5th ed.), §§ 43, 44; Thompson on Negligence, 1053, § 48, 1175, § 24, 1253, § 30; Wharton on Negligence, §§ 421, 423, 430, incl., 477, 990; Field on Damages, 182, §§ 189, 190, 191; "Contributory Negligence and the Burden of Proof," by Edward E. Sprague, Esq., of New York; 6 New York State Bar Association Reports; Mr. Browne's notes in 28 Am. Rep. 563, and 39 Am. Rep. 511. See, also, 15 Western Jurist (1883), 197, 209, 529.

§ 440. The disagreement of the courts upon this question.— Upon the question of where to place the burden of proof in actions of negligence when contributory negligence is the issue, which we have considered in this chapter, we find the courts of last resort by no means agreed. On the one hand, in Massachusetts, Connecticut, Maine, Michigan, Iowa, Indiana, Illinois, Mississippi, Louisiana, North Carolina, Oregon, and New York the burden is upon the plaintiff. In each of these States the rule is, as it is well expressed in Cordell v. New York, &c., R. Co.,[79] by the Court of Appeals of New York, that "care on the part of one seeking to hold another liable for neglect must be established by proof. Where there is no proof of such care the court should nonsuit. * * * Absence of negligence will never be presumed;" or, as it is well put by Judge Cooley in Teipel v. Hilsendegen:[80]—"When one sues to recover damages for a negligent injury the *gravamen* of his complaint is that he has been damnified by the wrongful and negligent action of the defendant, without having contributed thereto by negligent conduct of his own. The absence of contributory negligence is therefore a part of his case, and it is quite proper to say that he should show that he acted with due care." But, on the other hand, in Alabama, California, Colorado, Georgia, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, and Vermont, as well as by the Supreme Court of the United States, and in England, it is held that contributory negligence is matter of defense, and that the burden is upon the defendant, unless the plaintiff's own case raises a presumption of negligence on his part, to allege and prove the concurrent default of the plaintiff. "The rule intended," said Chief Justice Ryan, in the case of Prideaux v. City of Mineral Point,[81] "is, that a plaintiff giving evidence of the negligence of the defandant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further; he is not required to negative his own negligence. If, however, the plaintiff, in proving the injury, shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff's evidence leave no doubt of the fact, his contribu-

[79] 64 N. Y. 535.
[80] 44 Mich. 461.
[81] 43 Wis. 513; 28 Am. Rep. 558.

tory negligence is taken, as matter of law, to warrant a nonsuit. If the plaintiff's evidence leave the fact in doubt, the evidence of contributory negligence on both sides should go to the jury."

§ 441. No possible middle ground.—Between these two antinomies there seems to be no practicable middle ground. The courts in New York, Connecticut and Vermont strove to find some tenable mean, but the result has been that, in the two former States, the courts have at last settled down to the rule that puts the burden upon the plaintiff, while in the latter State the tendency is toward the other rule. In Vermont, the law is not yet entirely settled. As long ago as the year 1880, Mr. Browne, in his note to the case of Buesching v. St. Louis Gas Light Co.,[82] after an extended review of the later New York decisions, summed up as follows:—"We think the following is the rule deducible from the New York decisions: If on the plaintiff's affirmative evidence it clearly appears that he himself was materially negligent, he may be nonsuited,[83] otherwise the defendant, assuming that negligence on his part is shown, must give his proof. If on the whole case it does not clearly appear that the plaintiff was free from negligence, he may be nonsuited; but if the evidence is conflicting and doubtful it must go to the jury." This, as a statement of the rule, is hardly more than a circumlocution, and is about equivalent to a rule that the burden of proof is upon the plaintiff. Since 1880, when this statement of the law was published, the Court of Appeals has taken somewhat advanced ground in favor of the rule, and reiterated many times the doctrine first announced in Ernst v. Hudson River R. Co.[84] in 1862, so that in New York the rule may be considered as well settled as any rule of law is ever likely to be.

§ 442. Tendency toward the better rule.—While, as the reports show, there is no tendnecy on the part of any court which holds that the burden of proof in these cases is upon the plaintiff, to recede from that position, it is suggested that, from the opinions in the reports of those States where the contrary rule ob-

[82] 39 Am. Rep. 503, 513; 73 Mo. 219.

[83] This is of course the rule everywhere. In any jurisdiction where the English common law rule as to contributory negligence obtains, the plaintiff, it is believed, would suffer a nonsuit if his own case demonstrated his negligence.

[84] 24 How. Pr. 97.

tains, it may be spelled out that the doctrine which makes contributory negligence, *semper ubique*, matter of defense, and puts the burden always upon the defendant, is not regarded entirely satisfactory. It is those courts that have all the trouble over the matter. Were their position more tenable, and if their doctrine were less grounded in a sentiment, it is, with deference, submitted that the reported cases might show less floundering, and fewer attempts to modify and extenuate, with a correspondingly higher measure of evenness and certitude.

§ 443. Pleading contributory negligence.— Having discussed the burden of proof in the foregoing pages, we come by natural transition to the subject of pleading, for, as a general rule, a party must allege all the facts which he is required to prove in order to defeat his adversary. Accordingly, we find it consistently held in those courts where the burden of proving contributory negligence rests upon the defendant, that it is not incumbent upon the plaintiff to allege the absence of fault upon his part.[85] But it is also declared in Massachusetts[86] and New York,[87] jurisdictions where the plaintiff has the burden of proof, that no direct averment of freedom from contributory negligence on his part is necessary in the complaint. The reason for this seeming departure from the general rule of pleading is specious, but not entirely satisfactory. It is thus stated by the Court of Appeals of New York in the case last cited:—"Substantially that averment is always involved in the averment setting out that the injury was occasioned by the defendant's negligence. To prove that it is necessary for the plaintiff to show, and the burden is upon him to establish that his own negligence did not cause or contribute to the injury." Where the contributory negligence of the plaintiff is shown by his own proof, it is no ground of objection that the defendant did not specially plead and prove it,[88] and a general averment of contributory negli-

[85] Watkinds v. Southern Pac. R. Co., 38 Fed. Rep. 711; Church v. Charleston, &c., Ry. Co., 21 S. C. 495; Consolidated Coal Co. v. Wombacher (Ill.), 24 N. E. Rep. 627; Keitel v. St. Louis, &c., Ry. Co., 28 Mo. App. 657; Conroy v. Oregon Construction Co., 23 Fed. Rep. 71; Shearman & Redfield on Negligence (5th ed.), § 113.

[86] Fuller v. Boston, &c., R. Co., 134 Mass. 491.

[87] Lee v. Troy, &c., Gas. Co., 98 N. Y. 115, 119.

[88] McMurtry v. Louisville, &c., Ry. Co., 67 Miss. 601; 7 So. Rep. 401; Hudson v. Wabash, &c., Ry. Co. (Mo.), 14 S. W. Rep. 15. Generally, contributory negligence is a matter of defense, and must be

gence in an answer without specifying the particular act is sufficient;[89] but evidence of the plaintiff's fault is inadmissible under a general denial.[90]

alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence. Bunnell v. Rio Grande Western Ry. Co., 13 Utah, 314, 323; 44 Pac. Rep. 927.

[89] Neier v. Missouri Pac. Ry. Co. (Mo.), 1 S. W. Rep. 387.

[90] Stone v. Hunt, 94 Mo. 475; 7 S. W. Rep. 431. And see the note in 12 Am. St. Rep. 75, where many decisions on pleading contributory negligence are collected.

CHAPTER XVI.

LAW AND FACT.

§ 444. General statement.
445. A mixed question of law and fact.
446. A preliminary question of law for the court.
447. Contributory negligence as matter of law.
448. When a question of fact.
449. A question of law only in a plain case.
450. Contributory negligence as a question of fact.
451. Judge Cooley's statement of the rule.
452. What the inquiry involves.
453. The tendency of the law in its development.
454. Summary statement of the rule.

§ **444. General statement.**— As a general proposition of law, it is agreed that case of negligence present a mixed question of law and fact, by which it is meant to say, that in an action in a court of justice in which the negligence of either plaintiff or defendant is an issue, or the issue, it devolves upon the court to say, as a matter of law, what is, or amounts to negligence, and upon the jury to say, as matter of fact, in the light of the instruction from the bench, whether or not in the particular case at bar, the facts as proven to their satisfaction, warrant the imputation of negligence. In other words, the court tells the jury what negligence is, and the jury tells the court what the facts of the case show upon the question of negligence; the judge defines negligence in the charge, and the jury apply the definition to the facts in the verdict. "Negligence," said the Supreme Court of California, "is always a mixed question of law and fact, and when the facts are doubtful, they must be submitted to the jury under such instructions from the court as will enable them to apply the law to the facts."[1] An uncounted multitude of authorities might be cited in support of this elementary proposition.[2]

[1] Fernandes v. Sacramento City Ry. Co., 52 Cal. 45, 50.

[2] Wharton on Negligence, § 420, and the cases collected; Thompson on Negligence, 1235, § 10; Wells' Law & Fact, §§ 263-265, incl.; Holmes' Common Law, 120 *et seq.* See, also, Herring v. Wilmington, &c., R. Co., 10 Ired. (Law) 402; 51 Am. Dec. 395; Wright v. Mal-

§ 445. A mixed question of law and fact.— Dr. Wharton, in his discussion of this subject, said:—"Negligence, we must remember at the outset, is not a fact which is the subject of direct proof, but an inference from facts put in evidence. A witness is asked, not whether A. was negligent at a particular juncture, but what were the facts of the case, and from these, negligence,

den, &c., R. Co., 4 Allen, 289; Cleveland, &c., R. Co. v. Terry, 8 Ohio St. 584; Detroit, &c., R. Co. v. Van Steinburg, 17 Mich. 99, 118; Trow v. Vermont, &c., R. Co., 24 Vt. 487; 58 Am. Dec. 191; Barton v. St. Louis, &c., R. Co., 52 Mo. 253; 14 Am. Rep. 418; Keller v. New York, &c., R. Co., 24 How. Pr. 172; Pittsburgh, &c., R. Co. v. McClurg, 56 Penn. St. 300; Norris v. Litchfield, 35 N. H. 277; Raymond v. City of Lowell, 6 Cush. 524; 53 Am. Dec. 57; Lane v. Atlantic Works, 107 Mass. 104; Gerald v. Boston, 108 Mass. 580; Knight v. Ponchartrain, &c., R. Co., 23 La. Ann. 462; Whirley v. Whitman, 1 Head, 610; Union Pacific R. Co. v. Rollins, 5 Kan. 180; Lake Shore, &c., R. Co. v. Miller, 25 Mich. 274; Baker v. Fehr, 97 Penn. St. 70; Germantown, &c., R. Co. v. Walling, 97 Penn. St. 55; Fitts v. Cream City, &c., R. Co., 59 Wis. 323; City of Montgomery v. Wright, 72 Ala. 411; 47 Am. Rep. 422; Lanier v. Youngblood, 73 Ala. 587; Hall v. Union Pacific Ry. Co., 4 McCrary, 257; Harris v. Union Pac. R. Co., 4 McCrary, 454; Delgar v. City of St. Paul, 4 McCrary, 634; McKeever v. Market St., &c., R. Co., 59 Cal. 294; Kansas, &c., R. Co. v. Ward, 4 Colo. 30; Colorado, &c., R. Co. v. Holmes, 5 Colo. 197; Behrens v. Kansas, &c., R. Co., 5 Colo. 400. It is not for the court to tell the jury what facts constitute negligence. Pennsylvania Co. v. Frana, 112 Ill. 398; Andrews v. Runyon. 65 Cal. 629; Myers v. Indianapolis, &c., R. Co., 113 Ill. 386; Clay v. Chicago, &c., R. Co., 17 Mo. App. 629; Dexter v. McCrary, 54 Conn. 171. But in Atlanta, &c., R. Co. v. Wyly, 65 Ga. 120, it was held that while negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act imperative upon the agents of the company, the court may instruct the jury that proper diligence required such act. South, &c., R. Co. v. Singleton, 66 Ga. 252; Cook v. Western, &c., R. Co., 69 Ga. 619; Chicago, &c., R. Co. v. Pennell, 94 Ill. 448; Wabash, &c., R. Co. v. Elliott, 98 Ill. 408; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Wabash, &c., R. Co. v. Shacklet, 105 Ill. 364; 44 Am. Rep. 791; Ohio, &c., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; Cincinnati, &c., R. Co. v. Peters, 80 Ind. 168; Pennsylvania Co. v. Dean, 92 Ind. 459; McLaury v. City of McGregor, 54 Iowa, 717; Slosson v. Burlington, &c., R. Co., 60 Iowa, 215; Central, &c., R. Co. v. Henigh, 23 Kan. 347; Atchison, &c., R. Co. v. Smith, 28 Kan. 561; County Com. v. Burgess, 61 Md. 291; Johnson v. Boston Towboat Co., 135 Mass. 209; Peverly v. Boston, 136 Mass. 366; Tyler v. New York, &c., R. Co., 137 Mass. 238; Loewer v. City of Sedalia, 77 Mo. 431; Ruland v. South Newmarket, 59 N. H. 291; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Moe-

if there be any, is to be inferred."[3] It is the province of the jury, not only, in such cases as these, to find the facts, but to draw for themselves the inferences from the facts. Said the Supreme Court of California to this point:—"The testimony consists of a series of circumstances from which the jury are to find on the issue of negligence. The jury, under such circumstances, are to make such inferences from the testimony as legitimately and justly follow, on which to base their verdict. They are not only to find the facts, but the inferences from them,"[4] and to the same effect in Longenecker v. Pennsylvania R. Co.,[5] it was said:—"Upon a state of facts admitted, or proved by direct and undisputed testimony, the court may pronounce the law applicable thereto; but when alleged facts are the subject of inference from other facts and circumstances shown by the evidence, it is the exclusive province of the jury to consider the testimony and ascertain the facts under proper instructions from the court."

§ 446. A preliminary question of law for the court.—In the trial of a cause in which the negligence of either party is an issue, it is a preliminary question of law for the court, whether there is any evidence that ought reasonably to satisfy the jury that an alleged fact is established. If there is evidence from which the jury can properly find the question for the party upon whom the burden of proof rests, it should be submitted, but on the other hand, if the evidence is wholly insufficient to justify the jury in such finding, and the court would be justified in setting aside the verdict, as against evidence, if they did so find, then the testimony should be withdrawn from the consideration of the jury, and the question is one of law.[6] Inasmuch

bus v. Becker, 46 N. J. Law, 41; Palmer v. Dearing, 93 N. Y. 7; Ochsenbein v. Shapley, 85 N. Y. 214; Bucher v. New York, &c., R. Co., 98 N. Y. 128; Walsh v. Oregon, &c., R. Co., 10 Or. 250; Texas, &c., R. Co. v. Herbeck, 60 Tex. 602; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; Claxton's Adm'r v. Louisville, &c., R. Co., 13 Bush, 636; Thompkins v. Kanawha Board, 21 W. Va. 224; Fassett v. Roxbury, 55 Vt. 552; Kemp v. Phillips, 55 Vt. 69; Metropolitan, &c., Ry. Co. v. Jackson, 3 L. R. App. Cas. 193; Dublin, &c., Ry. Co. v. Slattery, 3 L. R. App. Cas. 1155; Manzoni v. Douglas, 6 L. R. (Q. B. Div.) 145.

[3] Wharton on Negligence (2d ed.), § 420.

[4] McKeever v. Market St. R. Co., 59 Cal. 294, 300.

[5] 105 Penn. St. 328, 332; Philbrick v. Miles, 25 Fed. Rep. 265.

[6] Longenecker v. Pennsylvania R. Co., 105 Penn. St. 328. Although the question of negligence is for

as contributory negligence is nothing else than negligence merely on the part of one who is plaintiff in an action of negligence, all the rules of law applicable to the negligence of the defendant, or negligence merely, are applicable, without addition or abatement, to the negligence of the plaintiff, or contributory negligence,[7] and the same rules that apply to contributory negligence upon this point are equally to be applied to comparative negligence as that doctrine obtains in Illinois.[8]

§ 447. Contributory negligence as matter of law.—What amounts to negligence is, as we have already seen, a question of law. It is for the court to say, in a majority of instances, what is, and what is not, negligence as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences, or conclusions to be drawn from the facts, indisputable; when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond a cavil, then contributory negligence is matter of law. In such a case there would be nothing for the jury to decide. The case has decided itself, and it only remains to the court to declare the rule. When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them, than that the plaintiff was, or was not, at fault, then it is the province of the court to determine the question of contributory negligence as one of law,[9] and when the case is all against the plaintiff,

the jury, it is the province of the trial justice, in the first instance, to determine whether a *prima facie* case has been made out; that is to say, whether, regarding the evidence as true, the case, as it stands on motion by defendant for a nonsuit, is such as to authorize the jury properly to find for the plaintiff. Simms v. South Carolina Ry. Co. (S. C.), 2 S. E. Rep. 486.

[7] Hoye v. Chicago, &c., R. Co., 62 Wis. 666; 23 N. W. Rep. 14; Thompson on Negligence, § 1178.

[8] Wabash, &c., R. Co. v. Elliott, 98 Ill. 481; Wells' Law & Fact, 221, § 263.

[9] Pyle v. Clark, 49 U. S. App. 260; 79 Fed. Rep. 744; Missouri Pacific Ry. Co. v. Moseley, 12 U. S. App. 601; 57 Fed. Rep. 921; Fisher v. Town of Franklin, 89 Wis. 42, 46; 61 N. W. Rep. 80; Guthrie v. Missouri Pacific Ry. Co. (Neb.), 71 N. W. Rep. 722; Dowdy v. Georgia, &c., R. Co., 88 Ga. 726; 16 S. E. Rep. 62; Ludwig v. Pillsbury, 35 Minn. 256; Fernandes v. Sacramento City R. Co., 52 Cal. 45; Abend v. Terre Haute, &c., R. Co., 111 Ill. 202; 19 Cent. Law Jour. 350, and the note; Hoye v. Chicago, &c., R. Co., 62 Wis. 666; 23 N. W. Rep. 14; West Chester, &c., R. Co. v. McElwee, 67 Penn. St. 311; Rudolphy v. Fuchs, 44 How. Pr. 155;

there may properly be a nonsuit; but, in the language of Mr. Field,[10] "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded, or established beyond controversy."

§ 448. When a question of fact.— It will, it is plain, in point of fact, very rarely occur that the case which the evidence

Baker v. Fehr, 97 Penn. St. 70; Germantown, &c., R. Co. v. Walling, 97 Penn. St. 55; City Council of Montgomery v. Wright, 72 Ala. 411; 47 Am. Rep. 422; Colorado, &c., R. Co. v. Holmes, 5 Colo. 197; McLaury v. City of McGregor, 54 Iowa, 717; Moebus v. Becker, 46 N. J. Law, 41; Curran v. Warren Manfg. Co., 36 N. Y. 153; Walsh v. Oregon R. & Nav. Co., 10 Or. 250. It is only when the conclusion of negligence necessarily results from the facts that the court can be called upon to say that the facts establish negligence, as matter of law. Chicago, &c., R. Co. v. O'Connor, 119 Ill. 586; Matthews v. Missouri Pac. Ry. Co., 26 Mo. App. 75. In an action by one employed in a tunnel for injuries caused by the falling of rock from the roof, testimony of plaintiff that he could not say whether he had or had not, prior to the accident, noticed the dangerous condition of the roof, does not sufficiently show his own freedom from negligence to authorize the submission of the case to the jury. Eades v. Clark, 55 N. Y. Super. Ct. 132. When the evidence so clearly shows plaintiff's contributory negligence that a verdict for him, if rendered, would necessarily be set aside, it is proper for the court to order a verdict for defendant. Goodlett v. Louisville, &c., R. Co., 122 U. S. 391; Indianapolis, &c., Ry. Co. v. Watson, 114 Ind. 20; 15 N. E. Rep. 824; Columbus, &c., Ry. Co. v. Bradford, 86 Ala. 574; 6 So. Rep. 90. It is also the business of the court to determine the question of proximate cause, where the facts are undisputed. Pike v. Grand Trunk Ry. Co., 39 Fed. Rep. 255. "When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the case as a matter of law." Shearman & Redfield on Negligence (5th ed.), § 56. Where the undisputed evidence in an action to recover damages sustained through a collision between two steam vessels belonging to the parties respectively, shows that the plaintiff failed to comply with a rule of navigation (U. S. Rev. Stat., § 4233, rule 21), applicable to the situation of the vessels immediately preceding the collision, and which required him to "slacken her speed, or, if necessary, stop and reverse" his vessel, he is guilty of contributory negligence as matter of law, and the submission of the question to the jury is reversible error. New York Harbor Towboat Co. v. New York, Lake Erie & Western R. Co., 148 N. Y. 574; 42 N. E. Rep. 1086.

[10] Field on Damages, 519.

discloses, either for or against the plaintiff, is so clear and incontestable as to leave no room for difference of opinion as to the merits. In almost every case something will appear upon which there may be contrariety of judgment, so that, in the majority of instances, the question of the plaintiff's negligence will be one of fact to be ultimately determined by the jury. In the case of Detroit, &c., R. Co. v. Van Steinburg,[11] Judge Cooley said: —" The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care.[12] The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of

[11] 17 Mich. 99, 120.

[12] In Walsh v. Oregon R. & Nav. Co., 10 Or. 250, 258, it was said, by Lord, J., to this point:— "Twelve men, drawn from the body of the community, comprising men of various occupations and grades of intelligence, better secures that average judgment which it is the aim of the law to obtain, and which, the law assumes, better understand the ordinary affairs of life, and can draw wiser and safer conclusions from admitted facts thus occurring than can one man, or a single judge," citing Railroad Co. v. Stout, 17 Wall. 657; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 36. Judge Holmes, however, in The Common Law, 124, says:—"A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances, far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all, should be continually growing." It is not a question that each of these views is sound, and it may be admitted that the best judges can administer justice as well in nine cases in ten, without, as with a jury, or better, for the matter of that, without any reflection even upon a jury much beyond the average of juries.

fact which the first has ruled to be one of law. "Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury." That contributory negligence is matter of law is plainly the exception and not the rule. In a perfectly plain case, plain as to the facts at issue, and plain as to all the reasonable inferences from those facts, the negligence of the plaintiff may be a question for the court alone; but, inasmuch as questions about which there can be no dispute are not often litigated, it does not often occur that a court is warranted in taking the question wholly from the jury.

§ 449. A question of law only in a plain case.— It is sometimes insisted that whenever there is any evidence, even the slightest, that tends to prove a fact from which the negligence or due care of the plaintiff might be inferred, it should be submitted to the jury;[13] but the better rule is that there must be a substantial basis for difference of opinion, or some reasonable ground of dispute, or the court may refuse to entertain it. In Cotton v. Wood[14] it was said:—"To warrant a case of this class being left to the jury it is not enough that there be some evidence. A mere *scintilla* of evidence is not sufficient, but there must be proof of well-defined negligence."[15] This is also the rule in this country, and one "which," said Judge Thompson, "ought to prevail universally."[16] Among the cases in the reports in which

[13] Cumberland, &c., Iron Co. v. Scally, 27 Md. 589; Flori v. St. Louis, 3 Mo. App. 231.

[14] 8 C. B. (N. S.) 568.

[15] See, also, Toomey v. London, &c., Ry. Co., 3 C. B. (N. S.) 146; Cornman v. Eastern Counties Ry. Co., 4 Hurl. & N. 781, 786; Jewell v. Parr, 13 C. B. 916; Jackson v. Metropolitan Ry. Co., 3 App. Cas. 193.

[16] Thompson on Negligence, 1237, citing Beaulieu v. Portland Co., 48 Me. 291; Greenleaf v. Illinois, &c., R. Co., 29 Iowa, 22; Lehman v. Brooklyn, 29 Barb. 234. *Cf.* Wharton on Negligence, § 421, and note. The federal courts do not recognize the doctrine that, when there is but a *scintilla* of evidence to support the issue of negligence, the case must go to the jury; but in such a case the court will give a peremptory instruction to the jury. Hathaway v. East Tennessee, &c., R. Co., 29 Fed. Rep. 489. A court cannot say, as a matter of law, that it appears from the allegations of the complaint that the plaintiff was guilty of contributory negligence, or had voluntarily assumed, as incident to his employment, the risks which caused the injury, unless these allegations so clearly show that fact that there could be no room for different minds reasonably arriving at any different conclusion,

the court has passed upon the question of negligence as matter of law, are those in which the conduct of the plaintiff was such as to shock the mind of an ordinarily prudent man, and to evince a plain disregard of common care and caution, as, for an example, in cases where it appeared that the plaintiff took desperate chances in crossing a railway track,[17] or jumped from a rapidly moving train,[18] or lay down in a fit of intoxication upon a railway track,[19] or disobeyed plain rules enacted with a view to his protection from some obvious danger,[20] or crawled under a train of cars,[21] or rode upon a locomotive as a passenger,[22] subjects which have been cnsidered at some length in preceding chapters. In such cases as these a court may well say that the plaintiff's plain and reckless disregard of his own safety was negligence as matter of law. But even here it is not to be overlooked, that cases may arise in which, while there is no dispute as to the facts, there is yet room for difference of opinion as to the inferences and conclusions which may be drawn from those facts. It is for the jury not only to find the facts, but to make the proper inferences and draw the conclusions from those facts; and when such a case arises, the question of negligence is no longer one of law, even upon the undisputed facts, but should be left to the jury, which we now proceed to consider.

§ 450. **Contributory negligence as a question of fact.**— In general it cannot be doubted that the question of negligence is a question of fact and not of law.[23] Whenever there is any

upon any possible evidence admissible under and consistent with the allegations. Rolseth v. Smith, 38 Minn. 14; 35 N. W. Rep. 565. Plaintiff cannot be nonsuited on the ground that his contributory negligence conclusively appears from his own testimony, if his conduct, under the peculiar circumstances of the case, is compatible with the exercise of reasonable care. Crowley v. St. Louis, &c., Ry. Co., 24 Mo. App. 119.

17 § 188, *supra.*

18 §§ 147, 291, *supra.*

19 § 197, *supra.*

20 §§ 150, 151, *supra.*

21 § 216.

22 § 150. Unless the inference of negligence or its absence is necessarily deducible from the undisputed facts and circumstances proved, the question is for the jury. Dahl v. Milwaukee, &c., Ry. Co., 62 Wis. 652; Hoye v. Chicago, &c., Ry. Co., 62 Wis. 666.

23 Pennsylvania R. Co. v. Horst, 110 Penn. St. 226; 1 Atl. Rep. 217; Colorado Central R. Co. v. Martin, 7 Colo. 592; Walton v. Ackerman, 49 N. J. Law, 234; 10 Atl. Rep. 709; Farley v. The Mayor, 152 N. Y. 223; 46 N. E. Rep. 506; Graham v. Manhattan Ry. Co., 149 N. Y. 336; 43 N. E. Rep. 917; Mahar v. N. Y. C. & H. R. R.

doubt as to the facts, it is the province of the jury to determine the question; or whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury,

Co., 5 App. Div. (N. Y.) 22, 30-31; Andreoli v. N. Y. C. & H. R. R. Co., 14 App. Div. (N. Y.) 345; McCrane v. Flushing & C. P. Electric Ry. Co., 13 App. Div. (N. Y.) 177; Harper v. Delaware, L. & W. R. Co., 22 App. Div. (N. Y.) 273; Bamberger v. Citizens' Ry. Co., 95 Tenn. 18, 25; 31 S. W. Rep. 163; 49 Am. St. Rep. 909; Elliott v. Newport Street Ry. Co., 18 R. I. 707, 711; 28 Atl. Rep. 338; 31 Atl. Rep. 694; New Jersey Traction Co. v. Gardner (N. J.), 38 Atl. Rep. 669. The question of wilful neglect is not a question of law, but a mixed question of law and fact, which it is the peculiar province of the jury to determine, especially as to the degree of it. Needham v. Louisville, &c., R. Co., 85 Ky. 423; 3 S. W. Rep. 797; 11 S. W. Rep. 306; Alabama Great Southern R. Co. v. Arnold, 80 Ala. 600; Seefeld v. Chicago, &c., R. Co., 70 Wis. 216; 35 N. W. Rep. 278; Carver v. Detroit Plank-Road Co., 61 Mich. 584; 28 N. W. Rep. 721; Wight Fire-Proofing Co. v. Roczekai, 130 Ill. 139; 22 N. E. Rep. 543; Davis v. Utah Southern R. Co., 3 Utah, 218; Sheldon v. Flint, &c., R. Co., 59 Mich. 172; Detroit, &c., R. Co. v. Van Steinburg, 17 Mich. 99, 188 (by Cooley, J.); Trow v. Vermont, &c., R. Co., 24 Vt. 497; 58 Am. Dec. 191; North Penn. R. Co. v. Heileman, 49 Penn. St. 60; Linfield v. Old Colony, &c., R. Co., 10 Cush. 569; Barton v. St. Louis, &c., R. Co., 52 Mo. 253; 14 Am. Rep. 418; Keller v. New York, &c., R. Co., 24 How. Pr. 172; Huelsencamp v. Citizens' Ry. Co., 34 Mo. 54. "From the very nature of the case (where the amount of prudence is involved), the question of contributory negligence cannot resolve into one of law, but must needs be submitted to the jury with instructions." Fassett v. Roxbury, 55 Vt. 552; Kemp v. Phillips, 55 Vt. 69; Thompkins v. Kanawha Board, 21 W. Va. 224; Louisville, &c., R. Co. v. Goetz, 79 Ky. 442; 42 Am. Rep. 227; Claxton's Adm'r v. Lexington, &c., R. Co., 13 Bush, 636; Texas, &c., R. Co. v. Herbeck, 60 Tex. 602; Walsh v. Oregon R. & Trans. Co., 10 Or. 250; Ochsenbein v. Shapley, 85 N. Y. 214; Palmer v. Dearing, 93 N. Y. 7; Bucher v. New York, &c., R. Co., 98 N. Y. 128; Dudley v. Camden Ferry Co., 45 N. J. Law, 368; Moebus v. Becker, 46 N. J. Law, 41; Ruland v. South Newmarket, 59 N. H. 291; Loewer v. City of Sedalia, 77 Mo. 431; Johnson v. Boston Tow Boat Co., 135 Mass. 209; Shapleigh v. Wyman, 134 Mass. 118; Randall v. Conn. R. Co., 132 Mass. 269; Tyler v. New York, &c., R. Co., 137 Mass. 238; Born v. Albany Plank Road, 101 Penn. St. 334; Longenecker v. Pennsylvania R. Co., 105 Penn. St. 328; County Commissioners v. Burgess, 61 Md. 291; Osage City v. Brown, 27 Kan. 74; Atchison, &c., R. Co. v. Smith, 28 Kan. 561; Hatfield v. Chicago, &c., R. Co., 61 Iowa, 434; Hauser v. Chicago, &c., R. Co., 60 Iowa, 230; Slosson v. Burlington &c., R. Co., 60 Iowa, 215; Pennsylvania Co. v. Dean, 92 Ind. 459;

not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts.[24]

§ 451. Judge Cooley's statement of the rule.—Judge Cooley has stated the rule in the following language:[25]—"Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence,

Ramsey v. Rushville, 81 Ind. 394; Wabash, &c., R. Co. v. Shacklet, 105 Ill. 364; Wabash, &c., R. Co. v. Elliott, 98 Ill. 481; Cook v. Western, &c., R. Co., 69 Ga. 619; South, &c., R. Co. v. Singleton, 66 Ga. 252; Kansas, &c., R. Co. v. Ward, 4 Colo. 30; McKeever v. Market St. R. Co., 59 Cal. 294. In North Carolina a court cannot under any circumstances find contributory negligence as an affirmative fact. Cable v. Southern Ry. Co. (N. C.), 29 S. E. Rep. 377; White v. Railroad Co., 121 N. C. 107, 109; 27 S. E. Rep. 1002; Eller v. Church, 121 N. C. 269; 28 S. E. Rep. 364.

[24] Hoye v. Chicago, &c., R. Co., 62 Wis. 666, holding that even where all the facts are undisputed, yet if it is possible that different men might draw different conclusions, the case has to be submitted to the jury. Finegan v. L. & N. W. Ry. Co., 53 J. P. 663, holding that when there is conflicting evidence on a question of fact, no matter what may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it to the jury. Cook v. Missouri Pac. Ry. Co., 19 Mo. App. 329; Johnson v. Missouri Pac. Ry. Co., 18 Neb. 690; Orange, &c., R. Co. v. Ward, 47 N. J. Law, 560; Leavitt v. Chicago, &c., Ry. Co., 64 Wis. 228; Dufour v. Cent. Pac. R. Co., 67 Cal. 319; Nugent v. Boston, &c., R. Corp. (Me.), 19 Atl. Rep. 797; Bennett v. Syndicate Ins. Co., 39 Minn. 254; 39 N. W. Rep. 488; Popp v. New York, &c., R. Co., 7 N. Y. Supl. 249; Longenecker v. Pennsylvania R. Co., 105 Penn. St. 327; Nelson v. Chicago, &c., R. Co., 60 Wis. 324; Hill v. City of Fond du Lac, 56 Wis. 246; Sutton v. Town of Wauwatosa, 29 Wis. 21; McKeever v. Market St. R. Co., 59 Cal. 294; Johnson v. Bruner, 61 Penn. St. 58; Pitcher v. Lake Shore, &c., Ry. Co., 8 N. Y. Supl. 389; Stoker v. Minneapolis, 32 Minn. 478. The issue of negligence should go to the jury (1) when the facts which, if true, would constitute evidence of negligence are controverted; (2) where such facts are not disputed, but there might be a fair difference of opinion whether the inference of negligence should be drawn; (3) when the facts are in dispute, and the inferences to be drawn therefrom doubtful. But when no fair inference of negligence can be drawn from evidence favorable to the plaintiff, upon the assumption that it is true, the issue should be withdrawn from the jury. Hathaway v. East Tennessee, &c., R. Co., 29 Fed. Rep. 489.

[25] Detroit, &c., R. Co. v. Van Steinburg, 17 Mich. 99, 118.

under all the existing circumstances, in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."[26]

§ **452. What the inquiry involves.**— In the ultimate determination of the question whether the plaintiff was guilty of negligence, two separate inquiries are involved: First. What was ordinary care under the circumstances? and Second. Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law and a matter with which a jury can properly have nothing to do.

[26] To the same effect see Briggs v. Taylor, 28 Vt. 183; North Pennsylvania R. Co. v. Heileman, 49 Penn. St. 60; Meesel v. Lynn, &c., R. Co., 8 Allen, 234; Beers v. Housatonic R. Co., 19 Conn. 566; Park v. O'Brien, 23 Conn. 347; Isbell v. New York, &c., R. Co., 27 Conn. 393; Button v. Frink, 51 Conn. 342; 50 Am. Rep. 24; Ireland v. Oswego, &c., R. Co., 13 N. Y. 533; Oldfield v. New York, &c., R. Co., 14 N. Y. 310; Ernst v. Hudson River, &c., R. Co., 35 N. Y. 38.

This is well illustrated by the rule which requires one who crosses a railway track to be on his guard, and, before attempting to cross, to look attentively up and down the track. In the early periods of the development of the law upon this point it was the rule that one, under such circumstances, must exercise due care. In case of an action for a negligent running down of the plaintiff at a crossing, under that rule, it was incumbent upon the jury, first to set up the standard of ordinary care in their own minds, and then to say whether or not the plaintiff has come up to the standard. But as the law now stands the standard is fixed. One must look up and down the track; anything short of that is negligence. So that, at present, the jury, having the standard set up for them, have only to say whether the plaintiff did look up and down, and so bring himself within the protection of the rule.

§ 453. The tendency of the law in its development.— When the law has outgrown, in any particular, the featureless generality that one must exercise due care, and has come to require, or prohibit, specific acts, and to say that is negligence and this is carefulness, the function of the jury is so far forth curtailed, and the tendency plainly is to make the question of negligence, in this way, more and more a question of law, *quoad hoc*, and less and less a question for the caprice of a jury. "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore, it aids its conscience by taking the opinion of the jury. But, supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is, or is not, blameworthy, and therefore, un-

less explained, is, or is not, a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. * * * The trouble with many cases of negligence is that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination."[27]

§ 454. Summary statement of the rule.— It appears, therefore, on the one hand, that, as the law is developed, and approaches more and more to the fixedness and certitude of the exact sciences, outgrowing the abstract and the general, and growing up to the concrete and the particular, enriching itself by statutes and judicial decisions, and thereby settling and determining point after point in the law of negligence, the function of the jury in respect of the standard of conduct is, in a corresponding degree, curtailed; while, on the other hand, in the very nature of things, and by reason of the essential variety and complexity of the cases, that, whatever be the standard of conduct, must continue forever to perplex the courts, the function of the jury in respect of the particular facts of each particular case — that is, the function of the jury in measuring individual conduct by the juridical yardstick, and so determining for each plaintiff and defendant whether his conduct is, or is not, up to the standard of ordinary care under the circumstances, can never be curtailed, but, however fixed, the standard must forever remain.

[27] The Common Law, by Judge O. W. Holmes, Jr., pp. 125, 129.

INDEX.

[The references are to sections.]

A.

ABSENT-MINDEDNESS:
at a railway crossing, contributory negligence, 37, n., 193.
forgetfulness of danger, 37, 255.

ACCIDENT:
inevitable, what is, 36.
no action for consequence of, 36.
in discharge of fireworks, 413.
licensed or unlicensed exhibition, city not liable, 413

ADMIRALTY:
the rule of damages in collisions, 402.
commended as just, 12, n.
origin of, 402.
stated by Lord Stowell, 402.
Lord Stowell's rules considered, 403.
collisions by the fault of both parties, 403.
an apportionment of damages, 404.
this rule defended, 404.
Mr Rothery's defense of the rule, 404.
disregarded at common law, 404.
applies to all cases of marine tort, 404.
apportionment, how made, 404.
imputed negligence of carrier in. See Imputed Contributory Negligence.

ADMISSIONS:
of contributory negligence by plaintiff, not conclusive, 427.

AGENT:
principal responsible for agent's negligence, 103, 104.
servant leaving team loose, 104.
parent not child's, by mere relationship, 129.
when servant deemed master's, 325.
test whether one is mere servant or vice-principal, 327.
in respect of care of machinery, &c., 356. See Master and Servant.

AGGRAVATION OF THE INJURY:
plaintiff's, goes only in mitigation of damages, 34, 59, 70.
in case of malpractice, 69, n.
Gould v. McKenna, 70.
a misapplication in Iowa, 71.
the application in Tennessee and Georgia, 71, 92, 93.
very near comparative negligence, 71.
the rule criticised, 71.

[The references are to sections.]

AGGRAVATION OF THE INJURY (*continued*):
plaintiff contributing to a breach in a fence, 228.
by a patent in action against physician, 406.

ALABAMA:
rule of comparative negligence denied, in, 77.
negligence of parent not imputed to child, in, 130.
carrier's stipulation limiting liability in, 172.
railway *prima facie* liable by statute for killing animals, 224.
fences, and cattle at large, in, 222, 230.
overhead railway bridges, in, 363.
rule in respect of fellow-servants modified by statute, 379.
burden of proof, in, 426, 440.

ALDERSON, BARON:
definition of negligence by, 5.
statement of the exception to the rule of *respondeat superior*, 309, 310

ALIGHTING FROM MOVING CARS:
railway train. See Railways.
street car. See Street Railways.
railway servants, whether contributory negligence, 299, n.

ALTER EGO:
vice-principal. See Master and Servant.

AMBULANCE:
entitled to right of way by statute in New York, 283.

ANIMALS:
owner exposing horse to object calculated to frighten, 37, n.
trespassing on railway track, 50, n.
putting in pastures with known defective fence, 58, n.
servant leaving team loose on highway, 104.
crazy horse killed on railway through insufficient fence, 230.
runaway horse, owner liable for damage by, if negligent, 259.
injury to, by defects in highway. See Highways.
injured, or doing injury by reason of insufficient fences. See Fences.
injuries by or to, contributory negligence considered, 416, n. See Horse; Dogs.

APPORTIONMENT OF DAMAGES. See Aggravation of Injury; Admiralty.

ARCHITECT:
coservant with a superintendent, 328.

ARIZONA:
burden of proof, in, 426.

ARKANSAS:
carrier's negligence imputed to shipper of goods, 109, 114.
rule as to stock at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.
servant's contract releasing master from liability for negligence, 383.
burden of proof, in, 426.

[The references are to sections.]

ARM:
passenger's, outside of railway car window, 155.
street car window, 296.
stage coach window, 296, n.

ASSAULT AND BATTERY:
action for, contributory negligence no defense, 65.
unnecessary force in ejecting passenger, 65, n. See Wilful Negligence.
railway passenger entitled to protection from, 285.

ATTORNEY AND CLIENT:
contributory negligence in actions between, 405.
Read v. Patterson, 405.

AUSTIN, MR. JOHN:
definition of negligence by, 5.

AWNING:
defectively hung, liability of city, 276.

B.

BACON, LORD:
his paraphrase of the Latin rule of proximate cause, 32.

BAGGAGE:
what constitutes, 173, n.
mixed questions of law and fact, 173, n.
duty of railway company in respect of, 173, 174.
when carrying gratuitously, 174, n.
liability of palace and sleeping car companies, 173.
contributory negligence when no defense, 173.
effect of conditions printed on checks, 174.
not negligent to look after in lawful manner, 174.
of guest. See Innkeeper and Guest.

BAGGAGE CARS:
passengers riding in. See Railways.

BAGGAGE CHECKS:
effect of conditions printed on, 174.

BAGGAGE-MASTER:
at station, coservant with conductor, 333.
with a switch tender, 332.

BAILEE:
negligence of, imputable to bailor, 114, n.

BAILMENT:
law of, connected with that of negligence, 2.
bailee's negligence imputable to bailor, 114, n. See Imputed Contributory Negligence.
delivery of baggage to railway company, 173.
to parlor and sleeping car companies, 173.

[The references are to sections.]

BARBED WIRE FENCE:
injuries to cattle by, 226, n. See Fences.

BARON ALDERSON:
definition of negligence by, 5.

BERNINA CASE, THE:
overruling Thorogood v. Bryan, 107. See Imputed Contributory Negligence.

BICYCLE:
one riding, subject to law of the road, 282, n. See Highways.
riding, on the sidewalk, 256, n.

BLACK, HON. JEREMIAH:
rule of contributory negligence stated by, 14.

BLACKSMITH:
railway, coservant with conductor on the way to a wreck, 335.

BLIND PERSONS:
entitled to ordinary care, 141, n.
increased vigilance required of, 396.
right of, to use the street, 396.
entitled to a safe highway, 396, 397.
O'Mara v. Hudson & C. R. Co., 396.
duty of the public toward, 397.

BOARDING MOVING CARS:
contributory negligence in. See Railways; Street Railways.
by railway servants, 299, n.

BRAKEMAN:
coservant with engineer on same train, 332.
on different trains, 332.
with another on same train, 332.
with a fireman on same train, 332.
with employees of another train, 332.
with a car inspector, 332.
with a switch tender, 332.
with the inspector of machinery and mechanics in a repair shop, 332.
with one who fills the locomotive sand-box, 332.
with conductor on same train, 333.
on different trains, 333.
with a section boss, 332.

BRIDGE:
plaintiff's knowledge of defect in, 37. See Knowledge of Danger.
railway train stopping upon, 161.
horse falling off defective, 253, n.

BROWNE, MR. IRVING:
Humorous Phases of the Law, 177, 248, n.

[The references are to sections.]

BUILDINGS:
erecting near chimney with defective spark arrester, 37, n.
projecting ice or snow on sidewalk, 276.
ruinous, contiguous to highway, 276.
obstructing view at railway crossing, 191.
wooden, exposed to sparks and fire from steamers, 416.

BURDEN OF PROOF:
of negligence where railway passengers alight at unusual places, 162, n.
of infant's negligence at a railway crossing, 181, n.
of railway company's neglect to signal at crossing, 186, n.
in action against railway for injuries by fire, 237, n.
of master's negligence in furnishing defective tools, 305.
of existence or absence of contributory negligence, 417.
the question stated, 417.
depends on legal presumptions, 417, 420.
the rule in Butterfield v. Forrester, 418.
not decisive on this question, 418.
presumption not unjustly against the plaintiff, 419, 420.
plaintiff generally at fault, 420, 423, 425, 437.
in ninety per cent. of the cases, 420.
presumption of, should depend on the circumstances, 420.
sometimes in favor of the plaintiff, 421.
weight of authority against the plaintiff, 422.
but circumstantial evidence sufficient, 422, n., 431, 432.
an infant subject to the rule, 422, n.
plaintiff's gross or wilful negligence a matter of defense, 422, n.
the rule against the plaintiff defended, 423.
in case of death, 423, n., 426, n.
Mr. Freeman's criticism, 424.
his position untenable, 425.
in some jurisdictions upon the defendant, 426.
the rule not inflexible, 427.
plaintiff's admissions not conclusive against him, 427.
Zemp v. Wilmington, &c., R. Co., 427.
the rule in Connecticut, 428.
Park v. O'Brien — the language of the court, 428.
the burden upon the plaintiff, 428.
Judge Redfield's statement of the rule, 429.
the rule in Kansas, 430.
Kansas Pac. R. Co. v. Pointer — the language of the court, 430.
the burden upon the defendant, 430.
the rule of contributory negligence not strictly just, 12, n., 430.
against the defendant criticised, 431.
against the plaintiff, explained in Massachusetts, 432.
Mayo v. Boston, &c., R. Co., 432.

[The references are to sections.]

BURDEN OF PROOF (*continued*):
the rule in New York, 433.
earlier and later cases compared, 433.
not an arbitrary rule, 433.
Johnson v. Hudson River R. Co.— language of the court, 434, 438.
development of the rule, 435, 436.
a reasonable rule, 435.
Spencer v. Utica, &c., R. Co., 435.
Button v. Hudson River R. Co.— language of the court, 436, 437.
the cases further considered, 438.
Ernst v. Hudson River R. Co., 438.
the rule summarized, 439, 441.
Lee v. Troy Citizens' Gas Light Co., 439.
disagreement of the courts, 440.
the opposing courts marshalled, 440.
no possible middle ground, 441.
tendency of authority against the plaintiff, 442.
BUTTERFIELD v. FORRESTER:
the rule declared in, 8.
text of Lord Ellenborough's decision, 9.
the author's comments, 9.
repudiated in Davies v. Mann, 10, 11.
generally followed, as of course, 246.
BY-LAW:
requiring removal of snow from highways, 274. See Highways.

C.

CABOOSE CAR:
passenger injured while riding in, 151, n., 154, n. See Railways.
CALIFORNIA:
negligence of parent imputed to child, in, 122, 130.
fences, and cattle at large, in, 222.
land owner next to railway need not take unusual precautions against fires, 237.
accumulations of combustible stuff near the track, 239.
walking on street railway track, in, 288.
rule in respect of fellow-servants modified by statute in, 379.
burden of proof in, 426, 440.
CAMPBELL, LORD:
actions under his act. See Lord Campbell's Act.
CANADA:
carrier's stipulation limiting liability, 172.
CAPTAIN:
of a ship coservant with seaman, 328.
CAR INSPECTOR:
coservant with brakeman, 332.

[The references are to sections.]

CAR REPAIRER:
coservant with engineer of switch engine, 332.
with a yard switchman, 332.
with a yard master, 332.

CAR WINDOWS:
injuries at car windows. See Railways; Street Railways.

CARE. See Ordinary Care; Negligence; Contributory Negligence.

CARPENTER:
railway, coservant with trainmen, 332.
with servants in charge of turn-table, 332.
on a steamship coservant with porter, 336.
with the stewardess, 336.
in a saw-mill, coservant with sawyer, when, 336.

CATTLE. See Animals and Fences.

CATTLE GUARDS:
near railway track, brakeman injured by, 360, n. See Master and Servant; Fences.

CAUSAL CONNECTION:
distinction between, and plaintiff's negligence, 33, 34.

CAYLE'S CASE:
duty of an innkeeper at common law, 409.

CHARITY:
necessity or, as applied to Sunday traveling. See Highways, 261, *et seq.*; Railways, 175, *et seq.*; Street Railways, 298.

CHICAGO, &c., R. CO. v. ROSS:
rule of the Supreme Court of the United States in respect of fellow-servants, 326, 333.
railway engineer not a coservant with the conductor, 326.

CHILDREN:
as trespassers, 51a.
degree of care required from, 21b.
are *non sui juris*, when, 116, 117, 118.
ordinary care in, 130, 136, 141, n., 204, 396.
a question of fact, not determinable on demurrer, 117, n.
Lynch v. Smith, 136.
Munn v. Reed, 136.
duty to "look and listen" at railway crossing not absolute, 136, n.
instructions to the jury, 136.
averments in defendant's plea of contributory negligence of, 117, n.
as trespassers, 50, n., 137-142.
Lynch v. Nurdin, 137.
Hughes v. Macfie, 138.
Mangan v. Atterton, 138.
exposing a dangerous machine to, 138.
goods colored with poisonous paint, 138.
the general American rule, 140.
injuries to, on turn-tables, 140, 207, *et seq.*

[The references are to sections.]

CHILDREN (*continued*):
Railroad Co. v. Stout, 140, 207.
falling into unguarded excavations, 140.
lumber pile falling upon, 140.
heavy castings falling upon, 141.
the Massachusetts rule, 141.
Lane v. Atlantic Works, 141.
injured by dangerous machinery, 141, n.
objects alluring to, 141, n.
stealing rides on trains, 148, n.
on railway tracks, degree of care due to, 199, 200.
riding free, alighting from moving train, 167, n.
on railway property, 204.
sleeping on the track, 204, n.
injuries while playing on turn-tables, 207-210.
when cars are left across street, 210a.
while playing on highway, 278.
imputed negligence of parent, 278.
conflicting decisions, 278.
the New York rule, 279.
McGary v. Loomis, 279.
the rule in Maine, 279.
the rule in Massachusetts, 279.
Blodgett v. Boston, 279.
degree of care required of, in crossing street, 279a.
riding free on railway or street cars, 167, 297.
as fellow-servants of adults, 257.
stopping on the sidewalk out of curiosity, 413, n.
imputed negligence of parents or custodians. See Imputed Contributory Negligence.
as employees, duty of employer to. See Master and Servant.

CITY. See Municipal Corporation.

COASTING:
on the highway, 269. See Highways.

COEMPLOYEE. See Master and Servant.

COGGS v. BERNARD:
foundation of modern English law of negligence, 2, 17.

COLLATERAL NEGLIGENCE. See Contributory Negligence; Collateral Violations of Law.

COLLATERAL VIOLATIONS OF LAW:
by plaintiff, not contributory negligence, 23, 45, 49, n., 256, 415.
driving on wrong side of the road, 45, 282.
a circumstance for the jury, 45.
wagon placed in violation of city ordinance, 45, 257.
servant violating master's rules, 373.
ferryboat going at unlawful speed, 45, n.
defective highway, smoking on, 45.
Baker v. Portland, 45.

[The references are to sections.]

COLLATERAL VIOLATIONS OF LAW (*continued*):
racing on, 256.
unlawful speed on, 257.
otherwise if a proximate cause of injury, 45, 47.
a misapplication in Georgia, 48.
no excuse for defendants' wilful negligence, 45, n., 46.
by defendant not negligence, 49.
unless a proximate cause, 49, n.
Sunday traveling, the New England rule, 262 *et seq.*
the rule criticised, 267.
not recognized elsewhere, 266.

COLLISION. See Admiralty; Railways; Highways.

COLORADO:
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 426, 440.

COMBUSTIBLES:
set afire by locomotives. See Fires.

COMMON CARRIERS:
of goods, palace and sleeping car company not generally a, 173, 412.
imputed negligence of. See Imputed Contributory Negligence; Ferries; Railways; Street Railways.

COMMON EMPLOYMENT:
servants of railways having running connections, 341. See Master and Servant.

COMPARATIVE NEGLIGENCE:
apportionment of damages nearly equivalent to, 71.
the theory of the rule, 73.
the rule stated, 74, 79, 84.
the prevalence of the rule, 75.
generally repudiated, 76, 77.
the rule in Illinois, 78.
Galena, &c., R. Co. v. Jacobs, 79.
ordinary care essential to a recovery, 79, n., 85.
the later Illinois cases, 80.
attributed to Chief Justice Breese, 81.
the rule criticised, 82, 83.
proximate cause under, 83.
not a rule of contributory negligence, 84.
a comparison of relative degrees of negligence, 85.
rule of comparative negligence now obsolete in Illinois, 85a.
combined with imputed negligence, 121, n., 122.
applied in actions by servant against master, 321.
communication of fire, 238.
where a passenger falls from a car platform, 149, n.
the rule in Kansas, 86.
the confusion with proximateness and remoteness, 87.
the rule in Georgia, 88.
mitigation of damages, 88, 92, 93.

[The references are to sections.]

COMPARATIVE NEGLIGENCE (*continued*):
Macon, &c., R. Co. v. Davis, 89.
Davies v. Mann and comparative negligence, 89.
the later Georgia cases, 90.
the confusion pointed out, 91.
summary statement of the rule, 92.
the rule in Tennessee, 93.
not strictly comparative negligence, 93.
mitigation of damages, 93, 94.
Whirley v. Whiteman, 94.
this rule defended, 95.
the rule in Kentucky, 96, 99.
not comparative negligence, 96.
the Kentucky statute, 97.
Louisville, &c., R. Co. v. Collins, 98.

CONDUCTOR:
imputed negligence of. See Imputed Contributory Negligence.
coservant with engineer on same train, 337.
contra, Chicago, &c., R. Co. v. Ross, 326, 333.
with a switchman, 333.
with a station baggage-master, 333.
with a laborer on the track, 333.
with a railroad blacksmith on their way to a wreck, 333.
with a brakeman on same train, 332.
on different trains, 333.
not with a railway detective on the track, 332, n.
on a gravel train with the laborers, 333.
with servants of a contractor working on the train, 333.
riding as passenger and trainmen, 333.

CONNECTICUT:
negligence of parents not imputed to child, in, 130.
rights and liabilities of an infant trespasser, in, 140.
carrier's stipulation limiting liability, 172.
fences, and cattle at large, in, 219, 226.
land owner next to railway need not take unusual precautions against fires, in, 237.
injuries to runaway horse on defective highway, 245.
burden of proof, in, 422, 428, 439 441.

CONTRACT:
carrier's liability limited by. See Railways.
servant's contract releasing master from liability. See Master and Servant.

CONTRACTORS:
independent, servants of, not fellow-servants, 339.

CONTRIBUTION:
none between parties *in pari delicto*, 255.

[The references are to sections.]

CONTRIBUTORY NEGLIGENCE:
origin of the law of, 1.
definition of, 7.
two necessary elements in, 7,
law of, first announced in Butterfield v. Forrester, 8, 9.
the doctrine of, repudiated in Davies v. Mann, 10, 11. See Davies v. Mann.
reasons for the rule of, 12, 13, 14, 72.
stated by Judge Loomis, 12, n.
comments by Judge Holmes, 13, n.
rule of, not strictly just, 12, n., 430.
proximateness of, 14, n. See Proximate Cause.
however slight, may bar recovery, 14, n., 20.
not required that it should "substantially" or "materially" contribute, 14, n.
general statement of the rule of, 14.
express or implied waiver of a right of action, 15, 16.
slightest want of ordinary care may be, 20.
the rule in Wisconsin, 20.
mere collateral negligence is not, 33, 34. See Collateral Violations of Law.
summary statement of the doctrine, 35.
plaintiff's previous knowledge of the danger, 36, 37.
presumptive evidence of contributory negligence, 37.
the presumption disputable, 37. See Knowledge of the Danger.
voluntary exposure to danger, 37.
forgetfulness as, 37, 255.
absent-mindedness at railway crossing, 37, n., 193.
failure to anticipate defendant's negligence, 39, 40.
plaintiff acting under fear produced by defendant, 40, 189, 299, n.
leaping from moving train in fear of collision, 40.
jumping the wrong way to avoid a train, 40.
contributory negligence a question of fact, 40, n.
plaintiff acting erroneously in trying to save human life, 42, 43, 44.
where person injured exposes child, 42, n.
Eckert v. Long Island R. Co., 42.
Pennsylvania Co. v. Roney, 42, 373.
engineer attempting to save his train, 42a, 373.
Evansville, &c., R. Co. v. Hiatt, 43.
mother attempting to rescue her child, 42, n.
exposure in effort to save property, 44.
where one is in discharge of legal duty, 44a.
a trespass as, 50, 52, 53.
Bush v. Brainard, 53. See Children; Trespass; Trespasser.
plaintiff's prior, defendant's subsequent negligence, 54, 56.
no defense for wilful negligence, 55. See Assault and Battery; Wilful Negligence.
plaintiff's contemporaneous negligence, 56.
plaintiff's negligence after the catastrophe, 57, 58, 248.

[The references are to sections.]

CONTRIBUTORY NEGLIGENCE (*continued*):
failure to extinguish fire, 58. See Fires.
Illinois, &c., R. Co. v. McClelland, 58.
Toledo, &c., R. Co. v. Pindar, 58. See Aggravation of the Injury.
negligence of decedent under Lord Campbell's Act, 60. See Lord Campbell's Act.
presupposes negligence on the part of defendant, 64.
when defendant's conduct throws plaintiff off his guard, 67, 68.
imputed, of third persons, 53, n., 100. See Imputed Contributory Negligence.
of a parent in his suit for injury to child, 131-135, 142.
of plaintiff and driver of private conveyance, 115.
of children, averments in defendants' plea of, 117, n. See Pleading; Children.
plaintiff's admissions of, not conclusive, 427.
intoxication as. See Intoxication.
whether a question of law or fact. See Law and Fact.

COUPLING CARS:
injuries to trainmen in, 364. See Master and Servant.

CRAWLING UNDER CARS. See Railways.

CRIMINAL NEGLIGENCE:
what is, 64, n.

CROSSING:
railway. See Railways.
street. See Highways.

D.

DAKOTA:
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.
rule in respect of fellow-servants modified by statute, in, 379.

DAMAGES:
in actions under Lord Campbell's Act, 60. n.
preventive, provision in Kentucky statute, 66, 97, 318. See Aggravation of the Injury.

DAMNUM ABSQUE INJURIA. See Accident.

DANGER:
plaintiff's knowledge of. See Knowledge of Danger; Contributory Negligence; Highways; Trespassers.

DANGEROUS ATTRACTIONS:
liability of owner for, where children injured, 51a.

DANGEROUS MACHINE:
exposed in a public place, 51, n.
trespassing child injured by, 138.
children allured by, turn-table cases, 206 *et seq.* See Master and Servant.

[The references are to sections.]

DANGEROUS POSITION:
plaintiff placing himself in, 37, n. See Knowledge of Danger; Highways.
defendant putting plaintiff in, 67.
railway passenger riding in. See Railways; Street Railways.

DANGEROUS PREMISES. See Master and Servant; Invitation or License; Negligence.

DARKNESS:
traveling in the, 248. See Highways.
alighting from and boarding trains, 160.

DAVIES v. MANN:
the case stated, 10.
the author's criticism, 11.
a dangerous expression of the rule, 27.
one aspect of, adopted in Georgia Code, 27, n.
the rule in, analyzed, 28.
in New York, 29.
in other States, 30.
Judge Thompson's formulation, 54.
his position criticised, 55.
resolved into comparative negligence, 89.
an application of, in imputed contributory negligence, 122.
a donkey contrasted with a child, 127.
application of, to trespassers on a railway track, 203. See Negligence; Contributory Negligence; Discovery Clause.

DEAF PERSONS:
entitled to statutory signals at railway crossings, 67, n.
care required of, in crossing railway track, 197.
walking on railway track, duty of engineer, 203, n.
increased vigilance required of, 396.
entitled to more care, if infirmity be known, 396.

DECK-HAND:
not a coservant with the pilot, 337.

DEFECTIVE HIGHWAYS. See Highways; Knowledge of Danger.

DEFECTIVE MACHINERY. See Master and Servant.

DEFECTIVE VEHICLES. See Highways.

DEGREES OF CARE. See Ordinary Care.

DEGREES OF NEGLIGENCE. See Negligence.

DELAWARE:
carrier's stipulation limiting liability, in, 172.
fences, and cattle at large, in, 219.
land owner next to railway need not take unusual precaution against fires, 237.

DETECTIVE:
railway, on the track, coservant with conductor, 332, n.

DEVIATION:
from highway. See Highways.

[The references are to sections.]

DILIGENCE: See Contributory Negligence; Negligence; Ordinary Care.

DISABILITY:
persons under, 21a.

DISABILITIES, PHYSICAL. See Blind Persons; Deaf Persons; Children; Intoxication.

DISCOVERY CLAUSE, JUDGE THOMPSON'S:
an attempt to make sense out of Davies v. Mann, 54.
may be read backward, 59.
the expression of the rule deprecated, 59.
proximate cause the real issue, 59.
applied to trespassers upon a railway track, 201, 202, 203.

DOCK:
invitation or license to go upon, 50, n. See Invitation or License.

DOGS:
injuries by or to, 127, n., 136, 206, n., 222, n., 264. See Animals.

DOMESTIC ANIMALS:
injury to, on railways. See Fences.

DOORS:
injuries at car windows and. See Railways.
injury by swinging door at ferry waiting room, 284, n.

DRIVING AND RIDING:
driver's assumption that others will exercise care, 38, n.
on wrong side of the road, 45, 282. See Highways.
fast, at a railway crossing, 188.
a horse near an engine, 189, 196.
negligence of driver of private vehicle. See Imputed Contributory Negligence.

DROVERS:
traveling on free railway passes 170, 172.

DRUNKENNESS. See Intoxication.

E.

ENCROACHMENTS UPON THE HIGHWAY:
fruit stand encroaching, a nuisance, 257.

ECKERT v. LONG ISLAND R. CO.:
plaintiff trying to save human life, 42.

ELEVATED RAILWAYS:
passenger leaving his seat upon approaching station, 68, n. See Railways; Street Railways.

ELLENBOROUGH, LORD:
opinion of, in Butterfield v. Forrester, 8, 9.
not decisive of burden of proof, 418.

EMBANKMENT:
on highway, 253, 256, n. See Highways.

[The references are to sections.]

ENGINEER:
remaining at his post to save his train, 42, 373.
Imputed negligence of. See Imputed Contributory Negligence.
coservant with a fireman, 311.
with a switchman, 323.
coservant with a fireman, 332.
with a brakeman on same train, 332.
on different trains, 332.
with engineer on another train, 332.
with conductor on the same train, 332.
contra, Chicago, &c., R. Co. v. Ross, 326, 333.
with a switch tender, 332.
with a telegraph operator, 332.
with a track repairer, 332.
with an inspector of tracks, 332.
with a signal man, 332.
with a shoveler on a gravel train, 332.
on a switch engine, with a car repairer, 332.
with a station agent, 332.
with a servant coupling cars, 332.
with a workman in an engine yard, 332.
with a tunnel repairer, 332.
with the superintendent, 332.
with a section boss, 332.
with a common laborer, 332.
with the servants of a contractor on the train, 332.
in a factory, coservant with his fireman, 328.
of a coal mine, coservant with laborer at bottom of shaft, 336.
ENGINE WIPER:
coservant with trainmen, 332.
ENGLAND:
carrier's stipulation limiting liability, 172.
railway track, when a *quasi* public way, 213.
EVANSVILLE, &c., R. CO. v. HIATT:
defendant's negligence, not plaintiff's merit, the ground of liability, 43.
EVIDENCE:
of habitual carelessness to prove negligence, 21, n.
conduct of others in the particular danger competent, 41. See Lord Campbell's Act.
photograph of defective highway, competent, 244, n.
opinion, competent to prove intoxication, 395.
admissions of contributory negligence not conclusive. 427.
EXCAVATION:
near a highway, liability of landowner, 102, n.
in the highway, 250. See Highways.
unguarded, children falling into, 140.
on the seashore. See Seashore.

[The references are to sections.]

EXPRESS AGENT:
carrier's contract limiting liability for injury to, 172, n.

EXPESS COMPANIES:
contract limiting liability, 168-173. See Railways.

F.

FACT:
question of. See Law and Fact.

FARWELL v. BOSTON & WORCESTER R. CO.:
the exception to the rule of *respondeat superior*, 313.
Judge Shaw's opinion in the case of, 313.

FEAR:
plaintiff acting under. See Contributory Negligence.

FELLOW-SERVANT. See Master and Servant.

FENCES:
putting horse in pasture with known defective fence, 58, n., 226.
See Knowledge of the Danger.
duty of owner of cattle to maintain, 218.
the common law of England, 218.
its prevalence in the United States, 219.
contributory negligence, 219, 220, 221, 223.
proximate cause, 219.
a modification of the English rule, 220.
animals escaping from well-fenced inclosure, 220.
the American rule, 221.
Kerwhacker v. Cleveland, &c., R. Co., 221.
abrogation of the English rule, 222.
the prevalence of this doctrine, 222.
dog on a railway track, 222, n.
contributory negligence, the effect of a statute, 223.
generally a question for the jury, 223.
municipal ordinances, 223.
turning animals loose upon one's own land, 223.
turning cattle loose upon railway track, 223.
summary statement of the prevailing doctrine, 224.
ordinary care by a railway, 224.
statutes making killing *prima facie* evidence, 225.
duty of a railway to maintain fences, 225.
may arise out of contract, 225.
a contract when implied, 225.
the rule in Kentucky, 225.
Vicksburg, &c., R. Co. v. Patton, 225.
neglect to fence, how treated, 225.
statutes requiring railways to fence, 226.
the English statute, 226.

[The references are to sections.]

FENCES (*continued*):
statutes in the United States, 226.
contributory negligence, 226.
construction of, 226, n.
pleadings in actions under, 226, n,
presumptions, 226, n.
proof, 226, n.
injuries to cattle by barbed-wire fence, 226, n.
"persons" injured includes employees, 226, n.
plaintiff's knowledge that fences are blown down, 226.
cattle guards included in fence laws, 226.
no duty to fence in cities and towns, 227.
burden of proof, 227, n.
nor at highway crossings, 227.
contributory negligence, 227, n.
nor around depot grounds, 227.
burden of proof, 227, n.
question of fact, 227, n.
animal must come in contact with train, 227.
place of entrance controls, 227.
these statutes liberally construed, 227.
contributory negligence as a defense, 227, 228.
contributing to a breach in fence, 228.
failure to repair, 228.
fences defectively built by railway, 228.
defective partition, 228, n.
out of repair, 228.
notice to company, 228.
reasonable time to repair, 228.
failure to repair division fence, 228.
breachy horse, 228.
plaintiff's knowledge of defect in fence, 58, n., 228, 234.
adjacent owner's contract to repair, 229.
assent to company's neglect to repair, 229.
company's agreement to repair, 229.
sufficiency of repairs a question for the jury, 229.
using adjoining owner's fence as part inclosure, 229.
stock wrongfully in highway or adjoining close, 230, 234.
stock escaping from lawful custody, 230.
allowing stock to run at large not *per se* contributory negligence, 230.
ordinarily question for jury, 230, n.
crazy horse and insufficient fence, 230.
where a railroad divides a farm, 230.
blind horse near unfenced railway, 230.
stock straying at large, whether contributory negligence, 231.
Munger v. Tonawanda, R. Co., 231
the New York common-law rule, 231.

[The references are to sections.]

FENCES (*continued*):
the New York statute, 232.
Hance v. Cayuga, &c., R. Co., 232.
Corwin v. N. Y., &c., R. Co., 232.
summary statement of the rule, 233.
the rule in New England and Wisconsin, 234
at highway embankment, duty of municipal corporation, 253.
barbed-wire along highway, 253.

FERRIES:
ferryman a common carrier, 284.
when not an insurer, 284.
passengers crowding toward the bow, 284.
standing near a stairway, 284.
joining a crowd, 284.
driving a spirited team, 284.
injured by a swinging door, 284, n.

FERRYMAN. See Ferries.

FIREMAN:
in a factory, coservant with the engineer, 328.
railway, coservant with engineer, 311, 332.
with brakeman on same train, 332.
with a master-machinist, 332.
with servants of a contractor on the train, 332.
with a track repairer, 332.
with a track walker, 332.
with a telegraph operator, 332.

FIRES:
spread by unexpected wind, whether proximate cause of injury, 32, n.
negligent communication by railway locomotives, 235.
duty of railways, 235.
contributory negligence of property owner, 235.
the rule in England, 235, 236.
the effect of a statute, 236.
Vaughan v. Taff Vale Ry. Co., 238.
the rule in England and the United States, 236.
whether property owner should guard against negligence, 236. 238, 240.
the rule in the United States further stated, 237.
Vaughan v. Taff Vale Ry. Co. criticised, 238.
comparative negligence in Illinois, 238.
leaving windows open near railway track, 238.
erecting building near track, 238, n.
leaving doors open, 239.
combustibles, shavings, dried grass, &c., 239.
storing lumber near railway track, 239.

[The references are to sections.]

FIRES (*continued*):
whether contributory negligence for the jury, 239.
stacks of grain, 239.
fire spreading from railway company's land, 239.
firebreaks, 239, n.
duty of property owner to put out, 58, 240.
his acquiescence in use of defective engine, 240.
duty of the company herein, 240, n.
spread from A's property to B's, 240.
negligence of plaintiff's servant, 240, n.
proximate and remote cause, 241.
the analogy of the "Squib case," 241.
the rule in England and the United States, 241.
Kuhn v. Jewett, 241.
communication by burning oil, 241.
the rule in Pennsylvania, 242.
communicated by fireworks, city not liable, 413.
communicated by steamer to plaintiff's wooden building, 416.

FIRE INSURANCE. See Insurance.

FIREWORKS:
licensed or unlicensed, city not liable for accidents, 259, 413.
not contributory negligence to stand and look at, 413.

FLAGMEN, GATEMEN, &c., 190. See Railway.

FLORIDA:
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.

"FLYING SWITCH":
injuries from a "running," or, 217.
practice of making, condemned, 217.

FOREMAN:
coservant with a laborer under him, 323, 327, 336.
in a railway yard, coservant with employes moving cars, 333.
under stevedore, having entire charge, not coservant with laborer, 337.

FORGETFULNESS:
as contributory negligence, 37, 255.
absent-mindedness at railway crossing, 37, n., 193.

FRAUD:
riding free on railway by stealth or, contributory negligence, 47.

FREE PASSENGERS:
injuries to, 165-167.
limitation of liability to, by contract, 168-172. See Railways.
on street cars, 297. See Railways.

FREE PASSES:
limiting a carrier's liability, 168-172. See Railways.

FREIGHT TRAINS:
riding upon, 154. See Railways.

[The references are to sections.]

FRENCH LAW:
liability of master to servant under the, 388.
rule of damages in Admiralty, in the, 403.

FRUIT STAND:
encroaching upon the highway a nuisance, 257.

G.

GAMES:
playing at, upon the highway, 256.
children using the highway to play at, 278.
conflict of authorities, 278.
contestants not liable to each other for injuries, 416.

"GANG-BOSS":
coservant with a laborer, 336.

GAS COMPANIES:
liability for explosions caused by defective pipe, 101.
liability to volunteer assisting servant by request, 343, n.

GATEMEN, FLAGMEN, &c. See Railways.

GEORGIA:
Davies v. Mann, in the Georgia Code, 27, n.
collateral violation of law, misapplication of rule in, 48.
the rule of contributory negligence in, 71, 75, 88-92.
mitigation of damages, 71, 75, 88-92.
attempted application of Davies v. Mann, 71, 75, 89-90.
partly adopted by statute, 27, n.
not settled, 92.
negligence of parent not imputed to child in, 130.
carrier's stipulation limiting liability in, 172.
neglect to "look and listen" at railway crossing not negligence *per se*, 183.
fences, and cattle at large, in, 222.
modified rule of contributory negligence applied, 219, n.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237.
injuries to runaway horses by defective highways, 245.
overhead railway bridges in, 363.
negligence of freight train conductor in coupling cars, 365.
rule in respect of fellow-servants modified by statute, 379.
servant's contract releasing master from liability for negligence, 384.
intoxication as a defense under the Code of, 197, 390.
burden of proof in, 426, 440.

GRADE CROSSINGS. See Railways.

GRIPMAN:
on motor car, coservant with signal man, 336.
coservant with track foreman, 332.

GROSS NEGLIGENCE. See Negligence.

[The references are to sections.]

H.

HAND:
passenger's, outside of car window, 155, 156, 296.
HAND-CAR:
free passenger on, 165, n. See Railways.
HARNESS:
defective highway — runaway horse — breaking of reins, 32, n.
HARTFIELD v. ROPER. See Imputed Contributory Negligence.
HATCHWAY:
falling into, 255.
contributory negligence for the jury, 255.
mother falling into, when trying to rescue child, 42, n.
servant falling into — assumed risk, 360.
HIGHWAYS:
liability of municipal corporations for injuries from defective, 243
no liability at common law, 243.
generally liable by statute, 243, 244.
duty of corporate officials, 244.
to keep highways in repair, 244.
not limited to traveled path, 244.
ditches for drainage not defects, 244.
slight inclination in sidewalk not a defect, 244, n.
photograph of defective, competent evidence, 244, n.
obstructions in, are defects, 244.
injuries to runaway horses, 245.
the authorities in conflict, 245.
injuries to one wilfully thrown into a pit, 245.
proximate cause, 245.
traveler's contributory negligence, 246.
Butterfield v. Forrester, 246.
a question for the jury, 246, n.
sidewalk presumed to be safe, 36, n., 246, n.
presumption that highway is safe, 246a.
right of traveler to assume that sidewalk is safe, 246a.
not negligent to use a defective highway, 247.
traveling upon, when obviously dangerous, 247.
knowledge of the danger, 191, n., 247.
passing obstruction in the night, 248.
open cellarway in the night, 248.
City of Bloomington v. Perdue, 248.
plaintiff's negligence after the injury, 248. See Aggravation of the Injury.
duty of traveler on a defective, 248, 249.
where traveler knows that highway is defective, 248.
care proportionate to the risk, 249.
in avoiding obstructions, 249.
traveling in the dark, 249.

[The references are to sections.]

HIGHWAYS (*continued*):
driving through pool of water, 249.
excavations in, injuries from, 250.
duty of one making, 250.
when authorized by municipal license, 250.
when unauthorized, 250, n.
duty of traveler, 250.
excavations near, 102, n.
ditch dug by municipal license, 250, n.
injuries from unlawful obstruction, 250, n.
effect of municipal ordinance, 250.
one injured by his own obstruction, 250.
right of pedestrian in the roadway, 251.
may cross at any point, 251, 268.
equal, but not superior to vehicles, 251, 268.
pedestrian must exercise ordinary care, 251, 268, 269.
deviation from the highway, 252.
from necessity, 254.
when the highway is obstructed, 252.
to get better sleighing, 252.
contributory negligence a question of fact, 252.
embankment on, duty to maintain railing, 253, 256, n.
due only to actual travelers, 253.
backing horse out of a shed, 253.
extent of the duty, 253.
horse falling off defective bridge, 253, n.
pitfalls on adjoining land, 253, 254.
barber-wire fence, 253.
open cellar window in sidewalk, 255.
hole in the pavement, 255.
unguarded trap-door in sidewalk, 255, n.
open cellarway, forgetfulness of traveler, 255.
falling into hatchway, 255.
contributory negligence for the jury, 255.
trespass upon the highway, 256.
use for games or sports, 256.
racing upon, 256.
riding velocipede on a sidewalk, 256, n.
unfenced embankment, 256, n.
driving at unlawful speed upon, 257.
collision with team placed in unlawful manner, 257.
fruit stands encroaching upon, 257.
leaving horses untied and unattended upon, 258.
the decisions not in accord, 258.
Norris v. Kohler, 258.
Wasmer v. Delaware, &c., R. Co., 258.
horse unlawfully at large upon, a nuisance, 259.
object calculated to frighten horse, 259.

[The references are to sections.]

HIGHWAYS (*continued*):
licensed fireworks, 259.
cow lawfully at large upon, 259.
defective vehicle or harness, 259.
owner's knowledge of, 259.
horse frightened by car, 259, n.
defective highway and harness — proximate cause, 32, n.
unskilful or reckless driving, 260.
bars recovery if a proximate cause, 260.
permitting a woman to drive, 260.
immoderate driving by fire department, 260, n.
intoxication as contributory negligence, 260, n.
Sunday traveling, 261-267.
Sunday *dies non juridicus*, 261.
the English statute, 261.
the New England rule, 262.
Massachusetts, Bosworth v. Inhabitants of Swansea, 175. 176, 262.
the Massachusetts rule illustrated, 263, 264.
the rule in Maine and Vermont, 265.
the rule in Rhode Island, 266.
Baldwin v. Barney, 266.
the Massachusetts rule generally denied, 266.
the New England decisions criticised, 267.
Sutton v. Wauwatosa, 267.
Sunday traveling not a proximate cause, 267. See Railways; Sunday Traveling.
pedestrians crossing the, 268.
equal right with vehicles, 268.
may cross at any point, 268.
entitled to higher care at regular crossing, 268.
whether he must look for vehicles, 268.
failure to look and listen, 268, n.
attempting to dodge vehicles, 269.
a woman wearing a sun-bonnet, 269.
aged and infirm persons on the highway, 269.
blind man walking streets unattended, 269.
persons with physical infirmity, care required of, 269.
aged person on icy sidewalk, 269.
city not liable for coasting accidents, 269.
coasting on Boston Common, 269.
person waiting for street car, 269, n.
street sweeper, 269, n.
accumulations of snow upon, 270.
ice and snow upon a sidewalk, 270.
Providence v. Clapp, 270, 271.
duty of the municipality, 270, 271.
must remove in a reasonable time, 271.

[The references are to sections.]

HIGHWAYS (*continued*):
mere slipperiness not a defect, 272.
otherwise, if caused by shape of the pavement, 272.
slippery sidewalk of glass and iron, 272.
duty of the traveler, 273.
degree of care required, 273.
not negligence *per se* to venture on, 273.
where roadway is safe, 273, n.
knowledge of the danger, 247, n., 273.
by husband, whether imputable to wife, 273.
corpulent woman crossing slippery crosswalk, 273.
ordinances (or by-laws) requiring removal of snow, 274.
liability of abutting owner in respect of icy sidewalks, 274.
his exemption does not relieve the city, 274.
street railway obstructing gutter with snow, 274.
contributory negligence in departing from obstructed sidewalk, 274.
rules as to ice and snow on, summarized, 275.
not *in se* defects, 275.
municipality bound to remove, 275.
mere slipperiness not a defect, 275.
traveler's duty of increased care, 275.
municipal liability for something falling on traveler, 276.
defectively hung awnings, 276.
weak show-boards, 276.
snow from an adjoining roof, 276.
ruinous building contiguous to highway, 276.
something falling from window, 276.
falling of hanging sign, 276.
buildings projecting ice or snow upon the highway, 276.
no action in favor of trespasser, 276.
contributory negligence of traveler, 276, n.
Byrne v. Boadle, 277.
barrel falling from window, 277.
presumption of negligence, 277.
injuries to children while playing on, 278.
imputed negligence of parent, 278. See Imputed Contributory Negligence.
the conflicting decisions, 278.
the New York rule 279.
McGary v. Loomis, 279.
the rule in Maine, 279.
the rule in Massachusetts, 279.
Blodgett v. Boston, 279.
degree of care required in crossing street, 279, n.
the rule in New Hampshire, 280.
the author's criticism, 281.
collision upon the, 282.
the law of the road, 282.

[The references are to sections.]

HIGHWAYS (*continued*):
plaintiff driving on the wrong side, 45, 282.
not negligence *per se*, 282.
is strong circumstance, 282.
one riding bicycle subject to, 282, n.
racing on the, 283, n.
ambulance entitled to right of way by statute in New York, 283.
persons on horseback, 283.
seashore not a, 414. See Bridge; Street Railways.

HOLT, LORD:
his opinion in Coggs v. Bernard, 2.

HORSE:
owner exposing to object calculated to frighten, 37, n.
easily frightened, driving near cars, 196.
putting in pasture with known defective fence, 58, n.
servant leaving team loose on the highway, 104.
crazy, killed on railway through insufficient fence, 230. See Fences.
leaving horse untied on the highway, 258.
runaway, owner liable for damage by, if negligent, 259.
injury to runaway by defects in highway, 245. See Highways.
servant kicked by, knowing vicious propensity, 360, n.

HORSEBACK:
person on, must turn out for a vehicle, 283.

HORSE CARS. See Street Railways.

HUSBAND AND WIFE:
husband's knowledge of danger not imputable to wife, 273.
imputed negligence of a husband, 109. See Imputed Contributory Negligence.

I.

ICE:
accumulation of, in cattle guards. See Fences.

ICY SIDEWALK. See Highways.

IDAHO:
burden of proof in, 426.

IDENTIFICATION:
of passenger and carrier, 111. See Imputed Contributory Negligence.

IDIOTS AND LUNATICS:
are *non sui juris*, 117.
imputed negligence of custodians. See Imputed Contributory Negligence.

IGNORANCE:
traveler ignorant of a railway crossing, his duty, 188.
ignorance of danger. See Knowledge or Danger.

ILLEGAL ACT. See Collateral Violation of Law; Contributory Negligence.

[The references are to sections.]

ILLINOIS:
the rule of comparative negligence in, 73, 74, 78-86.
negligence of carrier not imputed to passenger in, 111.
riding on platform of railway car in, 149.
carrier's stipulations limiting liability in, 172.
duty to "look and listen" at railway crossing a question of fact, 181, n.
walking upon a railway track in, 212.
slight intoxication not contributory negligence in, 197.
fences, and cattle at large, in, 222, 226.
railway *prima facie* liable by statute for killing animals, 224.
accumulations of combustible matter on land near railway in, 237, 238.
law of master and servant affected by rule of comparative negligence in, 321.
cars rendering coupling dangerous, 365.
burden of proof in, 422, 440.
IMPUTED CONTRIBUTORY NEGLIGENCE:
the rule stated, 100.
contributory negligence of third persons, 100, 101, n.
generally no defense, 100, 101, 102.
passengers crowded from street cars, 100.
railway company running over fire-hose, 101.
explosion from defective gas pipe, 101.
fire started by concurring negligence of third person, 101, n.
no contribution among tortfeasors, 102.
negligence of fellow-servant and stranger, 102, n.
negligence of children on turn-tables, 102, n.
agent's negligence imputed to the principal, 103.
when the cause of action is derived from a third person, 103.
illustrations of agency, 104.
servant leaving team loose, 104.
Thorogood v. Bryan, the rule in, 105.
imputed negligence in the Admiralty, 106.
Baron Pollock's criticism of Thorogood v. Bryan, 107.
Thorogood v. Bryan overruled, 107.
the Bernina case, 10.
the case repudiated in part in Pennsylvania, 108.
Simpson v. Hand, 108.
Lockhart v. Lichtenthaler, 108.
negligence of a private driver, 108, 109.
Thorogood v. Bryan, in Arkansas, 109.
Duggins v. Watson, 109.
in Iowa, 109.
Nisbet v. Garner, 109.
in Wisconsin, 109.
in the case of private conveyances, 109.
in Michigan, 109.

[The references are to sections.]

IMPUTED CONTRIBUTORY NEGLIGENCE (*continued*):
imputed negligence of a husband, 109, 273.
Thorogood v. Bryan not the general American rule, 110.
Little v. Hackett, 111.
Bennett v. New Jersey R. & Transp. Co., 111.
the New Jersey rule further stated, 112.
rule in Louisiana, 112, n.
carrier's negligence imputed to shipper of goods, 113.
the reason of the rule, 110, 114.
the prevalence of the rule, 114.
Vanderplank v. Miller, 114.
imputed negligence of a bailee, 114, n.
plaintiff's negligence, 115.
concurring with that of driver of private conveyance, 115.
when negligence of driver imputed to other occupant of vehicle, 115a.
imputed negligence of the husband to the wife, 115b.
in the case of persons *non sui juris*, 116.
negligence of custodians, 116.
who are *non sui juris*, 117.
the status of infants, 118.
the New York rule, Hartfield v. Roper, 119.
the language of the court, 120.
later cases following Hartfield v. Roper, 121.
the rule modified in various jurisdictions, 122.
comparative and imputed negligence combined in Illinois, 122.
the modification in New York, 123, 124.
McGarry v. Loomis, 123.
Ihl v. Forty-second Street R. Co., 123.
a child's exercise of care, 123.
defendant's gross negligence, 124.
children entitled to more care than adults, 124.
where negligence of parent not proximate cause, 124a.
negligence of defendant essential, 125.
Lygo v. Newbold, 125.
North Penn. R. Co. v. Mahoney, 125.
negligence of self-constituted custodian, 125.
Waite v. Northeastern Ry. Co., 125.
negligence of parent, 125, 126.
the English doctrine further considered, 126.
Holly v. Boston Gaslight Co., 126.
Hartfield v. Roper criticised, 127, 128, 129.
the rule in Hartford v. Roper denied, 130.
Robinson v. Cone, 130.
states in which this rule prevails, 130.
states in which it is denied, 130.
ordinary care in an infant, 130.
when the action is for the parent's benefit, 131.

[The references are to sections.]

IMPUTED CONTRIBUTORY NEGLIGENCE (*continued*):
Bellefontaine, &c. R. Co. v. Snyder, 131.
where action is brought by parent as administrator, etc., 131a.
contributory negligence of child when action brought by parent, 132.
actions under Lord Campbell's Act, 132.
the plaintiff's poverty or destitution, 133.
Pittsburgh, &c. R. Co. v. Pearson, 133.
further statement of the Pennsylvania rule, 134.
Kay v. The Pennsylvania R. Co., 134.
Phila., &c. R. Co. v. Long, 134.
the doctrine commended, 135.
contributory negligence of parents, 142.
permitting children to play in streets, 142.
to pass from one railway car to another, 142.
to go to and from school alone, 142.
sending children on errands, 142.
generally a question for the jury, 142, n.
children placed in dangerous occupations, 142.

INDEPENDENT CONTRACTORS:
servants of, not fellow-servants, 339.

INDIANA:
rule of comparative negligence denied in, 77.
negligence of parent imputed to child in, 122, 130.
carrier's stipulation limiting liability, in, 172.
fences, and cattle at large, in, 219, 226, 227.
railway company *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237, 239.
plaintiff running risk to save human life, in, 42, 43, 373.
overhead railway bridges in, 363.
burden of proof in, 422, 440.

INDICTMENT:
ruinous building contiguous to highway a nuisance, 276.

INEVITABLE ACCIDENT. See Accident.

INFANTS. See Imputed Contributory Negligence; Children.

INJURIES RESULTING IN DEATH. See Lord Campbell's Act.

INNKEEPER AND GUEST:
contributory negligence in actions between, 408.
the innkeeper an insurer except against guest's negligence, 408.
guest's neglect to lock his door, 408, 410, 411.
the negligence a question of fact, 408.
Cayle's case, 409, 410.
duty of guest to exercise care, 411.
ostentatious display of money, 411.
delivering valise to porter, 411.

[The references are to sections.]

INNKEEPER AND GUEST (*continued*):
must conform to reasonable rules, 411.
loss of guest's money intrusted to another guest, 411, n.
guest falling through an elevator shaft, 412.
Hayward v. Miller, 412.
clothing store proprietor not an innkeeper, 412.
liable as bailee for hire, 412.
customer's watch stolen while trying on a new suit, 412.
INSPECTOR:
of railway track, coservant with an engineer, 332.
of machinery in repair shop, coservant with a brakeman, 332.
in a shop, not a coservant with one he is instructing, 337.
INSURANCE:
plaintiff's negligence no defense to action on the policy, 398.
not for use of premises as bawdy house, 398.
accidental self-destruction not suicide, 399.
non-compliance with common carrier's rules, 399.
INTOXICATION AS CONTRIBUTORY NEGLIGENCE:
when alighting from a moving train, 160.
an absolute defense in certain cases under Georgia Code, 50, n., 197, 390.
when crossing a railway track, 197.
as a proximate cause of an injury, 197, n.
of one injured by defective highway, 260, n.
no excuse for a wanton injury to one intoxicated, 203, n., 395.
is no excuse for party injured, 389.
must be a proximate cause to bar recovery, 389, 390.
Alger v. Lowell, 389.
as want of ordinary care, 390.
Ford v. Umatilla County, 390.
intoxicated traveler entitled to a reasonably safe highway, 389, 390.
not conclusive evidence of negligence, 390.
the intoxication of trespassers, 391.
fatal to recovery, 392.
the presumption of sobriety, 393.
trainmen may presume trespassers to be sober, 393, 394.
intoxicated person not an outlaw, 395.
duty of innkeeper in respect of goods of one intoxicated, 395.
expulsion of drunken passenger from train in the snow, 395.
ejection from defendant's saloon, 395.
proof of opinions of witnesses admissible, 395.
accorded less indulgence than natural disabilities, 396.
INTOXICATED PASSENGERS, 286. See Street Railways.
INVITATION OR LICENSE:
to go upon property, 50, 51.
duty of the occupant, 50, 51, 205.
to enter house as a visitor, 50.

[The references are to sections.]

INVITATION OR LICENSE (*continued*):
to use private way, when implied, 50, n.
to use dock or wharf, 50, n.
implied to enter business houses, 51.
duty of occupant, 51.
distinction between invitation and license, 51.
to enter railway stations, 160.
to cross a railway track to board or leave a train, 100.
to alight from a train at dangerous places, 161, 162.
the burden of proof, 162, n.
to enter railroad premises on business, 179.
by flagmen at a railway crossing, 190.
to go upon dangerous premises, duty of the owner, 205.
objects alluring children, 206.
the turn-table cases, 207, *et seq.*
Judge Dillon's decision, 207.
the Minnesota case, 208.
the later cases, 209.
the New York rule, 210.
walking on a railway track by permission, 212.
not a mere trespass, 212.
by street car conductor to children to ride free, 297. See Negligence.
IOWA:
negligence contributing in any degree bars recovery in, 26.
doctrine of comparative negligence denied in, 77.
negligence of driver of private vehicle not imputed to occupant in, 109.
negligence of parent not imputed to infant child, in, 130.
duty of pedestrian at railway crossing, 195.
fences, and cattle at large, in, 222, 223, 226, 230.
railway *prima facie* liable by statute for killing animals, 224.
contributory negligence of landowner next to railway in respect of fires, 238.
rule in respect of fellow-servants modified by statute in, 379, 381.
burden of proof in, 432, 440.
IRISH LAW:
liability of master to servant under the, 387.

J.

JOINT TORTFEASORS:
one not excused by combined negligence of another, 102.
JUDICIUM RUSTICORUM:
rule of damages in Admiralty sometimes known as, 403.

K.

KANSAS:
rule of contributory negligence in, 71, 75, 83, 86, 87.
denied to be one of comparative negligence, 77, 87.

[The references are to sections.]

KANSAS (*continued*):
negligence of parent imputed to child in, 121, n., 130.
fences, and cattle at large, in, 219, 226.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237.
collision with runaway team, 283.
rule in respect of fellow-servants, modified by statute, 283.
overhead railway bridges in, 393.
burden of proof in, 426, 430, 440.

KENTUCKY:
contributory negligence must be an "efficient" cause, 26.
"wilful neglect" under a statute, 66, 97, 318.
rule of contributory negligence, as applied in, 96, 320.
carrier's negligence imputed to shipper of goods, 109, 114.
duty of railway company to signal at crossings in, 186.
fences, and cattle at large, in, 219, 225.
railway *prima facie* liable by statute for killing animals, 224.
overhead railway bridges in, 363.
burden of proof in, 426, 440.

KERWHACKER v. CLEVELAND, &c., R. CO.:
owner of cattle not required to fence. See Fences.

KNOWLEDGE OF THE DANGER:
essential to constitute contributory negligence, 36.
obligation to know equivalent to knowledge, 36, 188.
what one knows he must remember, 37. See Forgetfulness.
plaintiff placing himself in dangerous position, 37, n.
servant kicked by horse known to be vicious, 36, n.
complaint showing plaintiff's, not demurrable, 37, n.
placing horse in pasture with defective fence, 58, n.
defective highway, 191, n.
driving horse easily frightened near cars, 196.
lumber exposed to sparks from railway, 239.
traveling on icy sidewalks, 273.
by husband, not imputable to wife, 273. See Contributory Negligence; Master and Servant; Fences; Highways; Railways; Street Railways.
by servant, when a bar, 370.

L.

LABORER:
a coservant with his foreman, 323, 328, 336.
with section boss, 328.
with a superintendent, 328.
on railway, coservant with locomotive engineer, 332.
on gravel train, coservant with conductor, 333.
on railway track, coservant with conductor, 333.
with roadmaster, 332.
with a gang boss, 338.

[The references are to sections.]

LABORER (*continued*):
in hold of a vessel, coservant with one above, 336.
at bottom of coal mine shaft, coservant with engineer, 336.
common, in a mine, not coservant with a miner, 337.
not a coservant with stevedore's foreman having entire charge, 337.

LAW AND FACT:
in cases of children, 21b.
negligence a mixed question of, 444, 445.
what constitutes baggage a mixed question of, 173, n.
the court defines negligence, 444, 445.
the jury determine the facts, 444, 445.
may infer facts from facts proved, 445, 449.
a preliminary question of law for the court, 446.
in the absence of evidence wholly a question of law, 446.
same rules apply to negligence and contributory negligence, 446.
as a matter of law, 447.
only when the facts are indisputable, 147, 148, 447, 448, 449.
the exception, and not the rule, 448, 450.
proximate cause for the court if facts undisputed, 447, n.
usually a mixed question of, 24, n.
recklessness in crossing railway track, 449.
jumping from rapidly moving train, 147, 148, 449.
drunk on a railway track, 449.
disobeying important rules of railway, 449.
crawling under cars, 449.
passenger riding on locomotive, 449.
when a question of fact, 448, 450.
effect of plaintiff's knowledge of danger, 37.
contributory negligence of landowner in respect of railway fires, 239.
in keeping trap-door open near sidewalk, 255, n.
contributory negligence of parent in suit for injuries to child, 142, n.
plaintiff acting erroneously under sudden fear, 41, n.
a mere scintilla of evidence not sufficient, 449.
when there is a reasonable doubt, 146, n., 450.
Judge Cooley's statement of the rule, 452.
what the inquiry involves, 452.
duty to "look and listen" at railway crossings, matter of law, 181, 452. See "Look and Listen."
tendency of the law in its development, 453.
summary statement of the rule, 454. See Contributory Negligence.

LAW OF THE ROAD. See Highways.

LAW MARITIME. See Admiralty.

LICENSE. See Invitation or License.

[The references are to sections.]

LIFE INSURANCE. See Insurance.

LIMITATION OF ACTION. See Lord Campbell's Act.

LIMITATION OF LIABILITY:
stipulation by carriers in free passes, 168-172. See Railways.

LOCOMOTIVES:
passengers riding on, 150. See Railways.

"LOOK AND LISTEN":
duty of travelers to, at railway crossings, 181-184. See Railways.
presumption as to looking and listening, 181, n., 182.
pedestrian crossing the highway, 268.

LORD'S DAY:
traveling on. See Railways, 175 *et seq.*; Highways, 261 *et seq.*; Street Railways, 298.
unlawful labor on. See Master and Servant, 299, n.

LORD CAMPBELL'S ACT (9 and 10 Vict., ch. 93):
negligence of decedent under, 60.
pleading in suits under, 60, n.
limitation of action, 60, n.
evidence, 60, n.
damages, 60, n.
contributory negligence of child bars suit by parent, 132.
servant's contract releasing master binds his widow, 381.

LOUISIANA:
application of law of the road in, 282.
trespass to walk upon a street railway track in, 288.
passenger's arm projecting from car window, 286.
burden of proof in, 422, 440.

LOUISVILLE &c., R. CO. v. COLLINS. See Master and Servant, 319.

LUMBER:
set afire by locomotives. See Fires.

LUMBER PILE:
falling upon a child, 140.

LUNATICS:
imputed negligence of custodians of. See Imputed Contributory Negligence.

LYNCH v. NURDIN:
the rule as to trespassing children declared in. See Children.

M.

MACHINERY:
duties of master and servant in respect of. See Master and Servant.

MAIL AGENT:
carrier's contract limiting liability for injury to, 172, n.

[The references are to sections.]

MAINE:
negligence of parent imputed to child in, 122, 130.
Sunday traveling in, 219, 226.
fences, and cattle at large, in, 177, 265.
injuries to runaway horses by defective highways, 245.
children playing in the highway, 278.
burden of proof, 422, 440.

MARYLAND:
negligence of parent imputed to child in, 122, 130.
fences, and cattle at large, in, 219.
landowner next to highway need not take unusual precautions against fire, 237.
injuries to runaway horse by defective highway, 245.
boarding a moving street car, in, 292.
overhead railway bridges in, 363.
burden of proof in, 422, 440.

MASSACHUSETTS:
doctrine of comparative negligence denied in, 77.
negligence of bailee imputed to bailor in, 114.
negligence of parent imputed to child in, 130.
children as trespassers in, 141.
boarding moving trains in, 146.
Sunday traveling in, 47, n., 175-177, 262-265.
Bosworth v. Inhabitants of Swansey, 176-262.
carrier's stipulation limiting liability, 172.
contributory negligence at railway crossing in, 184.
no duty to mere trespasser on railway track, 210.
fences, and cattle at large, in, 219, 226.
landowner next to railway need not take unusual precautions against fire, 237.
injuries to runaway horse by defective highway in, 245.
city ordinances requiring removal of snow, valid in, 274.
right of children to play upon the highway in, 278, 279.
riding upon platform of street car in, 293.
Farwell v. Boston & Worcester R. Co., 313.
master's liability to servants in, 313, 315, 331, 333, 357, 374.
liability of servant to a fellow-servant in, 374.
rule in respect of fellow-servants modified by statute in, 379, 381.
burden of proof in, 422, 440.
contributory negligence in pleading in, 443.

MASTER:
of a lighter, coservant with one of the crew, 336.
of a vessel, coservant with the mate, 336.

MASTER MACHINIST:
coservant with a fireman, 332.

MASTER MECHANIC:
in a railway shop, not coservant with a watchman, 337.

[The references are to sections.]

MASTER AND SERVANT:
servant's collateral violation of law no defense to his action, 48.
a misapplication of the rule in Georgia, 48. See Collateral Violations of Law.
servant's contributory negligence a bar to recovery, 299.
walking upon a railway track, 299, n.
alighting from and boarding moving cars, 299, n.
riding upon engine pilot, 299, n.
upon front foot-board of switch-engine, 299, n.
error of judgment in sudden peril, 299, n.
unlawful labor on Sunday, 299, n.
where there is a safe and unsafe way, 299, n.
where servant's negligence is not proximate cause, 300.
where servant is engaged in illegal act, 300.
where he is engaged in unlawful work on Sunday, 300.
where injury caused by recklessness of vice-principal, 301.
recklessness of conductor, 301.
recklessness of engineer, 301.
master liable for his own neglect, 302.
master working with the servant, 302.
the rule stated, 303.
master's negligence combining with that of coservant, 304.
proximate cause, 305.
defective brakes, 305.
fire damp in a coal mine, 305.
respondeat superior, 306.
the early cases, 307.
Michael v. Allestree, 307.
Tuberville v. Stampe, 307.
the exception to the rule, 308.
Priestley v. Fowler, 308.
later English cases, 309.
Baron Alderson's statement of the exception, 310.
the exception in the United States, 311.
Murray v. South Carolina R. Co., 311.
reasoning of the South Carolina case, 312.
Farwell v. Boston, &c., R. R. Co., 313.
the exception stated, 314.
reasoning of Farwell v. Boston, &c., R. Co., 315.
the reasoning criticised, 316, 317.
the modifications in Kentucky, 318.
the Kentucky statute, 318.
"wilful neglect," 66, 97, 318.
the leading case — Louisville, &c., R. Co. v. Collins, 319.
the opinion in the Collins case, 320.
comparative negligence in Illinois, 321.
the rule in Tennessee, 322.
who are fellow-servants, 323.

[The references are to sections.]

MASTER AND SERVANT (*continued*):
the rule stated, 324.
Bartonshill Coal Co. v. Reid, 324.
master machinist, engineers and firemen, 324, n.
rule of vice-principal, 325.
the rule in the federal courts, 325.
Chicago, Milwaukee & St. Paul R. Co. v. Ross, 326.
who is a vice-principal, 327.
test whether one is mere servant or vice-principal, 327.
applications of the doctrine, 328.
corporations not excepted from the rule, 329.
what is common employment, 330, 331.
illustrations, 332.
railroad employees, 332.
when conductor is a fellow-servant, 333.
rule as to train dispatchers, 334.
statutory modifications in case of railroad employees, 335.
illustrations, railroad employees, 334, 335.
miscellaneous employees, 336.
servants not in common employment, illustrations, 337.
servants of different masters, 338.
McAndrews v. Burns, 338.
the rule stated, 339.
employees of independent contractors, 339.
the rule approved, 340.
independent railways having running connections, 341.
as to volunteers, 342.
Degg v. Midland Ry. Co., 342.
the rule modified, 343.
Wright v. London, &c., Ry. Co., 343.
partnerships and receivers as employers, 344.
the obligation of the master, 345.
defective machinery, premises, &c., 346.
whether proximate cause of injury, 32, n.
averments in servant's complaint, 346, n.
knowledge the essence of liability, 346.
dangerous premises, 347.
defective machinery, 348.
master's duty as to machinery a continuing duty, 349.
duty of servant to report defects, 349, n.
modified in respect of railway cars from another line, 349.
this modification criticised, 350.
O'Neil v. St. Louis, &c., Ry. Co., 350.
modification not recognized in Illinois, 350.
master not required to furnish the best appliances, 351.
Kelly v. Silver Spring Co., 351.
imperfect and unfenced machinery, 351.
dangerous freight cars, 351.

[The references are to sections.]

MASTER AND SERVANT (*continued*):
master not a guarantor of the safety of appliances, 352.
ordinary care the measure of duty, 352.
master's duty as to competency and fitness of employees, 353.
who is a competent man, 353, n.
analogous to the duty in respect of machinery, 353.
ordinary care the measure of obligation, 353.
averments in servant's complaint, 353, n., 354, n.
incompetency must contribute to the injury, 353, n.
near-sighted railroad engineer, 353, n.
insufficient number of servants, 356, n.
where both servants are guilty of negligence, 353, n.
a continuing duty, 354.
master not a guarantor of fitness of servants, 355.
only ordinary care required, 355.
plaintiff must allege ignorance of unfitness, 354, n.
mere laziness not unfitness, 354, n.
qualifications once possessed presumed to continue, 355, n.
master's delegation of his duty to an agent, 356.
inspection of machinery, 356, n.
negligence of a mine boss, 356, n.
merely promulgating rules for agent does not relieve master, 356.
a minor subject to rule of common employment, 357.
this application criticised, 357.
exceptions hereto, 357, n.
the Massachusetts cases, 357.
master ordering servant into danger, or service not contracted for, 358.
servant presumed to be free moral agent, 358.
servant's duty of care, 358, n.
servant wandering from post of duty, 358.
patent and latent dangers of the employment, 360.
patent dangers are assumed risks, 360.
extent of master's duty to give notice of, 360.
inexperienced servant entitled to instruction, 359, n.
as to minor employees, 359, 362.
the servant's assumption of risk, 360.
test in such cases, 360.
duty to observe danger, 360.
hazardous employment, 360.
illustrations, 360.
obvious danger caused by negligence of master, 360.
risks arising from defective appliances, 360, n.
working on platform without a railing, 360.
a question of law for the court, 360, n.
risks incident to the use of snow ploughs, 360.
cattle upon an unfenced railway, 360, 361.
wheeling earth at the edge of a bank, 360.

[The references are to sections.]

MASTER AND SERVANT (*continued*):
passing near uncovered saw, 360, n.
falling through unguarded hatchway, 360.
standing in dangerous place to signal trains, 360.
digging under a bank of earth, 360, n.
repairing defective machinery, 360, n.
a railroad track-walker, coal from passing engine, 360.
railroad section hand working on a foggy day, 360.
falling into a waterway, 360.
risk from special trains, 360.
unblocked frogs in a railroad yard, 360, n.
mistaking damaged cars for sound ones, 360.
negligence of fellow-servant in handling such cars, 360, n.
brakes known to be defective, 360, n.
throwing mail-bags into a train in motion, 360, n.
uncovered saw, 360, n.
working near dangerous machinery, 361.
farm laborer kicked by a vicious horse, 361, n.
risks not assumed — illustrations, 361.
negligence of third persons, 361.
a carpenter working on a roof injured by defective walls, 361.
railroad employees in respect of road-bed and appliances, 361.
unsafe machinery, 361.
unsafe tracks, 361, n.
unsafe pile of ore, 361, n.
knowledge of risks distinguished from knowledge of defect, 361.
the master's duty toward minor servants, 362.
instruction how to avoid dangers, 362.
minors of immature years, 362.
how far rule of assumption of risks applies to, 362.
his liability a question of fact, 362.
overhead railway bridges and depot roofs, 363.
trainmen assume the risk, 363.
these structures condemned, 363.
lawfulness of, generally recognized, 363.
contributory negligence, 363, n.
absence of tell-tales, 364.
injuries to trainmen in coupling cars, 364.
while the train is in motion, 364.
servant's voluntary use of defective tools, 364.
ignorance of defects, 364.
disobedience of rules, 364.
his want of ordinary care, 365.
a conductor making couplings, 365.
bumpers of different heights, 365.
master's knowledge of defect, essential to a recovery, 366, 367.
obligation to know equivalent to knowledge, 366, 367.
servant's ignorance also essential, 367.

[The references are to sections.]

MASTER AND SERVANT (*continued*):
the servant's duty of ordinary care, 368.
in informing himself of dangers, 369.
must possess fair skill, 369.
knowledge of the danger, 370. See Knowledge of the Danger.
knowledge of defects and of dangers distinguished, 370, n.
continued service after knowledge a waiver, 371.
railway's neglect to fence, 226, n.
the rule relaxed in favor of minors, 371.
does not apply to seamen, 371.
servant's duty to report defects, 371.
where master promises to remove the danger, 372.
effect of continuing work, 372.
exceptions to this rule, 372
servant must obey rules to promote his safety, 373.
disobedience no bar unless a proximate cause of injury, 373.
locomotive engineer violating rules, 373.
where rules habitually disregarded, 373.
servant's liability to a fellow-servant, 374.
Albro v. Jaquith — the Massachusetts cases, 374.
liability to the master and to their persons, 375.
statutory modifications of the rule of common employment, 376.
Employers' Liability Act (43 and 44 Vict., ch. 42), 376.
provisions of, 377.
the effect of, 378.
legislation in the United States, 379.
servant's contract releasing master from liability, 380.
Griffiths v. The Earl of Dudley, 380.
forbidden in some of the States, 381.
the English doctrine not generally approved in America, 382.
contracts releasing master from common-law liability, 383.
Roesner v. Hermann, 383.
Railroad Co. v. Spangler, 383.
Little Rock, &c., Ry. Co. v. Eubanks, 383.
Memphis, &c., R. Co. v. Jones, 383.
the Georgia cases, 384.
master's liability in other countries, 385.
in Scotland, 385, 386.
in Ireland, 387.
on the continent of Europe, 388.
the influence of railway corporations, 388.

MATE:
on a vessel, coservant with the master, 336.
with a sailor, vessel in charge of captain, 336.
second, coservant with a seaman, 336.

MICHIGAN:
rule of comparative negligence denied in, 77.
negligence of private driver imputed to occupant of vehicle in, 109.
fences, and cattle at large, in, 219, 226.

[The references are to sections.]

MICHIGAN (*continued*):
contributory negligence of landowner next to railway in respect of fire, 238.
town not liable to private action for defective highways, 244.
burden of proof in, 422, 440.

MINER:
coservant with an "underlooker," 336.
not coservant with a "mining captain," 337.
not with common laborer, 337.

"MINING CAPTAIN":
not a coservant with miners, 337.

MINNESOTA:
negligence of parent imputed to child in, 122.
carrier's stipulation limiting liability in, 172.
fences, and cattle at large, in, 219, 226.
passenger's arm out of car window in, 296.
burden of proof in, 426, 440.

MINOR. See Children; Master and Servant.

MISSISSIPPI:
negligence of parent not imputable to infant child in, 130.
fences, and cattle at large, in, 222, 224, 225.
railway *prima facie* liable by statute for killing animals, 224.
rules as to fellow-servants modified by statute in, 379.
burden of proof in, 422, 440.

MISSOURI:
rule of comparative negligence denied in, 77.
negligence of parent not imputed to child in, 130.
carrier's stipulations limiting liability in, 172.
duty to "look and listen" at railway crossing not absolute in, 183.
trespassers upon a railway track in, 201, 202.
an attempt to apply the rule of Davies v. Mann, 202.
fences, and cattle at large, in, 222, 226.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237, 239.
injuries to runaway horse by defective highway, 245.
overhead railway bridges in, 363.
rule in respect of fellow-servants modified by statute in, 379.
burden of proof in, 426, 440.

MITIGATION OF DAMAGES:
the strict rule of contributory negligence, 69. See Aggravation of the Injury.
proper in certain cases, 69, 71.
rule in Georgia and Tennessee something near a rule in, 88, 91, 92, 93, 95.

MONTANA:
rule in respect of fellow-servants modified by statute in, 379.

[The references are to sections.]

MOVING TRAIN:
alighting from and boarding. See Railways.

MUNICIPAL CORPORATIONS:
not liable for accident in discharge of fireworks, 413.
duty in respect of highways. See Highways.

MURRAY v. SOUTH CAROLINA R. CO.:
exception to the rule of *respondeat superior*, declared, 311.

N.

NEBRASKA:
negligence of parent not imputed to child in, 130.
fences, and cattle at large, in, 222, 226.
landowner next to railway need not take unusual precautions against fire, 237.
burden of proof in, 426, 440.

NECESSITY OR CHARITY:
applied to Sunday traveling. See Railways, 175, *et seq.*; Highways, 261, *et seq.*; Street Railways, 298.

NEGLIGENCE:
derivation of the law of, 1.
Coggs v. Bernard, 2.
Sir William Jones, 2.
Chancellor Kent, 2.
variance between modern practice and scholastic theory, 3.
modern law of, essentially Roman, 3.
not capable of exact definition, 4.
Baron Alderson's definition, 5.
John Austin's definition, 5.
Dr. Wharton's definition, 5.
the author's definition, 6.
degrees of, 17.
in the Roman law, 17.
in the scholastic jurisprudence, 17.
Coggs v. Bernard — a triple classification, 17.
implies three degrees of care, 18. See Ordinary Care.
slight, a want of great care, 17-19.
sometimes confounded with "remote cause," 83, 86, 87.
gross, a want of slight care, 18, 61, 62, 74, 98, 171.
insufficient to overcome plaintiff's contributory, 14, n.
said to be mere vituperation without uniform meaning, 18, 61, 127, 171.
sometimes confounded with wilful, 61, 63, 98, 99.
sometimes used to mean a "proximate cause," 82, 86, 87.
the triple classification defended, 62.
comparative. See Comparative Negligence.
burden of proof in actions of. See Burden of Proof.
as a question of law or of fact. See Law and Fact.
a general charge of, in a complaint is sufficient, 19, n. See Pleading.

[The references are to sections.]

NEGLIGENCE (*continued*):
of third person combining with defendants, 32, n., 100-102.
defendant's invitation or license, 50, 51. See Invitation or License.
imposes duty of ordinary care, 50, 51.
Invitation defined, 51.
distinction between invitation and license, 51.
Hargraves v. Deacon, 51.
plaintiff's prior, defendants' subsequent, 54, 56. See Davies v. Mann.
Judge Thompson's discovery clause, 55, 198 *et seq.* See Discovery Clause.
defendant's acts throwing plaintiff off his guard, 67, 213, n.
abandonment of customary signals at private railway crossings, 185, n.
withdrawal of a flagman at a crossing, 190. See Contributory Negligence; Proximate Cause; Wilful Negligence.

NEVADA:
fences, and cattle at large, in, 222, 226.

NEW ENGLAND SUNDAY RULE. See Railways, 175 *et seq.*; Highways, 261 *et seq.*; Street Railways, 398.

NEW HAMPSHIRE:
parents' imputed contributory negligence repudiated in, 130.
Sunday traveling in, rule as to, 177.
fences, and cattle at large in, 219, 226.
landowner next to railway need not take unusual precaution against fire, 237.
injuries to runaway horses by defective highways, 245.
right of children to play upon the highway in, 278, 280.
burden of proof in, 426, 440.

NEW JERSEY:
rule of ordinary care in, 14, n.
rule of comparative negligence denied in, 77.
carrier's negligence not imputed to passenger in, 106, 111, 112.
negligence of parent not imputed to child in, 130.
carrier's stipulation limiting liability, 172.
fences, and cattle at large in, 219.
landowner next to railway need not take unusual precautions against fire, 237, 239.
remote fire communicated by burning oil, 241.
municipal corporation not liable to private action for defective highways, 244.
overhead railway bridges in, 363.
burden of proof in, 426, 440.

NEW YORK:
influence of Davies v. Mann, 29.
plaintiff acting wildly under impulse of fear in, 42, 44.
distinction between gross and wilful negligence, 62.

[The references are to sections.]

NEW YORK (*continued*):
doctrine of comparative negligence denied in, 76.
negligence of parent imputed to child in, 118-120, 123, 127-130.
negligence of carrier imputed to shipper of goods in, 109, 114.
riding on platforms of railway cars, 149.
the several grades of negligence defined in, 171.
carrier's stipulation limiting liabilities in, 172.
duty of traveler at railway crossing in, 193.
children trespassing on railway property in, 210.
fences, and cattle at large, in, 219, 226, 231, 239.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237, 239.
injuries to runaway horses by defective highways, 245.
pedestrians crossing the street in, 279.
right of children to play upon highway in, 278, 279, 281.
ambulance entitled to right of way by statute in, 283.
boarding a moving street car in, 291.
overhead railway bridges in, 363.
burden of proof in, 433-441.
contributory negligence in pleading in, 443.

NEWSBOYS:
riding free on railway or street cars, 167, 297.

NIGHT:
traveling in the, 248. See Highways.

NINETY PER CENTUM OF ACTIONS OF NEGLIGENCE:
contributory negligence defeats plaintiff in, 380, 420, 425.

NON SUI JURIS:
who are, 117. See Imputed Contributory Negligence.

NORTH CAROLINA:
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237.
burden of proof in, 422, 427, 440.

NOTICE:
by sleeping and parlor car companies disclaiming responsibility for baggage, 173, 174.
to railway company of defective fence, 228.
of danger. See Knowledge of Danger.

NUISANCE:
plaintiff's property a, no defense for injury to, 415.
Colchester v. Brooke, 415.
oyster bed obstructing public river, 415.
the case criticised, 415.
overhead railway bridges ought to be held, when, 363.
ruinous building contiguous to highway, 276.

[The references are to sections.]

NUISANCE (*continued*):
unguarded pitfall near highway, 253.
opening in a sidewalk, when not a, 255,
fruit stand encroaching upon the highway, 257.
what a city has licensed not a, 259, 413.
horse unlawfully at large in highway, 259.

O.

OBSTRUCTION:
in highway or sidewalk, 244, 248, 250, n., 274. See Highways.
plaintiff's knowledge of obstruction, 248, 250, n.
snow as an obstruction, 274.
of navigable river, by oyster bed, 415.
of crossing by cars, whether proximate cause of injury, 32, n.

OHIO:
negligence of parent not imputed to child in, 130.
carrier's stipulations limiting liability in, 172.
fences, and cattle at large, in, 221, 226.
servant's contract releasing master from liability for negligence, 383.
burden of proof in, 426, 440.

ONUS PROBANI. See Burden of Proof.

ORDINANCE. See Highways; Railways.

ORDINARY CARE:
rule as to, not changed by statute in New Jersey, 14, n.
what is, generally, 17-21.
Chancellor's Walworth's definition of, 21.
contributory negligence if plaintiff fails to exercise, 7, 9, 14, 19-21. See Contributory Negligence.
in care of children, 136-216.
in care of persons under disabilities, 21a.
failure to exercise is ordinary negligence, 18. See Negligence.
test of, 20, n.
a relative, not an absolute term, 21, 22.
generally a question of fact, 23. See Law and Fact.
tends to become a question of law, 23.
in a child. See Children.
by a passenger under various circumstances. See Railways; Street Railways; Ferries.
by a carrier towards strangers. See Railways.
by the public at railway crossings. See Railways.
by the owner of animals. See Animals; Fences.
by municipal corporation in respect of highways. See Highways.
by traveler upon the highway. See Highways.
the correlative obligation of master and servant. See Master and Servant.
presumptions in respect of exercise of. See Presumptions; Burden of Proof.

[The references are to sections.]

ORDINARY NEGLIGENCE. See Negligence.

OREGON:
fences, and cattle at large, in, 222.
burden of proof in, 422, 440.

ORIGIN OF MODERN LAW OF NEGLIGENCE. See Negligence.

OVERHEAD RAILWAY BRIDGES:
injuries to trainmen by. See Master and Servant.

P.

PALACE CAR COMPANY:
not generally an insurer of passenger's property, 173, 412.
otherwise if there is an actual bailment, 173.
contributory negligence when no defense, 173.

PARENT AND CHILD:
contributory negligence of parent in his action for injury to child, 131-135, 142. See Children; Imputed Contributory Negligence.

PARLOR CAR COMPANY:
liability for loss of baggage, 173, 412. See Railways.

PASSENGERS. See Imputed Contributory Negligence; Ferries; Railways; Street Railways.

PASSES, FREE:
limiting carrier's liability, 168-172. See Railways.

PATENT AND LATENT DANGERS. See Master and Servant.

PEDDLERS:
riding free on railway trains, 167. See Railways.

PEDESTRIANS. See Highways; Railways; Street Railways; Trespassers.

PENNSYLVANIA:
rule as to trespassers on railway tracks, 66, 198-200, 211, 214.
doctrine of comparative negligence denied in, 77.
imputed negligence of common carrier in, 108, 109, 112, 114.
negligence of parent not imputed to child in, 130.
poverty of the parent as affecting the question, 133-135.
passengers riding on car platforms, &c., 149, 151, 153.
injury to passengers at car windows in 155.
injuries at and about railway stations in, 160.
intoxication as contributory negligence in, 160.
carrier's stipulation limiting liability in, 172.
crossing a railway track in, 193.
fences, and cattle at large, in, 219.
landowner next to railway need not take unusual precautions against fires, 236, 239.
fire communicated by burning oil, 242.
injuries to runaway horse by defective highway, 245.
right of children to play upon the highway in, 278, 281.
law of the road in, 282.

[The references are to sections.]

PENNSYLVANIA (*continued*):
passenger's arm extending out of car window, 296.
overhead railway bridges in, 363.
burden of proof in, 426, 440.
PENNSYLVANIA CO. v. RONEY:
engineer attempting to save his train, 42, 373.
PERIL:
plaintiff acting erroneously under fear. See Contributory Negligence.
PHYSICAL DISABILITIES. See Deaf Persons; Blind Persons; Intoxication.
PHYSICIAN AND PATIENT:
contributory negligence in actions between, 406.
plaintiff's aggravation of the injury, 406. See Aggravation of the Injury.
Hibbard v. Thompson, 406.
Chamberlain v. Morgan, 407.
Pullman Palace Car Co. v. Bluhm, 407.
actions by patient against a third person, 407.
reasonable care in selecting physician, 407.
PILOT:
not a coservant with deck-hand, 337.
PIT:
child falling into unguarded, 140. See Highways.
PLATFORMS OF CARS:
passengers standing or riding on, 68, n., 149, 293. See Railways; Street Railways.
PLATFORMS AT RAILWAY STATIONS:
duty of the company. See Railways.
PLEADING:
negligence not a good reply to a plea of contributory negligence, 14, n.
averment of negligence in a complaint, 19, n.
of contributory negligence in a plea, 19, n.
complaint must show proximate cause, 32, n.
complaint showing plaintiff's knowledge of danger not demurrable, 37, n.
in suits under Lord Campbell's Act, 60, n.
plaintiff's averment of due care, when unnecessary, 144, n.
contributory negligence of infant plaintiff not determined on demurrer, 117, n.
averments in defendant's plea of, 117, n. See Master and Servant, 346, n.
in Indiana complaint must aver absence of contributory negligence, 422, n.
of existence or absence of contributory negligence, 443.
POLICIES OF INSURANCE. See Insurance.

[The references are to sections.]

POLLOCK, BARON:
his criticism of Thorogood v. Bryan, 136.

PORTER:
on steamship a coservant with the stewardess, 336.
with carpenter, 336.

POSTAL CLERK:
riding in postal car as a passenger, 151, n.

POVERTY OR DESTITUTION:
parents imputed negligence affected by, 135.

PREGNANT WOMAN:
carelessly directed to alight from a train far from home, 163.

PREPONDERANCE OF NEGLIGENCE:
mere, does not satisfy rule of comparative negligence, 74. See Comparative Negligence.

PRESUMPTION:
of negligence against common carrier, when, 144, 285, n.
presumptions as to looking and listening at railway crossings, 181, n., 182.
of negligence, from barrel falling into highways, 277. See Burden of Proof.

PRIESTLEY v. FOWLER:
exception to the rule of *respondeat superior*, 308, 309, 315.

PRINCIPAL AND AGENT. See Master and Servant; Imputed Contributory Negligence; Agent.

PRIOR NEGLIGENCE OF PLAINTIFF:
as a defense to subsequent negligence of defendant, 54, 55, 56. See Contributory Negligence.

PRIVATE CONVEYANCE:
negligence of driver. See Imputed Contributory Negligence.

PRIVATE WAY. See Way.

PRIVITY IN NEGLIGENCE:
between a common carrier and passenger or shipper. See Imputed Contributory Negligence.

PROXIMATE CAUSE:
essential to constitute contributory negligence, 7, 9, 14, 24.
the doctrine stated, 25.
remoteness of cause, 25.
need not be the *sole* cause, 27, 34.
negligence must *substantially* contribute, 26.
negligence must be an *efficient* cause, 26.
these circumlocutions unsatisfactory, 27, 28.
what is a, 31, 32.
Judge Cooley's definition of, 31.
Lord Bacon's definition of, 32.
where negligence of both parties is a, 14, n., 20, n., 56, n., 305, n.

[The references are to sections.]

PROXIMATE CAUSE (*continued*):
complaint must state facts showing, 32, n.
of suicide, injuries in railway collision not a, 32, n.
fire spread by unexpected wind, 32, n.
the "Squib case"— Scott v. Shepherd, 32, n.
question of, usually for the jury, 24, n., 32, n.
wrongful intervention of third person, 32, n.
coservant falling upon plaintiff from defective ladder, 32, n.
obstruction of crossing by cars, 32, n.
defective highway — runaway horse — breaking of reins, 32, n.
injuries in attempting to extinguish a fire, 44, n.
negligence must be *contributory* to be a, 33.
collateral negligence not a, 33.
general rule as to, 34, n.
plaintiff's unlawful act, 44, n., 45, 46, 47, 48, 49, n., 50. See Collateral Violations of Law.
plaintiff a trespasser, 50.
plaintiff's prior, defendant's subsequent negligence, 54, 56. See Contributory Negligence.
plaintiff's negligence after the catastrophe, 57. See Aggravation of the Injury.
plaintiff's negligence subsequent to defendant's, 58.
is disregarded under the rule of comparative negligence in Illinois, 81, 82.
negligence in alighting from moving trains, 147, n.
of injuries to passenger riding in express car, 150, n.
passengers injured after alighting at unusual places, 32, n., 163.
injuries to one while traveling on Sunday, 175, 176, 267.
intoxication as a proximate cause of an injury, 197, n. See Intoxication.
of fire communicated from intervening property, 241, 242.
runaway horse injured by defective highway, 245.
one wilfully thrown into a pit in the highway, 245.
runaway horse killed upon a railway track, 245, n.
master's negligence combining with that of coservant, 305.
servant's disobedience of master's rules, 373. See Discovery Clause.

PRUDENCE. See Contributory Negligence; Negligence; Ordinary Care.

PRUSSIAN LAW:
liability of master to servant under, 388.

PUBLIC CARRIER. See Railways; Street Railways; Ferries; Imputed Contributory Negligence.

PUBLIC POLICY:
rule of contributory negligence sustained by, 73.
as a reason for the exception of the rule of *respondeat superior*, 317.

PUNITIVE DAMAGES:
statute in Kentucky for the recovery of, 66, 97, 318.

[The references are to sections.]

Q.

QUESTION OF FACT. See Law and Fact.
QUESTION OF LAW. See Law and Fact.

R.

RACING ON THE HIGHWAY. See Highways.
RAILING:
at side of highway when duty to maintain, 253.
RAILROAD. See Railways.
wilful neglect of, not excused by contributory negligence, 29. See Wilful Negligence.
RAILWAYS:
the term "passengers" as used herein, 143.
the term "strangers," 143.
contributory negligence a frequent defense, 143.
duty of a public carrier to passengers, 144.
not an insurer of safety, 144.
wrongful acts of servants, 144, n.
great care required, 144.
presumption of negligence, 144.
duty exists toward all passengers, 144.
intended passengers, 144, n.
quasi passengers.
employees of express companies, 144, n.
mail agents, 144, n.
drovers in charge of stock, 144, n.
reciprocal duty of the passenger, 145.
ordinary care required, 145.
rule under Nebraska statute, 145, n.
boarding moving trains, 146.
contributory negligence a question for the jury, 146.
generally pronounced negligence, 146.
prima facie negligent in Massachusetts, 146.
where train fails to stop, 146.
where act is directed by conductor, 146, n.
alighting from moving trains, 147.
whether it is negligence *per se*, 147.
proximateness of contributory negligence, 147, n.
advice of the trainmen, 68, 148.
negligence and contributory negligence for the jury, 68, n., 148.
a misdemeanor in Iowa, 148.
children riding free, 167, n.
under apprehension of peril, 40, 148.
leaving the seat before the train stops, 295.
standing or riding on platforms, 149.
not negligence *per se*, 149.

[The references are to sections.]

RAILWAYS (*continued*):
the rule in Pennsylvania and Illinois, 149.
where this exposure does not contribute to injury, 149.
passing from car to car, 149.
leaving seat while car in motion, 149a.
riding in a baggage car, etc., 150, 151, 152, 153.
whether a proximate cause of injury, 150.
a *quasi* trespass, 150.
the consent of trainmen, 151.
must conform to reasonable rules, 151.
riding in a caboose car, 151, n.
postal clerk riding in postal car, 151, n.
employee's waiver of the rules, 151, 152, 153.
the reasoning in Pennsylvania, 151.
the reasoning approved, 152.
the rule summarized, 153.
riding in exposed or unlawful places, 154.
upon locomotives, 154.
upon hand-cars, 154.
upon the tops of freight cars, 154.
upon the pilot of the engine, 154, n.
drovers in exposed places, 154, n.
tipped up on a seat near an open side door, 154.
upon freight trains, 154.
passenger's assumption of risk, 154.
standing or leaning against the seat, 154.
passenger's ignorance of prohibitory rule, 154, n.
injuries at car windows and doors, 155.
in the case of a free passenger, 165, n.
putting head or elbow outside the window, 155.
resting an arm on the window sill, 155.
the rule in Pennsylvania, 155.
whether a proper question for the jury, 156.
the cases analyzed, 156.
the rule in Illinois, 156.
the rule in Missouri, 156.
the rule in Wisconsin, 156.
reasoning of the court, 157.
notice of the danger, 158.
passenger attempting to close the door, 158.
the English rule, 159.
leaning against the door, 159.
injuries at and about railway stations, 160.
the duty of the company, 160.
Judge Cooley's statement, 160.
contributory negligence of the passenger, 160.
entering premises in the dark, 160.
climbing an embankment to the track, 160.

[The references are to sections.]

AILWAYS (*continued*):
the duty of the railway to light the platform at night, 160.
a stranger alighting in the dark, 160.
boarding cars in the dark, 160.
going upon defective unlighted platform, 160.
walking off dark platform, 160.
leaving the station by a dark stairway, 160.
boarding train elsewhere than at a platform, 160.
running to get aboard, 160.
reasonable time to alight, 160.
a question for the jury, 160.
reasonable facilities for stepping off the train, 160.
personal assistance in alighting, 160.
going through the smoking car to alight, 160.
alighting when intoxicated, 160.
getting off the wrong side of the train, 160.
crossing the track to board a train, 160. See also Invitation or License.
alighting at dangerous places, 161.
the train stopping elsewhere than at a station, 161.
at a water tank, 161.
upon a side track, 161.
upon approaching another railroad crossing, 161.
upon a bridge or culvert, 161.
in a tunnel, 161.
announcing the station, 161.
the English rule, 162.
invitation to alight, 160, 161, 162.
alighting at unusual place by compulsion, or advice of trainmen, 68. 162, 163.
ordinary care in leaving the place, 163, n.
proximate cause, 163, n.
duty to move the train to the platform, 162.
a pregnant woman carelessly directed to alight far from home, 163. See Proximate Cause.
plaintiff hit by something thrown or dropped from a moving train, 164.
throwing out mail bags at a station, 164.
Carpenter v. Boston & Albany R. Co., 164.
Snow v. Fitchburg R. Co., 164.
injuries to free passengers, 165.
free carriage, how far a defense, 165.
gratuitous passengers injured at a car door, 165, n.
mail agents riding free, 165, n., 172, n.
assent of the company to carry free, 165.
unauthorized invitation to ride by employees, 165, 166.
passenger riding on a horse car, 165, n.
riding on a nontransferable pass, 47.
stealing a ride, 47.

[The references are to sections.]

RAILWAYS (*continued*):
newsboys, peddlers, &c., 167.
Commonwealth v. Vermont, &c., R. Co., 167.
Yeomans v. Contra Costa Steam Nav. Co., 167.
a child riding free on the platform, 167, n.
carrier's liability limited by contract, 168.
stipulations in free passes, 168.
the English rule, 169.
Railway and Canal Traffic Act, 169.
construction of, 169.
the rule of the Supreme Court of the United States, 170.
Railroad Co. v. Lockwood, 170.
the conclusion stated, 170.
drovers traveling on free passes, 170, 172.
the New York rule, 171.
tendency to abolish distinction between gross and ordinary negligence. See Negligence.
the general American rule, 172.
limitation of liability as an insurer, 172.
carrier's liability for, 172.
wilful negligence, misconduct of employees, 172, n.
mail and express agents traveling on free passes, 172, n.
stipulations limiting *amount* of liability, 172.
summary of the authorities, 172.
drovers traveling free, 172.
passenger's negligence as to baggage, 173.
the carrier an insurer, 173.
what constitutes baggage, 173.
delivery of possession to the carrier, 173.
liability of sleeping and parlor car companies, 173.
baggage intrusted to the porter, 173.
theft of baggage, 173.
posting notices disclaiming responsibility, 173.
passenger leaving property exposed to theft, 173.
theft by the company's servants, 173.
contributory negligence immaterial, 173.
conditions printed on baggage checks, 174.
passenger's assent necessary, 174.
not contributory negligence to take such checks, 174.
passenger injured while assisting about his baggage, 174.
traveling on Sunday, 175.
the rule in Massachusetts, 175.
proximate cause involved, 175.
Bosworth v. Inhabitants of Swansey, 176.

[The references are to sections.]

RAILWAYS (*continued*):
Stanton v. Metropolitan Street Ry. Co., 176.
riding upon a street car on Sunday, 176.
the rule in Vermont, 177.
the rule in Maine, 177.
the rule in Rhode Island, 177.
the rule in New Hampshire, 177.
the rule elsewhere than in New England, 177.
duty of a common carrier to strangers, 178.
ordinary care the measure of, 178.
slight care to mere trespassers, 179.
persons coming on business, 179.
travelers lawfully upon the track at a crossing, 179.
duty of the public at railway crossings, 180.
travelers must use their senses, 180.
the duty to look and listen, 181.
whether failure to do so constitutes contributory negligence as matter of law, 181.
absent-mindedness, 37, n., 193.
rule of "stop, look and listen," 182.
rule in Pennsylvania, 182.
not adopted generally, 182.
where view obstructed, 183.
duty of one riding with another, 184.
where passenger is seated away from driver, 184.
duty to look for irregular trains, 184a.
rule applies to passengers crossing tracks, 184b.
rule as to bicyclists, 184c.
duty of traveler, though railroad required to give statutory signal, 185.
assumption that signals will be given, 186.
right of trespasser, 187.
traveler's ignorance of the crossing, 188.
if a stranger, his negligence a question of fact, 188.
train behind time, 188.
fast driving — traveler unable to stop, 188.
to cross ahead of train in view, 188.
when retreat is impossible, 189.
principle of "sudden peril" may justify, 189.
driving frightened horse near an engine, 189.
flagmen, gatemen, &c., 190.
effect of a statute, 190.
duty to provide not due to trespassers, 190, n., 211, n.
withdrawal of, without notice, 190.
invitation to cross, 190.
an open gate, 190.
forbidding to cross, 190.
attempt to cross against advice, 190.

[The references are to sections.]

RAILWAYS (*continued*):
flagman cannot recover if run over himself, 190.
when the view of the track is obstructed, 191, 195.
increased vigilance required of the company, 191.
ordinary care under the circumstances, 191.
failure to signal, 67, 191.
the track obscured by smoke or fog, 191.
big buildings or piles of lumber, 191.
contributory negligence a question for the jury, 191.
several tracks at common grades, 192.
crossing after a train has passed, 192.
traveler's duty of care, 192, 193.
backing or switching trains over a crossing, 194.
duty of the railway, 194.
vigilance in crossing where the view is obstructed, 37, n., 195.
language of the Supreme Court of Iowa, 195.
the rule summarized, 196.
where a standing train obstructs a crossing, 196.
climbing over a standing train, 196.
reasonable attempts to pass, 196.
deafness of one crossing the track, 197.
imposed the duty of increased vigilance, 197.
intoxication of a person crossing, 197.
no excuse for want of ordinary care, 197.
matter for the jury, 197.
the Georgia Code, 197.
asleep or drunk on the track, 197.
in a fit, 197, n.
trespassers on a railway track — the Pennsylvania rule, 66, 198.
Phila. &c., R. Co. v. Hummell, 198.
language of the court, 198.
Judge Gibson's statement of the rule, 199.
Railroad Co. v. Norton, 199.
degree of care due to, 56, n., 199, 205.
the Pennsylvania rule further stated, 199.
the modified rule as to trespassers, 201, *et seq.*
the Missouri doctrine, 201, *et seq.*
Judge Thompson's discovery clause, 201, *et seq.* See also Davies v. Mann.
the rule summarized, 203.
trespassers presumed to appreciate the danger, 38, n., 203.
intoxication of, 203, n.
children as, on railway premises, 204.
playing upon turn-tables, 140, 205, 210.
the turn-table cases, 207.
the Minnesota case, 208.
other cases which follow this rule, 209.
the contrary rule, 209.

[The references are to sections.]

RAILWAYS (*continued*):
New York cases, 210, n.
Massachusetts cases, 210, n.
New Jersey and New Hampshire cases, 210, n.
cars left across street, 210a.
walking along a railway track, 38, n., 56, n., 211.
whether negligence *per se*, 211.
the Pennsylvania rule, 211, n.
riding on horse-back between the crossings, 211.
signals at crossings not due to trespassers, 211.
where the track is a *quasi* public way, 212.
the pedestrian a licensee, 212.
a tacit license, 212.
the English rule, 213.
the Illinois rule, 213.
the Massachusetts rule, 213.
the Pennsylvania rule, 214.
the Tennessee rule, 214.
the general American rule, 213, 214.
duty to a trespasser after the injury, 215.
person run over left uncared for, 215.
various acts of trespass, 216.
meddling with a torpedo, 53.
crawling under stationary cars, 216.
standing between tracks while a train passes, 216.
climbing over cars, 216.
in the case of a child, 216.
drovers riding on top of cars, 216.
plaintiff placing himself in dangerous position, 216. See Dangerous Position.
"flying" switches, 217.
negligence even toward trespassers, 217.
over crossings, 217.
the practice condemned, 217 — Mississippi statute, 217, n. See Contributory Negligence; Imputed Contributory Negligence; Fences; Fires; Master and Servant; Street Railways.

RAILWAY CROSSINGS. See Railways.

RECEIVER:
liability to servants for negligent management, 344.

REMOTE NEGLIGENCE. See Contributory Negligence; Negligence; Proximate Cause.

REPAIRER:
machine, coservant with operatives, 336.

RESPONDEAT SUPERIOR:
the rule of. See Master and Servant.

[The references are to sections.]

RHODE ISLAND:
Sunday traveling in, 177, 266.
fences, and cattle at large, in, 219.
icy sidewalks, how far a defect in highway in, 270.
overhead railway bridges in, 363.
burden of proof in, 426, 440.

RIGGER:
on steamship, coservant with scaffold-builder, 336.

ROAD:
law of. See Highways.

ROADMASTER:
coservant with laborer, 332.

ROMAN LAW:
modern law of negligence derived from, 1, 2, 3.

RUNAWAY HORSE. See Horse.

"RUNNING" SWITCHES:
the practice condemned, 217. See Railways.

S.

SABBATH DAY:
traveling on. See Highways, 261, *et seq.*; Railways, 175, *et seq.*; Street Railways, 298.

SAILOR. See Seaman.

SAWYER:
coservant with carpenter in the mill when engaged in common work, 336.

SCAFFOLD-BUILDER:
coservant with a rigger on steamship in port, 336.

SCOTCH LAW:
liability of master to servant in the, 385, 386.

SEASHORE:
not a highway for public travel, 414.
traveler takes the risk of defects, 414.

SEAMAN:
coservant with the mate, when, 336.
with captain, 328.
continued service after knowledge, not a waiver of defects, 371.

SECTION BOSS:
coservant with locomotive engineer, 332.
with a brakeman, 332.
with a laborer, 328.

SECTION-MAN:
not a coservant with an engineer, 332, n.
on a hand-car, coservant with trainmen, 332.

SEEN DANGER:
servant assumes the risk from, 15, 359, 371, 372. See Master and Servant.

[The references are to sections.]

SERVANT. See Master and Servant, 334.
SHOVELER:
on a gravel train, coservant with engineer, 332.
SHOW-BOARD:
falling on pedestrian, liability of city, 276.
SIDEWALKS. See Highways.
SIDE TRACK:
train stopping upon, 162.
SIGNALS:
at railway crossing, &c. See Railways.
SIGNAL MAN:
coservant with an engineer, 332.
with employees riding to their work, 332.
with gripman of a motor car, 336.
SIGNS:
falling on pedestrian, liability of owner, 276.
SLEEPING CAR CO.:
not generally an insurer of passenger's property, 173, 412.
liability for loss of baggage. See Railways.
when contributory negligence no defense, 173.
SLIGHT CARE. See Trespassers; Ordinary Care.
SLIGHT NEGLIGENCE. See Negligence; Ordinary Care.
SLIPPERY SIDEWALK. See Highways.
SMOKE:
obscuring railway crossing. See Railways.
SNOW:
accumulation of, in cattle guards. See Fences.
on highways. See Highways.
SNOW DRIFTS:
deviation from highway on account of, 254. See Highways.
SOUTH CAROLINA:
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.
land owner next to railway need not take unusual precautions against fire, 237.
municipal corporation not liable to private action for defective highway, 244.
rule in respect of fellow-servants first declared in, 311, 312.
test of common employment, 328.
burden of proof in, 426, 440.
"SQUIB CASE":
a leading case on proximate cause, 32, n.
applied to injuries by fire from remote source, 241.
STAGE COACH:
passenger's arm outside of window, 296.

[The references are to sections.]

STATIONS:
injuries at and about railway. See Railways.
STATION AGENT:
coservant with an engineer, 332.
STEALING A RIDE. See Railways.
STEAMBOAT COMPANY:
liability for negligent communication of fire, 416.
STEWARDESS:
on steamship, coservant with porter, 336.
with the carpenter, 336.
STOCK:
injuries to. See Fences.
STREET. See Highways.
STREET RAILWAYS:
passengers crowded off the platform, 100. See Imputed Contributory Negligence.
duties of, as common carriers, 285.
Goddard v. Grand Trunk Ry. Co., 285.
accident raises presumption of negligence against, 285, n.
duty of, to intoxicated passenger, 286.
duty to furnish change, 286.
duty as to pedestrians, 287.
driver must be watchful, 287.
rushing over street crossings, 287.
driver inside collecting fares, 287, n.
driver across the track, 287.
driver's negligence not imputable to passenger, 287. See Imputed Contributory Negligence.
walking upon the track, 288.
a trespass in Louisiana, 288.
otherwise in California and Texas, 288.
not properly a trespass, 288, 289, 290.
crossing street at other place than regular crossing, 288a.
railroads have preference, 288a.
duty of pedestrians, 288a.
the track not a highway, 289.
compared with steam railroad, 289, 290.
ordinary care by pedestrians, 290.
by the railway, 290.
where cars operated by electricity or cable, 290a.
where rule applicable to steam railroads obtains, 290a.
alighting from or boarding moving cars, 291.
not negligence *per se*, 291.
leaping in fear of collision, 41.
duty of the railway company, 291, 292.
where motive power is electricity or cable, 292.
riding upon platforms, 293, 294.
not negligence *per se*, 293, 294.

[The references are to sections.]

STREET RAILWAYS (*continued*):
riding on the steps, 293, 294, 295.
standing in dangerous position, 294.
when there is room inside, 294.
standing room only, 295.
passing on side steps from front to rear, 294.
in violation of rules, 294.
sitting upon a window sill, 294.
sitting on the driving bar, 294.
holding on to the straps when standing, 294.
leaving seat before the cars stop, 294.
risks assumed by riding in exposed position, 295.
collision with passing vehicles, 295.
collision with trolley pole, 295.
passenger's hand or arm outside of car window, 296.
the rule in Pennsylvania, Minnesota and Louisiana, 296.
where the tracks are near together, 296.
free passengers and trespassers, 297.
newsboys, 297.
the driver or conductor's invitation, 297.
Sunday traveling on, 176, 298.

SUDDEN PERIL. See Contributory Negligence.

SUICIDE:
not a proximate result of injuries, 32. See Insurance.

SUNDAY:
servant unlawfully laboring on Sunday, 299, n.
traveling on, 175, *et seq.*, 261, *et seq.*, 298.

SUPERINTENDENT:
coservant with a laborer, 328.
with an architect, 328.
railway, coservant with engineer, 332.

SWITCHES:
"running" or "flying" condemned, 217.

SWITCHMAN:
coservant with an engineer, 323, 332.
with a brakeman, 332.
with a baggage-master, 332.
with a track repairer, 332.

T.

TEAMSTERS:
injuries to, while unloading cars, 178, n.

TELEGRAPH COMPANIES:
actions against, for failure to transmit or deliver dispatches, 400.
contributory negligence of the sender, 400.

[The references are to sections.]

TELEGRAPH COMPANIES (*continued*):
illegible chirography, 400.
insufficient address, 400, 401.
regulations requiring deposit charge for delivery, 400.
Given v. Western Union Telegraph Co., 401.

TELEGRAPH OPERATOR:
coservant with engineer, 332.
with a fireman, 332.

TENNESSEE:
modified rule of contributory negligence in, 71, 75, 93-95.
negligence of parent not imputed to child in, 130.
statutory duty of railway company as to signals, 214.
land owner next to railway need not take unusual precautions against fire, 237.
servant's contracts releasing master from liability for negligence, 383.
contributory negligence in actions by client against attorney, 405.

TEXAS:
doctrine of comparative negligence denied in, 77.
negligence of parent not imputed to child in, 130.
rules as to boarding moving trains in, 146.
carrier's stipulation limiting liability in, 172.
duty to "look and listen" at railway crossing not absolute, 183.
fences, and cattle at large, in, 222, 226, 228.
injuries to runaway horse by defective highway, 245.
not a trespass to walk on street railway track in, 288.
burden of proof in, 426, 440.

THEFT:
of baggage, liability of sleeping and parlor car companies for, 173.
when contributory negligence no defense, 173.

THIRD PERSONS' NEGLIGENCE. See Imputed Contributory Negligence.

THOMPSON, JUDGE:
his discovery clause, 54, 59, 201, 202, 203. See Discovery Clause.

THOROGOOD v. BRYAN. See Imputed Contributory Negligence.

TORPEDO:
on railway track, trespasser meddling with a, 53.

TORT:
actions in, historically antecedent to actions in contract, 7.

TORTFEASORS:
no contribution among, 102.

TOWN. See Highways; Municipal Corporations.

TRACK REPAIRER:
coservant with an engineer, 332.
with a fireman, 332.
with a switchman, 332.

[The references are to sections.]

TRACK WALKER:
coservant with a fireman, 332.

TRAINMEN:
coservant with section-man, 332.
with engine wiper, 332.
with brakeman on another train, 332.
with conductor riding on his way to work, 333.

TRAIN DISPATCHER:
is a vice-principal, 334.

TRAP-DOOR:
unguarded in the sidewalk, 255, n.
servant falling through, 347, n.

TRAVELER. See Highways; Railways; Street Railways.

TRESPASS:
upon the highway. See Highways.
by cattle. See Fences.
See Trespassers; Contributory Negligence; Railways; Street Railways.

TRESPASSERS:
degree of care due to, 50, n., 178.
children as, 51a.
as a plaintiff under rule of comparative negligence, 79, n.
rights of, on a railway track, 56, n., 160, 187.
not to be expected on a railway track — the Pennsylvania rule, 199, 200.
the modification of this rule, 201.
wilful negligence toward, 200, 202, n.
a trespass as contributory negligence, 50, 52, 53, 203.
on a railway track presumed to appreciate the danger, 203.
intoxicated trespassers, 203, n., 391. See Intoxication.
walking along a railway track, 211.
riding on horseback between the crossings, 211.
signals at railway crossings not due to, 211.
upon land adjoining a highway, 254.
on highway, injury from something falling, 276.
may recover for wilful injuries, 416.
a child as a. See Children; Invitation or License; Railways; Street Railways; Highways; Contributory Negligence.

TUNNEL:
railway train stopping in, 161.

TUNNEL REPAIRER:
coservant with locomotive engineer, 332.

TURNPIKES. See Highways.

TURN-TABLES:
injuries to children playing upon, 140, 205, *et seq.* See Children.

[The references are to sections.]

U.

"UNDERLOOKER:"
in a mine, coservant with a miner, 336.
UNLAWFUL ACT. See Illegal Act; Collateral Violations of Law.
UNITED STATES SUPREME COURT:
carrier's negligence not imputed to passenger, 111.
carrier's stipulation limiting liability, 170.
burden of proof, 426.
UTAH:
fences, and cattle at large, in, 226.

V.

VELOCIPEDE:
riding on sidewalk not necessarily unlawful, 256, n.
VERMONT:
negligence of parent not imputed to child in, 130.
Sunday traveling in, 177, 265.
fences, and cattle at large, in, 219, 226, 228.
contributory negligence of landowner next to railway in respect to fire, 238, 239.
injuries to runaway horse by defective highway, 245, 253.
overhead railway bridges in, 363.
burden of proof in, 426, 439, 440.
VICE-PRINCIPAL. See Master and Servant.
VIEW:
obstructed at railway crossing. See Railways.
VIOLATION OF LAW. See Illegal Act; Collateral Violation of Law.
VISITOR. See Invitation or License; Negligence.
VOLUNTARY EXPOSURE TO DANGER. See Contributory Negligence; Knowledge of Danger; Dangerous Position.
VOLUNTEERS. See Master and Servant.

W.

WAIVER. See Contributory Negligence; Master and Servant.
WALKING ON RAILWAY TRACK. See Railways; Street Railways; Trespasser.
WALKING ON THE SEA SHORE. See Sea Shore.
WANTONNESS. See Negligence; Wilful Negligence.
WASHINGTON:
burden of proof in, 426.
WATCHMAN:
on railway, coservant with employee he was to watch, 335.
in railway shop, not a coservant with a master mechanic, 337.

[The references are to sections.]

WATER TANK:
train stopping at, 161.

WAY:
a railroad track when a *quasi* public, 212, 288, 290. See Street Railways.
deviation from private, 254.
deviation from highway. See Highways.

WEST VIRGINIA:
carrier's stipulation limiting liability, 172.
fences, and cattle at large, in, 222.
railway *prima facie* liable by statute for killing animals, 224.
landowner next to railway need not take unusual precautions against fire, 237, 239.
injuries to runaway horse by defective highway, 245.
burden of proof in, 426, 440.

WHARF:
invitation or license to go upon, duty of owner, 50, n. See Invitation or License.

WILFUL NEGLIGENCE:
no middle ground between negligence and wilful negligence, 14, n., 63, n.
not the same thing as gross, 61-63.
the term a misnomer, 62.
what is meant by, 62, 64.
contributory negligence no defense, 46, 50, 64, 65, 416.
under a Kentucky statute, 66, 97, 98, 318.
toward trespassers, 66, 200, 204, 205.
of a vice-principal, liability of master, 200.
of plaintiff, burden of proving is on defendant, 422, n.

WINDOW:
of railway or street railway car, 155, 158.
passenger's hand or arm outside of, 296.
leaving open near railway track. See Fires.

WINDOW SILL:
of street car, passenger sitting upon, 294.

WISCONSIN:
slightest want of ordinary care contributory negligence, 19.
rule of comparative negligence denied in, 77.
negligence of private driver imputed to occupant of vehicle, 109.
injuries at car windows, the rule in, 157.
carrier's stipulation limiting liability in, 172.
fences, and cattle at large, in, 219, 223, 226, 234.
landowner next to railway need not take unusual precautions against fire, 237, 238.
injuries to runaway horse by defective highway in, 245.
Sunday traveling in, 267.
rule in respect of fellow-servants modified by statute, 379.

[The references are to sections.]

WISCONSIN (*continued*):
servant's contract releasing master from statutory liability void by statute, 381.
burden of proof in, 426, 440.
WOMAN:
same care required of, as of a man, 260.
corpulent, crossing slippery crosswalk, 273.
WYOMING:
rules as to fellow-servants modified by statute in, 379, 381.

Y.

YARD MASTER:
coservant with a car repairer, 332.
YARD SWITCHMAN:
coservant with a car repairer, 332.